

# THE LAW REFORM (FRAUDULENT TRANSACTIONS) (SPECIAL PROVISIONS) ACT 2013: JAMAICA'S RESPONSE TO THE ABUSE AND PROLIFERATION OF DATA/IDENTITY RELATED FRAUD AND CONNECTED MATTERS

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*“AS LONG AS DEM NUH BUY NUH GUN, NAH SUPPORT NUH WAR, BIG UP THE MAN DEM STAR FROM NEAR AND FROM FAR. DEM CALL IT SCAM, MI CALL IT REPARATION, EVERY GHETTO YUTE IS A STAR. SO DEM WAH LIVE LIKE ONE....BIG UP EVERY SCAMMER WEH MEK US DOLLAR, WESTERN UNION PEOPLE FI GIVE WE MORE HONOUR. EVERY GHETTO YUTE FI A LIVE LIKE TONY MONTANA, LIVE PRESIDENTIAL LIKE BARACK OBAMA,” (LINE AND VERSE FROM THE SONG “REPARATION” BY GAZA SLIM AND VYBZ KARTEL)*

**TRANSLATED VERSION:** *AS LONG AS THEY ARE NOT BUYING GUNS, NOT SUPPORTING WAR, WE RESPECT THE MEN FROM NEAR AND FAR. THEY CALL IT A SCAM, I CALL IT REPARATION, AND EVERY GHETTO YOUTH IS A STAR. SO THEY WANT TO LIVE LIKE ONE....RESPECT TO EVERY SCAMMER THAT MAKE US DOLLAR, WESTERN UNION PEOPLE MUST GIVE US MORE HONOUR. EVERY GHETTO YOUTH MUST LIVE LIKE TONY MONTANA, LIVE PRESIDENTIAL LIKE BARACK OBAMA. (LINE AND VERSE FROM THE SONG “REPARATION” BY GAZA SLIM AND VYBZ KARTEL)*

## INTRODUCTION

The Jamaican “lottery scam” is a form of advance fee fraud<sup>1</sup> where “scammers” (Jamaican slang for these con artists or fraudsters) seek to lead victims to believe they have won a prize or lottery. Typically the scam starts with an unexpected telephone call, text message or email notification from what Jamaicans call a “scammer”. The “scammer” tricks the recipient (typically an elderly American citizen living in the United States); of the un-expected communication into believing that he or she has won a large sum of money or other fantastic prizes such as cars, house, or dream vacations in a lottery. The recipient is then convinced to believe that the cash or prize will not be released without upfront payment of fees or taxes to claim the prize. Instructions are then given to the recipient to have these fees paid through remittance agencies such as Western Union or MoneyGram. Although the recipient pays the

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<sup>1</sup> An advance-fee scam is a type of which typically involves promising the victim a significant share of a large sum of money, in return for a small up-front payment, which the fraudster requires in order to obtain the large sum.

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money to cover what they believe is the requisite fees (which can amount to thousands of US dollars) they will not obtain the prize they have won in the purported lottery.<sup>2</sup>

Access to personal data and related information is the key tool used in lotto scamming. This information is used to identify and locate potential victims and provide the information necessary to engage, deceive and defraud their targets. Despite the common belief that most victims of the lottery scam are just easily suckered, it is the access to legitimate personal information about the person being targeted that enables the “scammer” to sell convincing stories of massive winnings to the hopeless victims. This fraudulent enterprise has grown so large in Jamaica, that the US Embassy commented in October 2015 that the crime has “...morphed into an organized crime wave bigger than drugs.”<sup>3</sup> This crime involves a number of players and elements and has proven to be attractive to the young and unemployed hence its success.

“Lotto scamming” has become the largest and most pervasive criminal enterprise in Jamaica and unlawfully acquired personal data and communications technology plays a central role in the successful undertaking of this crime. This paper seeks to explore this rising criminal phenomenon and the challenges which faced Jamaican law enforcement in the investigation and prosecution of “lotto scams” which resulted in the enactment of the *Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013*.

The provisions of the Act will be examined and the writer will end by exploring whether the prosecution and investigation of these crimes have been successful since the enactment of the Act.

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<sup>2</sup> FBI agent from North Dakota, Frank Gasper, interviewed a Harvey woman who said she was defrauded out of US\$300,000 after someone called and told her she had won US\$19 million and a new car, and needed only to pay taxes and fees. See Jamaica Observer article entitled “US officials work to extradite alleged lottery “scammers” from Jamaica” December 25, 2015 available at <http://www.jamaicaobserver.com/news/US-officials-work-to-extradite-alleged-lottery-”scammers”-from-Jamaica>

<sup>3</sup> Ibid

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## BACKGROUND TO “LOTTO-SCAMMING” IN JAMAICA

Advance fee fraud (called “lotto-scamming” in Jamaica) is not unique to Jamaica. These types of scams are common across the world and are facilitated through access to modern technology. There are many variations of this type of scam, which can be initiated using fax and traditional mail, and is now prevalent in online communications like emails and text messages. The most popular advance fee scam is called the “419” scam normally associated with Nigerian criminal groups. 419 scams, named after the section of the Nigerian criminal code that outlaw’s that type of fraud, usually takes place via email correspondence. It typically involves a promise of large sums of money which may involve a lottery jackpot, a share of a large bank account owned by a “distant relative”, or some other made-up story to explain why a large sum of cash will be forwarded to the victim. The criminal will also make up a plausible story to explain why a fee is needed in advance. The email or correspondence may claim that a few hundred dollars are needed as an application or processing fee to the contest that has purportedly already been won. Another common claim is that the wire transfer of such a large sum of money involves fees that must be paid in advance.

The Jamaican “lotto scam” has been around since about 2007<sup>4</sup>, at about the same time the island became a regional leader in call centres dedicated to customer service.<sup>5</sup> It soared to immense proportions in about 2012 and gained local and international attention when Western Union International closed fourteen (14) of its branches in Jamaica’s second city and tourism center, Montego Bay as a result of the surge in scamming.<sup>6</sup>

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<sup>4</sup> Persons have argued that it has been around longer but became more prevalent in 2007. See Lottery Scam in a Third-World Nation: The Economics of a Financial Crime and its Breadth, Paul Bourne et al, 2010 available at <http://maxwellsci.com/print/ajbm/v5-19-51.pdf> that gives a very detailed analysis of the genesis of such scamming in Jamaica.

<sup>5</sup> Read more: [http://www.caribbean360.com/news/jamaica\\_news/new-jamaica-task-force-fights-international-lottery-scams#ixzz47uMeJHsG](http://www.caribbean360.com/news/jamaica_news/new-jamaica-task-force-fights-international-lottery-scams#ixzz47uMeJHsG)

<sup>6</sup> The branches were closed in the wake of the increase in lotto scams in St. James. The closure of Western Union presented a major disruption to the flow of remittances into and out of the country. The branches have since reopened and measures put in place to stem the use of the facilities to carry out scamming activities. This includes new

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The popularity of the scam is also evidenced by the fact that complaints from American citizens to the Federal Trade Commission about the Jamaican lottery fraud soared from 1,867 in 2007 to about 30,000 in 2012, and it appears that this number could be larger since most incidents go unreported out of fear or embarrassment. A representative from the U.S. Postal Inspection Service indicated that, victims are from all over the United States of America some from as far as Hawaii<sup>7</sup> and it has been reported that some persons have even committed suicide upon realizing that they have lost thousands of dollars and even their life savings, to “scammers”.<sup>8</sup>

The Jamaican “lotto scam” typically involves phone calls to unsuspected persons informing them that they have won large sums of money, a house, luxury car or other valuables and that they need to remit processing fees in order to receive the winnings. A key element of the Jamaican lotto scam is that the transaction from the victim to the scammer must be untraceable and irreversible. Otherwise, the victim, once they become aware of the scam, can successfully retrieve their money and alert officials who can track the accounts used by the scammer. Wire transfers of cash via international remittances services such as Western Union and MoneyGram are ideal for this purpose. International wire transfers cannot be cancelled or reversed, and it is difficult to track the person receiving the cash. Other similar non-cancellable forms of payment include postal money orders and cashier's checks, but as wire transfer via Western Union or MoneyGram is the fastest method, it is most commonly used.

Access to personal information for potential victims is critical to the success of this scam and a “lead list”, is a valuable tool in the scamming industry. Personal information such as name, home and e-mail addresses, telephone numbers, information about next of kin, household income and

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pay-out restrictions and a limit of \$400 US has been put on money transfers to and from St James. Customers are also now required to provide two forms of identification for collecting remittances.

<sup>7</sup> Ibid

<sup>8</sup> See case of Albert Polard Jr. 81 year old dementia patient who committed suicide after learning he was scammed and lost all his life savings reported by MOCA available at <http://www.moca.gov.jm/news-media/news/81-year-old-granddad-commits-suicide-after-falling-victim-lottery-phone-”scammers”>

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spending trends, age, social security information are acquired of each potential victim. This information is collated and placed on what is called a “lead list” (or “sucker list”).

There are many ways in which “scammers” obtain such personal information but the main source of this information is call centres in Jamaica and overseas. Call centres routinely collect personal information from and about customers who transact business with a company who uses call centres to provide technical and customer service support. Unscrupulous persons who work in these call centres sell customer’s personal information to “scammers” (who then develop lead lists from this information) or use the personal information themselves to scam customers.<sup>9</sup> Outside of call centres, personal information for potential victims is also acquired when persons fill out customer service surveys or coupons at stores and customers voluntarily supply their personal information to sign up for such discounts, promotions, or loyalty cards.

To boost their credibility, the “scammers” may use web-based tools such as Google Earth to get details about their victims such as the colour of the car in their driveway, or the distance of their home from a local bank. They may research their potential victims on websites such as Instant Checkmate and Spokeo to get details such as their previous home addresses and even divorce records.<sup>10</sup> This information is used to the scammer’s advantage and is also used to threaten victims and force them to make the advance payment of fees as they use the information to make the victim believe that the caller is actually in his or her neighborhood or knows exactly where the victim resides.<sup>11</sup>

Finally, the victims of these scams are typically, elderly retired persons living in the United States of America who often have retirement assets and may be suffering from dementia or loneliness. These victims may also forfeit their social security benefits and life’s savings in the

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<sup>9</sup> See Driven to Death by phone “scammers” by Wayne Drash October 8, 2015 available at <http://edition.cnn.com/2015/10/07/us/jamaica-lottery-scam-suicide/>

<sup>10</sup> See Tobbie Stanger “Jamaican Lottery “scammers” Gained Skills in call Centres” , October 13, 2015 available at <http://www.consumerreports.org/cro/money/jamaican-lottery-scam-has-roots-in-us-industry>

<sup>11</sup> Associated Press, Jamaican lottery scams spread despite US crackdown, FOX NEWS (Apr. 17, 2012), <http://www.foxnews.com/world/2012/04/17/jamaican-lottery-scams-spread-despite-us-crack-down/>.

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hope of receiving large sums of cash for having won a lottery “prize”. Alt and Wells (2004) suggest that seniors are targeted by “scammers” because they tend to be more trusting, being raised in a time when a person’s word was almost as good as a written contract.<sup>12</sup> It is estimated that the Jamaican lottery scam targets about 300,000 Americans a year most of which are senior citizens and is an annual 300USmillion dollar industry.<sup>13</sup>

## REASONS SURROUNDING THE PROLIFERATION OF “LOTTO SCAMMING” IN JAMAICA

There are a number of reasons why the Jamaican lotto scam has soared to mammoth proportions in recent years and has become as notorious as the Nigerian 419 scam. These include:

1. Technology has made it easy to access personal data as highlighted above and also made it cheaper to communicate (e.g. use of VOIP, internet calls, magic jack);
2. The World Bank<sup>14</sup> reports (as at October 2015) that the unemployment rate in Jamaica is above 13 percent and about twice that amount for young persons. As a result, many Jamaicans, especially in the western parishes, see scamming as the only source of income. In some communities scamming has become so embedded in the culture that children grow up to believe that it's okay to get involved in lottery scamming particularly as “scammers” are known to drive nice cars, live in mansions and have lavish lifestyles;
3. Many persons believe that scamming does no physical harm to the victim and enter into this lifestyle as it is seen as being a better alternative to using violence to commit illegal activities such as robbery and murder;

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<sup>12</sup> See discussion in Background Brief Lotto Scam by Capri November 2012 available at [http://www.capricaribbean.com/sites/default/files/public/documents/briefing\\_paper/background\\_brief\\_-\\_the\\_jamaican\\_lottery\\_scam.pdf](http://www.capricaribbean.com/sites/default/files/public/documents/briefing_paper/background_brief_-_the_jamaican_lottery_scam.pdf)

<sup>13</sup> Ibid

<sup>14</sup> The World Bank: Overview of Jamaica available at <http://www.worldbank.org/en/country/jamaica/overview>

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4. Victims targeted are often fearful of the “scammers” and therefore many persons refuse to file a report to the police and most scams go unreported out of fear and embarrassment. In addition, “scammers” thrive off naïve and gullible persons who are willing to pay “processing fees” to obtain their “winnings or prize” without testing the veracity of the information provided by the “scammer”;
5. There is (relatively) low risk and high profit.

Prior to 2013, Jamaica had no specific law which proscribed this activity. The Office of the Director of Public Prosecutions indicated that in light of the absence of specific legislation dealing specifically with “lotto scamming”, existing legislative instruments and the common law were used to investigate and prosecute lottery scams. These include, the *Cybercrimes Act*, the *Larceny Act*, the *Forgery Act*, the *Unlawful Possession of Property Act* and under the common law, the offence of conspiracy to defraud.

However, there were a number of weaknesses with using existing legislation to investigate and prosecute lottery scams which contributed to low prosecution rates and the sense of impunity amongst “scammers” prior to 2013. For example the Unlawful Possession of Property Act is highly procedural and as such it requires complete adherence to the procedural requirements stipulated. Section 8 provides for the issuance of a search warrant in circumstances where ***“there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any house, store, yard or other place, or on any lane or in any vessel”***. This section is popularly utilized by police officers and is deemed most convenient. It was however never created to address frauds of this nature. While there is short term success in immediately taking away property found in the possession of alleged lottery “scammers”, prosecution under this

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statute precludes the activation of forfeiture proceedings under Proceeds of Crime Act (**POCA**) in the event of a conviction.<sup>15</sup>

As it concerns the Cybercrimes Act 2010, section 4 (access any program or data held in a computer with intent to commit or facilitate the commission of an offence) and section 8 (unlawfully making device or data for the commission of an offence) were the most applicable provisions used to prosecute lottery scams. For example where data, including personal information is accessed (for example, stolen from a data processing centre) in order to commit or help another person to commit a fraud, they would commit an offence under section 4. Where a person possess, makes, distributes, sells or imports for example card skimmers or other electronic devices normally used in the commission of lottery scams, then section 8 could be used to prosecute them.

However, section 4 which was sought to be used to prosecute cyber related fraud had an error<sup>16</sup>, which made prosecution of scamming offences impossible. Section 4(1) (a) of the 2010 Act made it an offence to access without authorization any programme or data “with intent to commit any offence punishable by imprisonment for a term **not** exceeding one year”. The types of offences that could be prosecuted under this section were limited by the fact that only offences punishable by imprisonment for a term **not** exceeding one year was included in this provision.

Another factor which arguably contributed to the impunity and low prosecution rates prior to 2013, include the unwillingness of victims and witnesses (who reside primarily in the United States) to come to Jamaica to give evidence in these cases. This is important particularly since

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<sup>15</sup> Ibid

<sup>16</sup> This error has since been corrected with the enactment of a new Cybercrimes Act in 2015 which repealed and replaced the Cybercrimes Act of 2010.



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trial by way of *section 31D* of the **Evidence Act**<sup>17</sup> is not usually the most feasible route to prosecution.

In light of the growing concerns, the unsuccessful prosecution of these advance fee fraud offences using existing legislation and the negative impact that lottery scamming has caused on Jamaica's reputation<sup>18</sup>, the Minister of Justice requested a report from the Office of the Director of Public Prosecutions outlining the issues and any possible solution to addressing this criminal phenomenon. The report by the Office of the Director of Public Prosecution (which was prepared in consultation with the Jamaica Constabulary Force and the Legal Reform Department) recommended that specific legislation be enacted to address advance fee fraud in Jamaica. It recommended that the Nigerian *Advance Fee Fraud and other Fraud Related Offences Act 2006* and aspects of the Canadian Criminal Code be used as a guide in drafting this legislation. As result of these recommendations, the *Law Reform (Fraudulent Transactions) (Special Measures) Act 2013* was enacted and came into force on the 28<sup>th</sup> of March 2013.

## THE SOLUTION: THE LAW REFORM (FRAUDULENT TRANSACTIONS) (SPECIAL MEASURES) ACT 2013

*The Law Reform (Fraudulent Transactions) (Special Measures) Act 2013* popularly known in Jamaica as the "lotto scam" Act can be described as Jamaica's legislative solution specifically addressing the issue of advance fee fraud, identity theft and other related fraud in Jamaica. The Act introduces new offences that make the activities used in carrying out advance fee fraud an offence. These offences range from obtaining property by false pretence, offence of inviting a person to visit Jamaica by false pretence, threatening or intimidating a person involved in a criminal investigation and conspiring to commit an offence under the Act. Under this new Act,

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<sup>17</sup> Section 31D allows for the admission of first hand hearsay evidence in criminal proceedings only if any of the certain specified conditions relating to the unavailability of the maker of the statement is satisfied

<sup>18</sup> See Anderson Cooper's Driven to Death on CNN <http://edition.cnn.com/videos/us/2015/10/07/jamaica-lottery-scam-griffin-ac-pkg.cnn/video/playlists/scams-schemes-and-cons/>

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offences attract custodial sentences of up to 20 years, and provision is made for restitution to victims upon conviction of perpetrators.

We will now examine the Act in greater detail.

## ***Part One***

Part one is the usual provision for the short title of the Act being contained at section 1.

Section 2 is the interpretation section which defines the terms used in the Act. Of particular note is the term “access device” which is a new term in Jamaican law.<sup>19</sup> It seeks to capture any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number and any other means of access that can be used alone or with another device, to obtain a benefit or other thing of value, or that can be used to initiate a transfer of money. This term was adopted from the United States Federal Code<sup>20</sup> and is intended to be technology neutral so as to capture new and emerging forms of access devices.

It is important to note that the definition of other terms in section 2 was drafted with guidance from the Nigerian Advance Fee Fraud and other Fraud Related Offences Act 2006, the Canadian Criminal Code, the Jamaican Proceeds of Crime Act and the Electronic Transactions Act.

## ***Part Two***

### *The Offences*

#### *Section 3 -Obtaining Property by False Pretence*

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<sup>19</sup> Prior to this the Cybercrimes Act 2010 contained a provision called unlawfully making available device or data for the commission of an offence. This was only limited to offences under section 3-7 of the Act and thus prosecutions were limited in that regard.

<sup>20</sup> 18 U.S. Code § 1029 - Fraud and related activity in connection with access devices

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Section 3(1) creates the offence of obtaining property by false pretence. That is, where a person obtains any property<sup>21</sup> from another person or induces them to deliver any property to the offender or any other person by false pretence. Subsection 2 is similar and a person commits an offence where he induces any other person to confer a benefit on him or any other person by doing or permitting a thing to be done on the understanding that a benefit has been or will be paid for or some other benefit would be provided in exchange.

Section 3 is functionally the same as section 35 of the existing *Larceny Act*, however in the latter Act it only attracts a maximum penalty of five (5) years and is triable before the Parish Court (as Magistrates Courts are now known in Jamaica). This offence under section 3 of this Act attracts severe penalties of a fine or term of imprisonment not exceeding 20 years (or both) which reflects the seriousness of these offences and is triable before the Circuit Court (Supreme Court).

#### *Section 4- Inviting a person to visit Jamaica by a false pretence*

Corporal Kevin Watson, media liaison and communication officer for the Lottery Scam Task Force told the Observer West in July 2014 that “In light of the fact that the remittance services have clamped down on persons who have been receiving large sums of money from overseas lottery scam victims, you find that these persons (“scammers”) have found new and creative ways to get these monies from their victims. These persons (“scammers”) are now inviting their victims down here to our shores to bring these monies to them.”

Section 4 makes it an offence to invite or induce someone, by false pretence, to visit Jamaica for any purpose connected with the commission of an offence under this Act. The penalty for this offence is a fine or imprisonment not exceeding twenty years (20) or both such fine and

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<sup>21</sup> The word property has been defined widely to include money, all forms of real and personal property, things in action intangible or incorporeal property.

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imprisonment. This section followed the offence of fraudulent invitation contained in section 4 of the Nigerian Act.

## *Section 5-Offence of using premises for purposes which constitute an offence under this Act*

Any owner, occupier or other person responsible for the management of any premises who causes, or knowingly permit, the premises to be used for any purpose which constitutes an offence under this Act is liable to be charged with an offence. This offence attracts a penalty of a fine or imprisonment not exceeding fifteen years (15) or both fine and imprisonment. Similar provision is contained in section 5 of the Nigerian Act.

## *Section 6-Offence of using an access device to transfer or transportation of money or monetary instrument*

This section aims to capture two important aspects of lotto scamming. These aspects include the conducting of financial transactions and the transfer or transport of money or money instruments derived from proceeds of unlawful activity. These are new offences and are aimed at targeting the use by “scammers” of couriers or agents who collect the proceeds of their scams from money transfer firms or otherwise obtain and transport the proceeds. It addresses the transfer or transport of money by a perpetrator in Jamaica; within Jamaica, within Jamaica to a place outside of Jamaica; from another place to Jamaica; from another place outside of Jamaica to another place outside Jamaica. The penalty for this offence is a fine or imprisonment not exceeding twenty years (20).

## *Section 7-Offence of threatening or intimidating a person involved in criminal investigation*

Section 7 criminalizes the threatening, intimidation, or causing injury or attempting to cause injury to a person who is involved in criminal investigation or trial of an offence under the Act. This section is very wide and covers, judges, witnesses, expert witnesses, police officers,

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prosecutors, defence attorneys. This is a very serious offence which is reflected in the penalty which is imprisonment of a term up to twenty-five (25) years.

## *Section 8- Offence of theft of access device*

Computers, cell phones, card skimmers and other electronic devices are important tools in the lotto scamming trade. Cell phones are used to call unsuspected persons informing them that they have won prizes. Computers may also be used to send emails and further instructions for paying the request “fees”, before the prizes can be released to persons. In other instances card skimmers and other devices are used to steal the Personal Identification Numbers (PINS) and other personal information from credit and debit cards.

Section 8 is geared towards addressing the theft, forgery, possession use or trafficking of an access device. Although credit cards and credit card numbers are perhaps the most widely used form of access device, the term access device has been broadly defined in section 2<sup>22</sup> and captures not only credit cards and account numbers but also any means by which money or benefit or thing of value can be obtained. It is also an offence to use an access device knowing that it has been revoked or cancelled with intent to commit an offence under the Act. This offence attracts a penalty of a fine or imprisonment not exceeding fifteen years (15) or both fine and imprisonment. This provision and definition of the term access device was adopted from the Canadian Criminal Code and the US Federal Code.

## *Section 9 – Offence of making, repairing, buying, etc., thing for copying data from an access device or forging or falsifying an access device.*

This section is related to section 8 and makes it an offence for any person, without lawful justification or excuse, to deal in any instrument, device, apparatus or thing (this includes

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<sup>22</sup> It means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number and any other means of access that can be used alone or with another device, to obtain a benefit or other thing of value, or that can be used to initiate a transfer of money

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software) which he knows has been used, or knows is adapted for use or intended use in copying data from an access device for the purpose of committing an offence against this Act or in forging or falsifying an access device. The Penalty for this offence is a fine or imprisonment not exceeding twenty years or both fine and imprisonment. A similar provision is also contained in section 10 of the Jamaican Cybercrimes Act 2015.<sup>23</sup>

*Section 10- Offence of knowingly obtaining or possessing, transmitting, distributing, etc., identity information of a person.*

Personal information such as the name, address, telephone number or passwords of potential victims can be obtained from a number of sources which is often collated in what is known as “lead lists” or “sucker sheets”. As discussed earlier this information is obtained from various sources such as call centres. This information and lists are valuable and are in high demand.

Section 10 of the Act is aimed at dealing with those who unlawfully possess identity information or make the identity information available to others through distribution, selling or makes it available otherwise to commit an offence under this Act or any other law.

The term “identity information” is defined in section 10(3) and covers a wide range of information which can be used to identify an individual living or dead. Identity information means;

*“(a) a fingerprint, voice print, retina image, iris image, DNA profile, or any other biological or physiological information; or*

*b) a name, address, date of birth, written signature, electronic signature, e-mail address, digital signature, user name, credit card number, debit card number, financial institution account number, health insurance number, driver's licence number, telephone number,*

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<sup>23</sup> Conviction before Parish Court for this offence in the case of a first offence attracts a term of imprisonment not exceeding four years or a fine of four million dollars or both fine and imprisonment. Before the Circuit Court, in the case of a first offence it attracts a term of imprisonment not exceeding ten years

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*taxpayer registration number, social security number, or any other unique personal identification number, or password,*

*being information of a type that is used, alone or in combination with other information, to identify or purport to identify an individual, whether living or dead”.*

The penalty for this offence is fine or imprisonment not exceeding fifteen (15) years or both. This provision mirrors the offence of identity theft contained in section 402.2(1) and (2) of the Canadian Criminal Code.

## *Section 11– Offence of obtaining a benefit by menace*

These “scammers” often threaten to use violence and or make demands on victims. They may make threats to harm the victim’s family or the victim themselves. They also threaten to report them to the police or other government departments if they fail to pay over the “advance fees” they have demanded. Most of these victims are elderly and live alone and are very fearful and with the type of personal information<sup>24</sup> that the scammer has on the victim, they often feel helpless and believe their best and only option is to hand over the funds once they have been threatened.

Section 11 seeks to address this aspect of lotto scamming. It provides that a person commits an offence if he uses telephony or any other electronic communication system, to make any demands on a person with a view to obtaining a benefit for himself or with to cause loss to any other person. The penalty for this offence is imprisonment for a term not exceeding twenty (20) years. This provision was drafted taking guidance from the section 42A of the Jamaican Larceny Act that makes extortion an offence.

## *Section 12-conspiring to commit, aid and abet an offence*

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<sup>24</sup> In threatening the victims, “scammers” often reveal the type of information they have on the victim. Their full names and address and with the help of Google earth they obtain real time information on exact location of the house and other pertinent details.

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Section 12 (1) provides that it is be an offence to conspire, aid, abet, counsel or procure any other person to commit an offence under this Act. It is also be an offence to incite or induce any other person to commit an offence under the Act. The penalty for an offence under this provision is a term of imprisonment not exceeding fifteen (15) years.

It should be noted that section 12(2) states that, “for the avoidance of any doubt, that a charge of an attempt to commit an offence under this Act will not fail only because the false pretence which constitutes an element of the offence is contained in a document which was not received by the person to whom the false pretence was directed”. This is meant to capture situations where an email containing false pretence is sent to a non-existent or non-functioning email address so that the intended recipient does not received it, this would not, by itself, prevent the sender from being convicted for the attempt.

## ***Part Three***

### ***Enforcement Provisions***

In addition to the offences contained in sections 3-12 as outlined above, sections 13-17 of the Act deals with sentencing and enforcement provisions.

#### ***Section 13-Offences and Penalties Schedule***

Section 13 states that the offences under the Act are triable on indictment before the Circuit Court and that the penalties are outlined in the schedule. By virtue of Section 13 (2) there are a number of factors that the Court can take into consideration in sentencing the accused. This includes the age, whether menace (or threat) was used and whether there was persistent badgering.

#### ***Section 14-Committal for trial without Preliminary Enquiry***



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Section 14 provides that where a person is charged with an offence under this Act, the person shall be committed for trial without any preliminary examination and shall be tried before a Judge of the Circuit Court sitting alone, without a jury. The word “preliminary examination” has been defined to include any proceedings, by whatever name called, for determining the committal of a person for trial. This was done to take into account the Committal Proceedings Act<sup>25</sup> which abolished preliminary examinations in 2012 and replaced it with proceedings related to the committal for trial of indictable offences triable in the circuit court.

## *Section 15-Possession of Property not accounted for*

This section is an evidential provision which allows the court to take into consideration the fact that a person is in possession of property for which he cannot satisfactorily account and which is disproportionate to his known sources of income. Also where a person at or about the time of the alleged offence obtained an accretion to his property for which he cannot satisfactorily account. These factors can be taken into account by the Court and is admissible as evidence to the extent relevant for the case before the Court. This section mirrors section 15 of the Nigerian Act dealing with unaccounted property.

## *Section 16-Powers of Search and Seizure*

This section makes provision for the issue of search warrant by a Justice of the Peace to a constable to search premises for evidence of or relating to an offence under this Act. The warrant may also authorize the seizure of property to which the constable on reasonable grounds believes to be evidence or related to an offence under the Act.

## *Section 17-Restitution*

One of the negative effects of “lotto scam” includes the thousands and millions of dollars that victims lose when they pay out “fees” to the accused persons. Section 17 provides that where a

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<sup>25</sup> This Act came into effect January 1, 2016

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person is convicted under this Act, the Court shall make an order for restitution to the victim of the offence. Restitution may involve the payment of money equivalent to the loss sustained by the victim plus any interest which may have accrued during the period in which the person was deprived of his property. The court can also order the return of property which was deprived to the victim or his designee or that to pay an amount equal to the value of the property, where the return of the property is impossible or impracticable.

Section 17(2) provides that an order for restitution may be enforced by the victim or the prosecution on behalf of the victim in the same manner as a judgment in a civil action. Where the victim is deceased, section 17(3) provides that the personal representative of the victim is entitled to receive restitution ordered by the court.

## ***Part Four***

The final part of the Act, sections 18-20, located in Part IV contains the general provisions of the Act. It provides for the regulation making power of the Minister (section 18), enabling the minister to amend the penalty provisions of the Act (section 19). This is subject to affirmative resolution of the Jamaica Parliament.

Finally, section 20 stipulates that a review of this Act shall be conducted no later than five years after the commencement of this Act by a committee of both Houses of Parliament, appointed for that purpose. The first review is slated to take place on or before 2018

## **THE EFFECTIVENESS OF THE LAW REFORM (FRAUDULENT TRANSACTIONS) (SPECIAL PROVISIONS) ACT**

Prior to the enactment of the *Law Reform (Fraudulent Transactions) (Special Provisions) Act*, the Jamaica Constabulary Force noted that the absence of legislation specifically dealing with “lotto scam”, prevented the police from securing convictions for persons arrested for offences related to such scamming. The Director of Public Prosecutions noted that in 2008-2009 over a

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nine (9) month period, the police arrested and charged over ninety (90) persons in relation to lottery scams and of that figure only three (3) convictions were secured. There were t 63 charges preferred in the Residents Magistrates Courts<sup>26</sup> related to “lotto scamming” being prosecuted under a number of different legislative provisions. In 2012 and 2013, where such scams escalated, four hundred and thirty one (431) persons were arrested of that figure ninety-five (95) persons were charged.

Legislators, law enforcement and prosecutors have hailed the *Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013*, as a very effective piece of legislation which has made law enforcements better equipped to tackle “lotto “scammers”.<sup>27</sup> Law enforcement state that its effectiveness can be gleaned from the number of arrests and convictions made under the Act. Statistics that have been collated from the Jamaica Constabulary Force indicate that in 2013 after the Act was enacted, three hundred and thirty two (332) persons were arrested, of that figure, one hundred and sixty two (162) were charged and thirteen (13) convicted. During that period over eighty-three million five hundred seventy-three thousand five hundred fifty dollars (JMD \$83,573,550.00) and thirty thousand four hundred and twenty dollars (USD \$30,420.00) was seized along with a number of cars, marijuana and firearms.<sup>28</sup> For the period between January to July 2015, one hundred and twenty nine (129) persons were arrested, of that figure one hundred and seven (107) were charged and thirty one (31) were convicted. Since the passing of the Act there has been a total of Sixty-eight (68) convictions and over one billion two hundred million Jamaican Dollars in assets seized.<sup>29</sup>

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<sup>26</sup> The Office of the Director of Public Prosecutions report on “lotto scam” November 7, 2012

<sup>27</sup> Minister of National Security Hon. Peter Bunting speaking at a Press Release July 2014 on Nationwide

<sup>28</sup> Statistics obtained from the Major Organized Crime Agency (MOCA) which has responsibility for investigating these and other serious crimes

<sup>29</sup> Ibid

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In addition, a number of persons have been extradited to the United States of America for their role in defrauding several Americans through “lotto scamming”.<sup>30</sup> In 2015, Damion Barrett became the first Jamaican to be extradited to the United States of America for his part in a conspiracy in which elderly victims were informed that they had won a large amount of money in a lottery and were induced to pay bogus fees in advance of receiving their purported lottery winnings which took place from 2008-2012.<sup>31</sup>

An analysis of the effectiveness of the Act would not be complete without examining the types of sentences that have been imposed thus far by the Court. Although the penalties under the Act are harsher in comparison to similar offences contained in other legislation, the types of sentences imposed by the Court thus far have not been reflective of this. For example, sentences for the offence of being in possession of identity information have ranged from a fine of two hundred and twenty thousand (\$220,000JMD) to five hundred and fifty thousand (\$550,000JMD) Jamaican dollars to terms of imprisonment ranging between two years to five years hard labour. In a few cases of offence of possession of identity information, which attracts a fine or a term of imprisonment not exceeding fifteen (15) years or both fine and imprisonment, persons have received suspended sentences.<sup>32</sup> As it concerns the offence of making available access device the sentences imposed by the Court thus far have ranged from terms of

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<sup>30</sup> See report in Jamaica Observer entitled “over 500 arrests made under Lotto Scam law” available at <http://www.jamaicaobserver.com/news/More-than-500-arrested-under-Lotto-Scam-Act> . See also Jamaica Gleaner report entitled “lotto scam extraditions pending” available at <http://jamaica-gleaner.com/gleaner/20150211/lead/lead7.html>

<sup>31</sup>Read more at Jamaican sentence for role in International Lottery Scheme: <http://www.caribbean360.com/news/jamaican-sentenced-in-international-lottery-scheme#ixzz4DSxPyklB>

<sup>32</sup> See reports of persons sentenced pursuant to the Law Reform (fraudulent transactions) (special measures) Act in the Jamaica Gleaner, Jamaica Star and FID news available at <http://fid.gov.jm/html/historic-scammer-gets-four-years/>, <http://jamaica-star.com/thestar/20140227/news/news6.html>

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imprisonment of three years to five years.<sup>33</sup> This offence attracts a term of imprisonment not exceeding twenty years or both fine and imprisonment.

In light of the type of penalty that these offences attract, the sentences imposed by the Court thus far can be viewed as low and can be seen as a “slap on the wrist”. It can be argued that such low sentences may result in an offender being released from prison after serving the sentence and reoffending quickly, particularly since the benefits of scamming are alluring. One may also argue that the imposition of low sentences may be seen by the public as undermining the effectiveness of the Act.

In comparison, Jamaicans tried in the United States for similar offences have received much harsher penalties. The first Jamaican to be tried and convicted in the United States for his role in the lottery scamming which involved selling lead lists received twenty (20) years imprisonment and was ordered to pay more than five (\$5) million US dollars in restitution on 35 counts of conspiracy, wire fraud and lottery scamming. In relation to the offence of conspiracy, sentences imposed for one count have ranged from ten (10) months imprisonment to forty six (46) months imprisonment. In addition to these sentences, defendants have been ordered to pay restitution to victims. These orders for restitution have ranged from as low as seventy four thousand four hundred and fifty dollars (US\$74,450) to two hundred and thirty two thousand one hundred and eighteen dollars and seventy eight cents (US\$232,118.78).

With the number of arrests and convictions made thus far, many have argued that inroads<sup>34</sup> have been made in combating “lotto scamming”. Despite this, there are a number of matters ancillary to the lottery scam that seek to undermine these inroads. First, there has been an increase in the

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<sup>33</sup> See Jamaica Gleaner Article 21 year old gets two years for lottery scamming, July 4, 2014 <http://jamaica-gleaner.com/power/54061> and Man held with lottery scamming device August 7, 2014 <http://jamaica-gleaner.com/gleaner/20140807/lead/lead7.html>

<sup>34</sup> See for example “Lotto scam retreats government cops praises” in Jamaica Gleaner available at <http://jamaica-gleaner.com/article/lead-stories/20150316/lotto-scam-retreats-govt-cops-praised-threat-ict-sector-eases>

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number of murders that are being linked to lotto scam,<sup>35</sup> second, the rate at which this scam has now spread to other parishes in Jamaica<sup>36</sup> and finally, emerging trends which demonstrate that the phenomenon called “lotto scamming” is constantly evolving and seeks to continue on even a larger scale.

The Jamaica Constabulary Force stated that there were at least one thousand one hundred and ninety two (1,192) killings in 2015, with most related to gang violence. This was a nearly twenty (20) percent increase on 2014, which saw a total of one thousand and five (1,005) killings, the lowest since 2003. Authorities have attributed Jamaica's dramatic increase in homicides in 2015 to clashes between rival lottery scam rings who are reportedly competing for control of money and “lead lists”.<sup>37</sup> Additionally, indications are that the scam, which has its epicenter in St James, has spread to other parishes such as St. Elizabeth, Manchester, St. Catherine and Kingston as these “scammers” move their illegal operations to other parishes with hopes of avoiding the dragnet by law enforcers. The “scammers” are showing up in parishes where the multimillion-dollar underground operations once did not exist.<sup>38</sup>

As it concerns emerging trends these include inviting their victims to Jamaica to bring the monies to them or employ couriers (which includes elderly relatives) to specifically go to the United States of America to collect the victim’s money. The fraudsters ensure that in the courier’s limit, the amount of money being transported from the United States of America to Jamaica does not go over the ten thousand (\$10,000) US dollars threshold, which does not require compulsory declaration to customs. These methods are now used in light of the fact that

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<sup>35</sup> See news paper reports “Spike in Hanover murders linked to lotto scam players” Jamaica Observer October 10, 2015 available at [http://www.jamaicaobserver.com/news/Spike-in-Hanover-murders-linked-to-lottery-scam-players\\_19231299](http://www.jamaicaobserver.com/news/Spike-in-Hanover-murders-linked-to-lottery-scam-players_19231299)

<sup>36</sup> See report “Lottery “scammers” moving to other parishes” Jamaica Observer September 2015 [http://www.jamaicaobserver.com/news/Lottery-”scammers”-moving-to-other-parishes\\_19229960](http://www.jamaicaobserver.com/news/Lottery-”scammers”-moving-to-other-parishes_19229960)

<sup>37</sup> Supra n12

<sup>38</sup> See report Two Women arrested for Lotto scamming, November 23, 2015 available at <http://www.loopjamaica.com/content/two-women-arrested-lotto-scamming>

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the remittance services have clamped down on persons receiving large sums of money from overseas.<sup>39</sup>

It is also being reported that lotto “scammers” in the western end of the island appear to be recruiting children as young as eleven (11) years old to join in their illegal activities. It is alleged that the “scammers” have stepped up their drive, recruiting directly inside of schools, as their rank grows thin from a number of arrests. The pre-teen recruits are being asked to stash the “scammers’ money and to help process lead sheets, among other things.

In addition, “scammers” have been impersonating the police and calling persons who have been scammed indicating that they are establishing sting operations and need their assistance. This assistance is either in the form of donations to successfully undertake the operations or that they are to send the money to the “scammer” who has contacted them so that they can nab them when they are collecting same.<sup>40</sup> These trends seem to indicate that these “scammers” have grown desperate as their operations have taken serious hits since the passing of the *Law Reform (Fraudulent Transactions) (Special Provisions) Act* in 2013, which has resulted in hundreds of arrests, stiff penalties and the extradition of suspects to the United States for trial.

Nevertheless, it can be argued that it is still too early to concretely say that the *Law Reform (Fraudulent Transactions) (Special Provisions) Act* 2013 has been effective. Notwithstanding this debate there are a number of other recently enacted legislation which are complementary to the *Law Reform (Fraudulent Transactions) (Special Provisions) Act* that will aid and increase the effectiveness of the investigation and prosecution of these scams. These include the *Evidence (Amendment) Act 2015*, which now allows for the admission by agreement of any document or treat any fact as having been proved without evidence being led to prove such fact; admissibility of expert reports without having the expert giving viva voce evidence and a modernized simpler

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<sup>39</sup> A New Trend, Jamaica Observer available at <http://www.jamaicaobserver.com/mobile/regional/-A-NEW-TREND-17271448>

<sup>40</sup> Twice conned loop news available at <http://www.loopjamaica.com/content/twice-conned-lotto-scammer-reveals-new-scheme>

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procedure for the admissibility of computer generated evidence by allowing any party who seeks to rely on computer generated evidence to admit a certificate which shows that the computer was working at the time it generated the document.

Earlier it was noted that one of the factors that led to the seeming lack of prosecution of these scams, is the unwillingness of witness to travel to Jamaica to give evidence. The Evidence (Special Measures) Act 2012 and the Evidence (Special Measures) (Video Recorded Evidence) (Criminal Proceedings) Regulations 2015, provides for a child or a vulnerable witness<sup>41</sup> to give evidence via video recording or live link. This will enable a number of victims of lotto scams who are elderly and are unable or unwilling to come to Jamaica to still give evidence using these measures. It is also cheaper for both the victim and the state for such measures to be used.

Prior to the enactment of the *Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013*, attempts were made to use the Cybercrime Act of 2010 to investigate and prosecute lotto scams. However, due to the error in section 4 as outlined earlier and other challenges they were unable to successfully do this. The Cybercrime Act of 2010 was reviewed in 2013 pursuant to section 21 the review clause in the Act which maintained that the Act should be reviewed two years after commencement. A number of concerns, challenges and recommendations were raised by law enforcement, the public and private bar and members of the public. These concerns, challenges and proposals were examined and in light of this, the Cybercrimes Act of 2015 enacted. This Act repealed and replaced the 2010 Act of the same name. It corrected the error in section 4, and established new offences such as computer-related fraud or forgery; use of

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<sup>41</sup> Vulnerable witness includes a child, the witness is a complainant in criminal proceedings relating to a sexual offence; or (c) the court determines in accordance with subsection (3) that the evidence of the witness is unlikely to be available to the court, or the quality of the evidence if given in court by the witness is likely to be diminished as regards its completeness, coherence or accuracy, by reason of. (i) fear or distress on the part of the witness in connection with testifying in the proceedings; or (ii) the fact that the witness has a physical disability, physical disorder or suffers from a mental disorder within the meaning of the Mental Health Act.



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computers for malicious communication; and unauthorised disclosure of investigations (tipping off) as well as for the introduction of stiffer penalties.<sup>42</sup>

## CONCLUSION

The *Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013* was enacted as a legal response to assist law enforcers and prosecutors to effectively and successfully combat incidents of lotto scamming, data and identity theft and related fraud. While its effectiveness is still being measured, one must acknowledge that the Act has the potential to be a great legal tool for combating same. The fight against this scourge requires an “all hands on deck” approach which includes utilizing all the legislative tools available, conducting proper and candid investigation and educating the public about the ills of these scams.

It has been recognized that in addressing any multifaceted criminal phenomenon, legislative provisions must be reviewed on a consistent and constant basis to ensure they are meeting the objective for which it was intended. In this regard Section 20 of the Act provides that a review of the Act must be conducted no later than five years after the commencement of the Act by a committee of both houses of parliament. It is hoped that the legislature will conduct the necessary review in short order. This will involve analyzing the effectiveness of the Act, identifying and examining any challenges in the existing legislation and with law enforcement and effecting the necessary changes (if any) in light of this review.

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<sup>42</sup> For example under section 3,5, 6, 7 of the Act offences of unauthorized access, unauthorized modification of computer program or data, unauthorized interception of a computer function or service and unauthorized obstruction the penalty for the first offence was increased from two million dollars or two years imprisonment to three million dollars or three years imprisonment in a Parish Court (formerly called Resident Magistrate’s Court).

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