

LEGAL PRACTITIONER MOBILITY IN THE COMMONWEALTH

A discussion paper by Campbell McLachlan, author of Admission of Commonwealth Lawyers (A Technical Survey of the extent to which lawyers qualified in one Commonwealth jurisdiction may be admitted to practise in other Commonwealth jurisdictions) which was distributed to Commonwealth governments in May, 1986

Of all the legal ties which bind the Commonwealth, perhaps the most significant are those of personal interchange within the community of legal practitioners. Yet this human dimension of legal practitioner mobility in Commonwealth legal cooperation has never received sustained examination at the non-Commonwealth level. The multiplicity of approaches found in existing national legislation makes up a complex jig-saw in which any coherent policy is not always easily perceived. Only a common and uniform review can adequately address the issues.

2. This paper canvasses the arguments for and against practitioner mobility and develops some proposals for consideration. The detailed background is to be found in the technical survey Admission of Commonwealth Lawyers, which provides a complete compendium of the existing legislation on the subject in every Commonwealth jurisdiction.

A. WHAT SORT OF PRACTITIONER MOBILITY MERITS RECOGNITION?

3. The survey, and the proposals in this discussion paper, are concerned with only two aspects of practitioner mobility. This approach is largely reflected in the forms of recognition adopted in existing Commonwealth legislation. The concern is solely with lawyers who have been fully admitted to practise in their home jurisdiction and who wish to either:

- (a) move completely to a new jurisdiction (the 'host jurisdiction') and commence full-time practice there as a member of the host Bar or Law Society ('general admission'); or,
- (b) represent their client before the courts of the host jurisdiction for the purposes of one particular case only ('special admission').

4. This narrow frame of reference distinguishes practitioner mobility from many other complex issues which, though related, are distinct from any progress towards reform on this particular issue. Issues which should be distinguished include the following:

(i) Educational mobility

5. The restriction of focus to fully-admitted practitioners avoids the complex arguments about the equivalence and recognition of educational qualifications, and student mobility.

(ii) Practice without admission in the host country

6. A focus on lawyers from other Commonwealth jurisdictions joining the local legal profession or pleading before local courts avoids the issue of foreign lawyers providing services without becoming members of the host legal profession. Commonwealth cooperation in legal practitioner mobility would not encourage either the situation of foreign lawyers attracting local litigation to foreign jurisdictions or what the French have, in the context of European discussions, dubbed 'installations sauvages' or branch offices of foreign law firms, which operate not as members of the host legal profession but simply to give advice in the host country on the laws of their home jurisdiction. There has been no indication that these problems, which bedevil relations between many non-Commonwealth countries, have arisen in an intra-Commonwealth context.

(iii) Immigration and work permits

7. Immigration controls are a matter for the exercise of executive discretion on the basis of ever-changing social and economic policy considerations. From an individual's point of view, they are a normal incident of the move to a new country. The rules governing admission, on the other hand, operate as a special professional restriction on entry and are constructed on the basis of a more permanent set of considerations.

B. WHY HAS PRACTITIONER MOBILITY BEEN RESTRICTED?

8. Three major considerations have been advanced in the past for limiting freedom of movement in the Commonwealth legal profession.

(i) Protection of local legal education

9. The development of vital and self-reliant local legal education has been a major Commonwealth achievement in the last quarter of a century. Such a development would only have been possible if local law students who had habitually gone abroad for their legal education were encouraged to undertake their training at home. This necessitated a restriction on the recognition of overseas qualifications. However, the period of development is now beginning to stabilise. There are now few countries in the modern Commonwealth which are still dependent on overseas legal education. Most countries have well-established systems and faculties which are not susceptible to erosion by increased mobility. Indeed it is these newer qualifications which would be enhanced by wider recognition.

(ii) Protection of the host legal profession

10. An equally valid objection has been made on the basis that enhanced practitioner mobility undermines the strength of the host Bar. Local lawyers can be denied the opportunity to develop specialised skills if the most complex and lucrative work is taken by overseas lawyers. The local profession can fail to develop as the responsive servant of society if lawyers simply commute from abroad with no commitment to the host society. Nevertheless these objections relate more to the way practitioner mobility is approached rather than to the idea itself. The narrow focus, which this paper proposes, would entail either a full commitment to the host profession in the case of general admission; or, in the case of special admission, the existence of special circumstances.

(iii) The interests of the host society

11. While the Commonwealth shares a common legal heritage, it is equally important to recognise the extent of the divergences between legal systems. These are not confined to the level of detail. Major differences of approach occur where legal systems take account of indigenous customary laws or religious laws or where they draw upon legal traditions quite distinct from the Common Law. Commonwealth courts and legislatures are continuously adapting the law to local needs. These developments have the important consequence that a qualification in the knowledge of the law of one jurisdiction does not necessarily equip the lawyer with sufficient knowledge in the laws of other Commonwealth jurisdictions. Cultural diversity is also an important factor: language, religion, different social environments, all these place new demands on the overseas lawyer. These factors have complicated European negotiations, where the differences are far more fundamental than in the Commonwealth. These considerations cannot be ignored, although one may reflect on the practical importance and unique character of the Commonwealth's shared legal traditions, which constitute a most significant spur to freedom of movement. A rational system of practitioner mobility would need to include a specially designed adaptation course, which would introduce overseas lawyers to the special features of the host country's legal system. This is the approach newly adopted in the Caribbean and proposed for Europe.

C. WHY SHOULD THERE BE INCREASED FREEDOM OF MOVEMENT?

12. It is not suggested that freedom of movement in the Commonwealth legal profession, even on the limited terms here proposed, is an absolute good. Nor is it suggested that there should be absolute freedom of movement. A rational Commonwealth system of practitioner mobility must strike a balance between the significant policies outlined above for restriction, and the principles now advanced for greater freedom of movement:

(1) Consumer choice

13. Increasingly lawyers, along with other professional groups, are having their rules and practices examined to ensure that the consumer receives the best possible service. This policy may be seen at work in the many reports of national Monopolies and Restrictive Trade Practices Commissions in Commonwealth countries, which have touched on advertising restrictions, fee scales, the conveyancing monopoly, the 'two counsel' rule and many other restrictions typically found in the legal profession. Conditions of entry to the profession have also come under the spotlight. At an international level, the Organisation for Economic Cooperation and Development has issued a Report on Competition Policy and the Professions in which it recommends that member governments reconsider provisions for the entry of foreign nationals to ensure that they are really in the best interests of the public. In the EEC, substantial progress has already been made on the basis of the two principles of freedom to provide services and freedom of establishment enshrined in the Treaty of Rome. Discussions on a Directive for the Recognition of Qualifications for the Profession of Lawyers are now (June 1986) at an advanced stage. A policy of consumer choice does not, of course, involve sweeping away all restrictions on practice. What it does involve is a presumption of freedom: that restrictions on admission should only exist for the benefit of the public and should have a necessary and rational connection with the applicant's fitness to practise law.

(ii) Costs of restrictions for legal profession as a whole

14. The legal profession is one of the few professions in the Commonwealth which operates such a substantial system of restrictions on entry. Other professions, such as accountancy for example, allow a great deal more mobility. In an increasingly interdependent world, where international trade and transnational problems generally account for a large part of the demand for professional advice, a legal profession confined within national borders stands to lose its important role to other more mobile suppliers of professional services.

(iii) Value of comparative experience

15. As well as being of considerable value to the individual lawyer, it is increasingly recognised that the employment of lawyers who have qualified in another jurisdiction together with locally qualified lawyers can benefit the public. Overseas practice introduces the dimension of comparative experience of other systems. This can be of particular value in matters involving international trade and cooperation.

(iv) Reality of a common Commonwealth legal heritage

16. Despite the many domestic divergences, and the existence of some distinct legal traditions, the Commonwealth shares a common legal heritage. Shared rules and values are to be found in every aspect of commonwealth legal systems from the content of the basic law, to constitutions, court decisions, identical statutes, exchanged law reform proposals and a common understanding of the role and functions of the legal profession. Commonwealth lawyers are aware of the depth and breadth of this heritage, this very meeting bears witness to it. One may, however, care to reflect on two distinctive consequences of this common heritage for practitioner mobility. Firstly, there is reality in the claim of a transferable professional skill because the content of the law taught and practised in Commonwealth countries is very similar. Secondly, there is a single 'Commonwealth legal profession', because the forms and patterns of practice are substantially similar. Neither of these characteristics are to be found in the European context. They mean that, as a practical matter, Commonwealth practitioner mobility would work.

(v) Contribution to the development of Commonwealth law

17. An extensive sharing of ideas, both at the judicial and the legislative law reform levels, continues to take place amongst Commonwealth countries. Practitioner mobility can only enhance this process. Law Ministers will note that Senior Law officials, in their discussions on the Scheme relating to Mutual Assistance in Criminal Matters, recognised that increased cooperation would bring with it the need for transnational legal representation. Law Officials considered, in the context of paragraph 16(3), the utility of having the accused's legal representative present during the examination of witnesses in other Commonwealth countries.

(vi) Inequities in the present system

18. Because there has not as yet been the opportunity for a coordinated Commonwealth approach, existing legislation in Commonwealth countries can operate quite unfairly, either by drawing distinctions between the qualifications of different Commonwealth jurisdictions in a manner unconnected with fitness to practise or by imposing unduly onerous requirements on overseas applicants. This situation is understandable where each Commonwealth country, acting alone, must attempt to assure itself of equivalence and reciprocity in relation to other Commonwealth countries. It could however be avoided by a common response. As the technical survey shows in detail, many of the existing provisions were constructed in the light of historical circumstances which no longer apply. Greater recognition is often accorded to lawyers who have qualified in countries where legal education has long been provided. Lawyers who have qualified in countries which are geographically much closer but where the system of legal education is newer may find there is no recognition of their professional qualification.

D. WHAT APPROACHES ARE TAKEN IN COMMONWEALTH LEGISLATION?

(i) Recognised overseas qualifications

19. Three approaches to the initial issue of which overseas qualifications are to be recognised, may be found in existing Commonwealth legislation:

- a 'fixed list scheme' involves nominating a catalogue of countries whose practitioners will be recognised for admission. The list is typically constructed on the basis of bilateral negotiations to ensure reciprocity and equivalence. Such a system can operate unfairly by drawing distinctions between overseas lawyers on the basis of the provenance of their qualifications rather than their fitness to practise. It is difficult to keep such a list up-to-date with the increasing membership of the Commonwealth and development of new courses of legal education.
- a 'discretionary scheme' leaves the assessment of all overseas practitioners in the discretion of a qualifications committee. This has the advantage that no applicant is automatically precluded from admission, but does in practice substantially impede freedom of movement. Applicants cannot be sure in advance of their acceptability. They may find themselves subject to onerous further education requirements, amounting to a substantial retraining. It is difficult for qualifications committees to assess accurately the standard and content of overseas legal education, and tempting to err in favour of re-training.
- a 'general description scheme' does operate in a number of Commonwealth countries whereby either practitioners from Common Law or Commonwealth jurisdictions are generally recognised, subject to such additional educational requirements as are necessary to enable the overseas lawyer to adapt to the special characteristics of the host legal system.

(ii) Citizenship/residence requirements

20. Some form of permanent connection with the host country is often required for general admission. This may take the following forms:

- **nationality of host state** A requirement of full nationality can operate as a substantial hurdle to overseas applicants, and has no necessary connection with fitness to practise or protection of the public.

- **Commonwealth citizen/British subject/no citizenship restriction** A much wider class of applicants may be comprehended by a 'Commonwealth citizen' or 'British subject' definition. These are terms which appear in a number of admission statutes and which derive their specific meaning from domestic nationality legislation. Typically 'Commonwealth citizen' and 'British subject' are synonymous and include the citizens of all Commonwealth countries. Such a restriction would not therefore impede intra-Commonwealth arrangements, but it is doubtful whether it usefully adds much, so long as the qualification itself has been obtained in a Commonwealth country.
- **permanent residence** is a useful alternative means of ensuring the commitment of the overseas applicant to the host society. This can be done with a simple requirement of ordinary or permanent residence, or with amore specific definition including maintaining an office or chambers or residing for a certain length of time each year.

(iii) **Additional educational requirements**

21. Further education imposed by the host state may be an important element in the protection of the public, although unduly onerous education may operate as an unnecessarily restrictive practice, especially if it is designed to ensure exact educational equivalence. It is however important to orientate the overseas practitioner to the special characteristics of the host legal system. For this purpose, some countries simply specify elements of existing legal education courses, or require a period of pupillage or articles of clerkship. Others have designed a special adaptation course for the purpose.

(iv) **Special admission**

22. Many Commonwealth countries make special provision in their legislation for ad hoc admission in order to conduct a particular case. Special considerations apply in this situation, which are not present in the arguments for general admission. One may consider the following factors:

- the client's right to choose their legal representative, especially where the client is not a national of the host country;
- the need in some cases for specialist legal advice which no-one in the host Bar can provide;
- the interests of justice where the case involves political elements which call for disinterested outside counsel;
- the right of legal practitioners to be free to provide their services to their clients.

Adequate safeguards for the public and a degree of local accountability can be ensured by requiring outside counsel to act on the instructions of a local solicitor or to appear with local counsel.

E. MATTERS FOR CONSIDERATION BY LAW MINISTERS

23. The admission of overseas practitioners is a matter of considerable current interest in Commonwealth countries. There has been a continuous stream of legislative

amendments, some restricting and others widening freedom of movement. Reforms in law and practice have recently taken place at federal and regional levels, as well as locally. In many Commonwealth countries the topic is under active review. Can these isolated reforms not be organised in concert? The subject is an international one, which cannot adequately be tackled by any one country acting alone. Pan-Commonwealth consideration would ensure that the benefits of a more uniform system of practitioner mobility would extend equally in all directions. It is the existing situation, where each jurisdiction attempts to formulate its own rules, that wreaks injustice.

24. On this basis, the following issues arise:

- (i) whether there is value in approaching legal practitioner mobility on the basis of pan-Commonwealth discussion and cooperation;
- (ii) whether the advantages to Commonwealth societies and the principles of freedom of movement justify a reconsideration of existing legislation on the admission of overseas practitioners, especially in the light of the changing nature of legal education in the Commonwealth and of the need to develop tangible links to give effect to the common legal heritage of the Commonwealth;
- (iii) whether any discussions on the review of existing provisions should proceed on the basis of the underlying unity of the Commonwealth legal profession and a presumption of common legal educational standards;
- (iv) whether, in cases of general admission, the connection with the host country should take the form of a residence commitment to the host society without unduly discriminating against the overseas applicant on grounds of nationality;
- (v) whether further education requirements should be designed for the special purpose of orientating the overseas applicant to the particular characteristics of the host legal system, without amounting to an onerous period of re-training;
- (vi) whether the interests of fairness require more widespread provision in the Commonwealth for the special admission of overseas practitioners in order to conduct particular cases.