2002 Meeting of Commonwealth Law Ministers and Senior Officials

Kingstown, St Vincent and the Grenadines
18-21 November 2002

Memoranda

Commonwealth Secretariat

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PREFACE

Commonwealth Law Ministers from 34 jurisdictions met in Kingstown, St Vincent and the Grenadines from 18 to 21 November 2002. This volume contains the Memoranda prepared for the Meeting, together with the Communiqué and Meeting Agenda, and is available to the public.

The Minutes of the Meeting and classified Memoranda are published separately, as these are available only to member governments.

Commonwealth Law Ministers meet regularly at approximately three-yearly intervals. They are scheduled to meet next in Ghana in 2005. Previous Meetings have been held in London, United Kingdom (1966 and 1973), Nigeria (1975), Canada (1977), Barbados (1980), Sri Lanka (1983), Zimbabwe (1986), New Zealand (1990), Mauritius (1993), Malaysia (1996) and Trinidad and Tobago (1999).

Legal and Constitutional Affairs Division
Commonwealth Secretariat

June 2003

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COMMONWEALTH LAW MINISTERS' MEETING
KINGSTOWN, ST VINCENT AND THE GRENADINES
18 - 21 NOVEMBER 2002

COMMUNIQUÉ

1. Commonwealth Law Ministers met in Kingstown, St Vincent & the Grenadines, from Monday 18 to Thursday 21 November 2002. The Meeting was chaired by the Honourable Judith Jones-Morgan, Attorney General of St Vincent & the Grenadines. The Honourable Dr Ralph Gonsalves, Prime Minister and Minister for Legal Affairs of St Vincent & the Grenadines served as Co-Chair of the Meeting and took the chair for certain items.

2. A striking feature of the agenda of the Meeting was the extent to which it advanced the principles set out by Commonwealth Heads of Government in their Coolum Declaration issued in March 2002. In that declaration, Commonwealth Heads of Government reaffirmed their commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights. They committed themselves to respect for diversity and human dignity and reiterated their implacable opposition to all forms of discrimination. They were determined to work to eliminate poverty and promote people-centred and sustainable development and to strive for international peace and security, the rule of international law, and the elimination of terrorism.

3. Legal issues are central to this vision of the Commonwealth and the progress made during this Meeting underlined the great importance of the regular meetings of Law Ministers and of their Senior Officials in taking forward shared Commonwealth concerns.

DEMOCRACY AND HUMAN RIGHTS

4. Law Ministers reaffirmed the importance of the protection and promotion of the fundamental rights of citizens. They emphasised that mere 'paper rights' were not enough; their practical implementation was crucial. This was accomplished in their countries through a range of different mechanisms, including Human Rights Commissions, parliamentary committees and similar national agencies, the involvement of NGOs and the wider civil society, and the opportunities for individual recourse to legal remedies.

5. Ministers commended the introduction and continued development of mechanisms appropriate to the resources, culture and system of government of each Commonwealth member country to ensure that government legislative and policy proposals did not derogate from fundamental rights. They asked the Commonwealth Secretariat to assist in the training of national agencies, such as the police, to entrench respect for human rights in all their operations.

6. Law Ministers affirmed their commitment to the promotion of the fundamental Commonwealth values of freedom of assembly, association and expression, and welcomed the contribution made by the Commonwealth Expert Group that has developed guidelines on best practice in this field. Ministers recognised that there was always a need to balance individual rights with the responsibility of governments to guarantee the right of their citizens to security and public order. The Meeting acknowledged that the advancement of human rights had to be pursued hand in hand with development; economic and social rights were important considerations in that context.

7. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power seeks to ensure that the victims of crime receive proper consideration in national

legal systems and proper support from law enforcement and other services. Law Ministers mandated Senior Officials to finalise their work on a Commonwealth Statement of Basic Principles of Justice for Victims of Crime and present a draft to Ministers for consideration at their next meeting.

LATIMER HOUSE GUIDELINES ON PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE

8. Law Ministers gave detailed consideration to a set of Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights, drawn up by a conference sponsored by the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates and Judges Association and the Commonwealth Lawyers Association which was held at Latimer House, London, in June 1998 and revised by those Associations after their initial consideration by Law Ministers in Port of Spain in 1999 and further work by Senior Officials. Ministers fully endorsed the importance of the issues addressed in this document. They hoped that it would be possible for Commonwealth Heads of Government to agree a statement of principles which could assist reflection on those issues. They judged, however, that the text before them required further work before it could be submitted to Heads of Government. The Meeting invited the Commonwealth Secretary-General to convene a small group of Law Ministers to work with the Commonwealth Secretariat to review and develop principles based on the Latimer House Guidelines that take into account all the points made in the discussion at the Meeting. The resulting text received from the Secretary General's group is to be circulated to Law Ministers for approval before being submitted, through appropriate channels to Heads of Government.

TERRORISM

9. Sharing the determination expressed by Commonwealth Heads of Government at their 2002 meeting in Australia to combat terrorism, Ministers adopted the special statement which is Annex A to this Communiqué.

10. Ministers reported the progress that had been made in their countries to implement UN Security Council Resolution 1373 and the Commonwealth Plan of Action on Terrorism. They recognised that terrorism is a threat to small as well as large Commonwealth jurisdictions. They acknowledge that a proper response to this threat would strain the human and financial capacity of the smaller member countries. The meeting also noted the observation made on the need to identify the root causes of terrorism. Warm appreciation was expressed for the work of the Commonwealth Secretariat in providing guidance on the measures required for implementation of the UN Security Council Resolution and in preparing model legislative provisions and "implementation kits" for the twelve existing counter-terrorism conventions. They welcomed the holding of regional workshops on the development of legislation and the training of law enforcement agencies with particular focus on terrorist financing.

11. The Meeting underlined its belief that effective international co-operation was central to the legal response to terrorism. Ministers took note of the request by Heads of Government that member countries review national laws implementing the London Scheme on extradition within the Commonwealth. They agreed to amend in accordance with international law, the Scheme's provisions on the political offence exception to ensure that extradition of a person for alleged terrorist activity could not be refused on that basis.

12. Law Ministers identified two critical issues. The first was the threat posed by the misuse of technology and they asked the Commonwealth Secretariat to undertake further work. The second was the need to develop law enforcement networks for information exchange and cooperation and asked the Commonwealth Secretariat to arrange relevant training programmes.

13. Law Ministers recognised that their 1986 Harare Scheme for Mutual Assistance in Criminal Matters was crucial to the Commonwealth's efforts to combat terrorism. They acknowledged that all member countries must have in place comprehensive mutual assistance legislation. Law Ministers asked their Senior Officials to consider amendments to the Harare Scheme to strengthen it by including new provisions relating to the interception of communications (including computer communications) and to the preservation of computer data. They also asked Senior Officials to develop further proposals to enhance the Scheme's provisions on the seizure and forfeiture of criminal assets and encourage asset-sharing in ways which could lead to better compensation for the victims of terrorism. The Meeting asked the Commonwealth Secretariat to provide model legislative provisions dealing with the seizure and forfeiture of terrorist assets and for civil forfeiture regimes.

14. Law Ministers tasked their Senior Officials with considering how member countries could be assisted with training and capacity building in critical enforcement contexts such as border control and the prevention of counterfeiting of identity papers and travel documents. They were also asked to deal with the question of appropriate measures to prevent the abuse of the refugee system by those who commit or plan terrorist acts.

COMMONWEALTH CO-OPERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE

(a) The London Scheme on Extradition within the Commonwealth

15. The Commonwealth Plan of Action on Terrorism encouraged Law Ministers to give priority consideration to revision to the London Scheme for Rendition of Fugitive Offenders which under its new title is to be the London Scheme for Extradition within the Commonwealth. Law Ministers revised the Scheme to modernise and make more effective what has, for almost 40 years, been an important feature of Commonwealth co-operation. Apart from technical changes (adjustments in terminology to reflect changes in usage since the Scheme was first adopted in 1966) and the amendment concerning the political offence exception, the revision makes a number of significant amendments:

- The provisions dealing with double criminality are simplified and made consistent with the practice followed generally in the international community that dual criminality is a pre-condition for extradition.
- New provisions deal with extra-territorial offences which feature in a number of international conventions (including conventions dealing with torture, terrorism and drug-trafficking), and which are increasingly created in national legislation dealing with such matters as computer crime. The revised Scheme allows for refusal, at the discretion of the requested country, in cases of unacceptable jurisdictional claims.
- Provision is also included to allow the requested country to seek additional information where the extradition request is insufficient.
- The mandatory and discretionary grounds for refusing extradition are restated to give greater clarity. Recognising that persecution on the basis of sex is an important issue, Ministers have decided to add this as a ground for refusal of extradition.
- To minimise the possibility that a person whose extradition is refused on the ground that the person is a national or permanent resident of a Commonwealth country and may therefore wholly escape prosecution, the Scheme is amended to reflect recent international practice.

The Scheme as amended forms Annex B to this Communiqué.

(b) The Harare Scheme

16. Law Ministers agreed to make one immediate amendment to the Harare Scheme on Mutual Assistance in Criminal Matters, to clarify the position relating to the protection against self-incrimination and the process for determining questions of legal privilege. The Meeting asked that consideration be given by Senior Officials in the context of the review of the Scheme, to an amendment to encourage the provision of feedback to a country that had rendered assistance.

LAW AND TECHNOLOGY

17. In the course of their Meeting, Ministers agreed to commend a number of Model Bills for use by those member countries seeking assistance in the development of an appropriate legislative framework in particular areas. Three of these had been developed under a mandate given to the Commonwealth Secretariat for work on Law and Technology. The Model Law on Computer and Computer Related Crime takes into account recent international initiatives in this field, in particular, the Council of Europe Convention on Cyber Crime, and provides law enforcement agencies with effective and modern tools. The Model Law on Electronic Commerce responds to calls by Law Ministers at their last meeting in Port of Spain to develop legal rules which place no obstacles to countries taking full advantage of new technology. The model relies heavily on the UNCITRAL Model Law and provides a flexible and technologically neutral set of draft provisions. The Model Law on Electronic Evidence was specifically requested by Law Ministers and Attorneys General of Small Commonwealth Jurisdictions at their Meeting in 2000, to adopt system reliability as the basic test for admissibility of evidence. It also adapts the general rules of evidence to meet new technological possibilities.

18. Law Ministers mandated Senior Officials to keep the Model Law on Computer and Computer related Crime under review to ensure that the law is kept up to date with regard to emerging technology and investigative techniques They asked the Commonwealth Secretariat to work with Senior Officials on other aspects of e-governance and also on the legal implications of technological developments in broadcasting. They supported the request of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions that the Commonwealth Secretariat monitor the work being done in the OECD on the issue of the taxation of e-commerce and provide advice to member countries on developments in this area.

THE LAW OF EVIDENCE

19. Law Ministers welcomed the preparation, in response to requests made at their Meeting in Port of Spain and also by Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, of a set of model legislative provisions dealing with a number of aspects of the Law of Evidence. The Meeting commended the Bill prepared by experts and Senior Officials as a valuable resource for those countries wishing to modernise their evidence laws. The Commonwealth Secretariat was asked to continue work on the law of evidence and to pay special attention to the operation of these laws to criminal proceedings. Senior Officials were asked to bring a further report to the next Law Ministers' Meeting.

PRIVACY AND FREEDOM OF INFORMATION

20. The Meeting also considered three inter-related model Bills namely:-

i. Freedom of Information Bill;
ii. Privacy Bill;
iii. Protection of Personal Information

The Freedom of Information Bill was prepared to assist those countries desiring to give effect to the Commonwealth Freedom of Information Principles set out by Commonwealth Heads of Government. Law Ministers acknowledged that such legislation could impose significant burdens on governments but recognised that the right to access information was an important aspect of democratic accountability and promoted transparency and encouraged full participation of citizens in the democratic process. The Privacy Bill is designed to protect personal information held by Governments and other public authorities and to ensure that such information is collected only for appropriate purposes and by appropriate means. Law Ministers commended both these model Bills as useful tools which could be adapted to meet the particular constitutional and legal positions in member countries. They acknowledged that the implementation of these laws had to take into account the resources available in each member country.

21. Law Ministers decided that the third model Bill on the Protection of Personal Information needed more reflection on the balance between the protection of privacy and the legitimate needs of Governments in respect of law enforcement and national security. They asked the Commonwealth Secretariat, in consultation with Senior Officials, to prepare an amended draft which would be considered at the next plenary meeting of Senior Officials.

STRATEGIES FOR ENHANCING DEMOCRACY BY ELIMINATING LEGAL BARRIERS TO DEVELOPMENT

22. The 1999 Commonwealth Fancourt Declaration called for 'people-centred development'. Law Ministers acknowledged their important role in contributing to the development of a legal environment that fostered development. They expressed their appreciation for a stimulating and well-researched paper from the Commonwealth Secretariat which examined a range of inter-related issues concerning land, competition law, company law and corporate governance.

23. In their full debate on this topic, Law Ministers focused on issues concerning land, recognising the strong link between land and development and poverty reduction. Land issues were of great significance in the history of Commonwealth countries and remain extremely sensitive in national political debates. Some member countries acknowledged that the land issue constitutes a veritable time bomb because of the tensions arising from human and historical factors. To stress the importance of the role of Law Ministers in addressing the relationship between land and development, they adopted the Kingstown Declaration which forms Annex C to this Communiqué.

24. The Meeting recognised that many Commonwealth countries found that independence did not in itself bring justice in terms of land rights. Some Governments face a major task of land reform if progress is to be made in creating a stable property-owning democracy. Such appropriate land reform, in some member countries, consumes financial and human resources. Where financial resources were available to compensate groups of people for the wrongful seizure of land in the past, there was still an issue as to the use of those resources, with a tension between the claims of commercial development and the more communal aspects of the culture of those groups.

25. The management of the multitude of land tenure systems found in some Commonwealth countries presents a major challenge to governments seeking to respond to the demands of modern society. Whilst significant progress has been made in recognising the rights of women and other disadvantaged groups to hold land in some Commonwealth countries, Ministers acknowledged that much more work needs to be done. The commercialisation of land could pose serious transitional difficulties to those who had occupied land for subsistence agriculture. The registration of title needed to be accurate and accessible and to take account of customary and traditional patterns of land ownership.

26. Law Ministers were able to report progress in addressing these issues through modernised constitutional provisions, major pieces of legislation and the work of Land Commissions and similar bodies. The diverse experience of Commonwealth countries precluded any single set of solutions, but the Meeting recognised the value of sharing the experience of Governments as each worked to address the circumstances of its own country. Law Ministers asked the Commonwealth Secretariat to continue its work in this area, and indicated their wish to keep this matter in their future agenda.

27. The Meeting considered a draft Model Law on Competition. Some Law Ministers recognised that traditional competition laws addressed the commercial environment in developed countries, and stressed the need for the drawing up of competition laws that take into account the economic reality of developing countries. Law Ministers asked the Commonwealth Secretariat, in consultation with Senior Officials, to examine the experiences of developing countries with a view to dealing with those situations in which a section of the community had in the past, been systematically excluded from areas of commercial activity. They acknowledged that existing competition laws were reflected in WTO policies and asked that the conflict between the interests of developing countries and existing WTO norms be addressed. They expressed their intention to consider a revised model law on competition at their next meeting.

28. A round table discussion enabled Law Ministers to share a range of current concerns.

(a) Corruption

29. Law Ministers recognised that political leaders had to ensure that Government, the public service and law enforcement agencies were honest, competent and incorruptible. This was all the more important at a time when there were frequent reports of fraud and corruption on an enormous scale in the major corporations of powerful nations. It was possible even for small states to mount successful prosecutions for corruption offences by officers of multinational corporations, and arrangements for mutual assistance such as the Harare scheme could support such law enforcement efforts. Further, Governments should be encouraged to facilitate the repatriation of the proceeds of corruption offences once due process requirements have been met.

30. In addressing the issue of corruption in the judiciary, Law Ministers noted the conclusions of a Colloquium held in Limassol, Cyprus in June 2002. They agreed that a judicial system free from corruption was an essential component of a truly democratic country. Judicial independence did not imply an absence of accountability and there was a need for further work on the development of appropriate mechanisms, reflecting both proper independence and due accountability, for dealing with cases of judicial corruption or misconduct.

(b) Legislative drafting

31. Despite many initiatives over the years, there continue to be problems in many parts of the Commonwealth in attracting, training and retaining legal drafting staff. The quality of legislation, which often addresses matters of great complexity, suffered and law reform programmes could be delayed. The length of the existing training courses was seen as disadvantageous, and the hope was expressed that shorter courses could be arranged to supplement in-house training. The Meeting noted that the Commonwealth Secretariat was working with the Commonwealth of Learning to expand its distance learning programme and that an on-line version would soon become available. Law Ministers heard with pleasure of bilateral co-operation between some countries and an offer made at the Meeting on behalf of the Lord Advocate of a training placement in Scotland. They hopes that long-term solutions could be found to fund new initiatives and improved terms of service, possibly by the creation of a trust fund administered by the Secretariat and voluntarily contributed to by member countries.

(c) Intellectual property: protecting traditional and cultural knowledge

32. Much interest was expressed in this issue. Law Ministers heard of the action by the Pacific Forum island countries to agree a Model law on the protection of traditional knowledge and expressions of culture, and its continuing work on a Model law on the protection of traditional ecological knowledge and practices. Law Ministers invited WIPO to consider the need to have international recognition and protection of traditional knowledge and related rights. Law Ministers shared the view that the wider subject of intellectual property in the international arena was one which could very usefully be addressed in their future work. It was of particular concern to smaller jurisdictions.

(d) Regional courts

33. A number of regional courts have already been established and others are in contemplation. They have varying jurisdiction, original and appellate, and may have authority to give authoritative interpretations of regional agreements. Some courts were replacing the Judicial Committee of the Privy Council. This was seen as another topic which could be examined with a view to sharing experience on the operation of these courts and facilitating the transition to new appellate courts so as to ensure uniformly high standards of justice, Attention was drawn to the importance of Commonwealth countries ratifying the Rome Treaty establishing the International Criminal Court.

(e) United States Patriot Act

34. Law Ministers noted the provisions of recent legislation in the United States of America which authorizes the seizure of, and forfeiture actions in respect of, funds held in correspondent accounts in the United States of foreign banks. The legislation applies United States law to govern the forfeiture of funds corresponding in amount to those deposited in accounts in the foreign bank's own country, whether or not there be any traceable connection between those funds and the funds held in the correspondent account. The foreign bank cannot rely on the innocent owner defence. Ministers noted that the provisions of the US legislation have the potential to circumvent mutual legal assistance treaties between member countries and the United States.

35. Law Ministers recognised that the application of the Patriot Act subpoena power could place a bank in a situation of conflicting legal obligations and the loss of the correspondent account relationship and expressed their belief that the loss of such relationships can have significant effects on national economies, particularly those of small jurisdictions. They acknowledged and shared the concerns of Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions that banks operating in their territories retain their status as correspondent banks while at the same time being afforded appropriate national protection.

(f) Freedom of the Press

36. The hope was expressed that the legal issues concerning the freedom of the Press, especially in relation to legal proceedings, could be examined in the future work of the Commonwealth Secretariat.

COMMONWEALTH LAW CONFERENCE

37. The Attorney-General of Australia drew the attention of the Meeting to the Commonwealth Law Conference due to take place in Melbourne in April 2003. This Conference is attended by many Ministers, judges, academics and legal practitioners. The Australian Attorney-General offered to host a gathering of Law Ministers during the Conference. It was agreed that the

Secretary-General would canvass all Law Ministers as to how the opportunity could be given to them for much needed inter-sessional dialogue.

LAW MINISTERS' MEETINGS

38. This Meeting has made a very significant contribution to the advancement of core Commonwealth values of democracy, the rule of law, human rights, and sustainable development in a world of peace and security. Law Ministers are convinced that their regular Meetings are essential to maintain progress in carrying forward the priorities identified by Commonwealth Heads of Government, and recommend that Heads of Government ensure that Law Ministers' Meetings continue to be a regular feature of Commonwealth activity.

NEXT LAW MINISTERS MEETTING

39. Law Ministers accepted with pleasure the invitation by the government of Ghana to host their next meeting which is due to be held in 2005. They look forward to gathering in Accra and continuing their important work in support of Commonwealth values.

APPRECIATION

40. Law Ministers share the pride of St Vincent and the Grenadines at being the smallest Commonwealth member country ever to host a ministerial Meeting. They record their admiration and gratitude for the success of all the arrangements which had been made, and offer their warmest thanks to the Prime Minister, Government and people of St Vincent and the Grenadines for their friendly welcome, generous hospitality and attention to the Meeting's needs. They express their appreciation for the gracious chairing of their discussions by the Prime Minister and the Attorney General of St Vincent and the Grenadines and for the work of the Commonwealth Secretariat in preparation for and support of the Meeting.

Kingstown,
St Vincent and the Grenadines

21 November 2002

ANNEX A

COMMONWEALTH KINGSTOWN STATEMENT ON TERRORISM

Commonwealth Law Ministers recognize the need for legal reform in support of the Commonwealth Plan of Action on Terrorism developed by the Commonwealth Committee on Terrorism and endorsed by Heads of Government at their meeting in Coolum in March 2002.

Law Ministers condemn terrorism in all its forms. They stress that terrorism constitutes a threat to all countries and their peoples irrespective of faith, nationality, culture or community.

From a legal perspective Law Ministers acknowledge that common and combined action is essential in the fight against terrorism and recognize that Commonwealth countries are collectively as vulnerable as the weakest link amongst them. They noted the Statement of the Heads of Government in Coolum that: "There is no justification for terrorism. While terrorist activities are unconscionable and should be eradicated forthwith, the challenge is to understand the root causes of those despicable acts and to deal with them appropriately."

Law Ministers resolve to ensure that no Commonwealth country be used as a safe haven for terrorists and that no terrorist is able to evade extradition by invoking the political offence exception to extradition. In accordance with international law, they therefore removed from the London Scheme for Extradition the political offence exception to extradition when a fugitive is accused of a terrorism crime, and urged their governments to consider amending their domestic legislation as soon as possible.

Law Ministers note the commitment of Heads of Government in their statement of October 2001 to implement fully United Nations Security Council Resolution 1373 and emphasize the critical importance of international cooperation in combating terrorism, including terrorist financing. In this regard they reaffirm their commitment to strengthen the existing Commonwealth schemes for cooperation and to ensure their implementation in accordance with their domestic legal framework.

Law Ministers reaffirm their commitment to work together and assist each other to strengthen the capacity of Members to combat terrorism and protect and ensure the security of all peoples.

THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH

incorporating the amendments agreed at Kingstown in November 2002.

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.

(2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.

(3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE

2. (1) A person sought will only be extradited for an extradition offence.

(2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.

(3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:

(a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.

(4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:

(a) is of a purely fiscal character; or

(b) was committed outside the territory of the requesting country

where extradition for such offences is permitted under the law of the requested country.

WARRANTS, OTHER THAN PROVISIONAL WARRANTS

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -

(a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or

(b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.

(2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

PROVISIONAL WARRANTS

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.

(2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.

(3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.

(4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

COMMITTAL PROCEEDINGS

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.

(3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:
(a) a warrant has not been endorsed or issued in accordance with clause 3(1), or
(b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued,
the competent judicial authority will order the person to be discharged.

(4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -
(a) such evidence is produced as establishes a prima facie case that the person committed the offence; and

(b) extradition is not precluded by law

but, otherwise, will order the person to be discharged.

(5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

OPTIONAL ALTERNATIVE COMMITTAL PROCEEDINGS

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.

(2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -

(a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and

(b) extradition is not precluded by law,

but otherwise will order that the person be discharged.

(3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -

(a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and

(b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.

(4) A record of the case will contain -

(a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;

(b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

(c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition ;

(d) a recital of the evidence acquired to support the request for extradition; and

(e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

SUPPLEMENTARY INFORMATION

7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.

(2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

CONSENT ORDER FOR RETURN

8. (1) A person sought may waive committal proceedings, and if satisfied that the person sought has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the person sought to prison, or for admission to bail, to await extradition.

(2) The competent executive authority may thereafter order extradition at any time, notwithstanding the provisions of clause 9.

(3) The provisions of clause 20 shall apply in relation to a person sought extradited under this clause unless waived by the person.

RETURN OR DISCHARGE BY EXECUTIVE AUTHORITY

9. After the expiry of 15 days from the date of the committal of a person sought, or, if a writ of habeas corpus or other like process is issued, from the date of the final decision of the competent judicial authority on that application (whichever date is the later), the competent executive authority will order extradition unless it appears to that authority that, in accordance with the provisions set out in this Scheme, extradition is precluded by law or should be refused, in which case that authority will order the discharge of the person.

DISCHARGE BY JUDICIAL AUTHORITY

10. (1) Where after the expiry of the period mentioned in paragraph (2) a person sought has not been extradited an application to the competent judicial authority may be made by or on behalf of the person for a discharge and if -

(a) reasonable notice of the application has been given to the competent executive authority, and

(b) sufficient cause for the delay is not shown,

the competent judicial authority will order the discharge of the person.

(2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either -

(a) not later than two months from the person's committal to prison, or

(b) not later than one month from the date of the order for extradition made in accordance with clause 9.

HABEAS CORPUS AND REVIEW

11. (1) It will be provided that an application may be made by or on behalf of a person sought for a writ of habeas corpus or other like process.

(2) It will be provided that an application may be made by or on behalf of the government of the requesting country for review of the decision of the competent judicial authority in committal proceedings.

POLITICAL OFFENCE EXCEPTION

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to:

(i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;
(ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
(iii) murder, or any related offence as described above,
(iv) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

13. (1) The extradition of a person sought also will be precluded by law if -

(a) it appears to the competent authority that:
(i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
(ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.

(b) the competent authority is satisfied that by reason of
(i) the trivial nature of the case, or
(ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or
(iii) the passage of time since the commission of the offence, or
(iv) any other sufficient cause,
it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.

(c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

DISCRETIONARY BASIS FOR REFUSAL OF EXTRADITION

14. (1) A request for extradition may be refused in the discretion of the competent authority of the requested country if -

(a) judgment in the requesting country has been rendered in circumstances where the accused was not present; and
  (i) no counsel appeared for the accused; or
  (ii) counsel instructed and acting on behalf of the accused was not permitted to participate in the proceedings;

(b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances;

(c) the person sought has, under the law of either the requesting [or requested] country become immune from prosecution or punishment because of [any reason, including] lapse of time or amnesty;

(d) the offence is an offence only under military law or a law relating to military obligations.

DISCRETIONARY GROUNDS OF REFUSAL

15. (1) Any country may adopt the provisions of this clause but, where they are adopted, any other country may in relation to the first country reserve its position as to whether it will give effect to the other clauses of the Scheme or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 23(a).

(2) A request for extradition may be refused if the competent authority of the requested country determines -
  (a) that upon extradition, the person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country; and
  (b) it would be, having regard to all the circumstances of the case and to the likelihood that the person would be immune from punishment if not extradited, unjust or oppressive or too severe a punishment for extradition to proceed.
  (c) In determining under paragraph (a), whether a person would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting country may make with regard to the possibility that the death penalty, if imposed, will not be carried out.

(3) (a) A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country.

(b) For the purpose of sub paragraph a, a person shall be treated as a national of a country that is -

(i) a Commonwealth country of which he or she is a citizen; or

(ii) a country or territory his or her connection with which determines national status.

(c) The assessment under paragraph (b) should be at the date of the request.

ALTERNATIVE MEASURES IN THE CASE OF REFUSAL

16. (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

(2) The legislative action necessary to give effect to paragraph (1) may include –

(a) providing that the case be submitted to the competent authorities of the requested country for prosecution;

(b) permitting:

(i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and

(ii) the transfer of convicted offenders; or

(c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

COMPETENT AUTHORITY

17. (1) The competent authorities for the purpose of clauses 12, 13, 14 and 15 will include

(a) any judicial authority which hears or is competent to hear an application described in clause 11, and

(b) the executive authority responsible for orders for extradition.

(2) It will be sufficient compliance with sub paragraphs 12, 13, 14 and 15 if a country decides that the competent authority for those purposes is exclusively the judicial authority or the executive authority.

POSTPONEMENT OF EXTRADITION AND TEMPORARY TRANSFER OF PRISONERS TO STAND TRIAL

18. (1) Subject to the following provisions of this clause, where a person sought -

(a) has been charged with an offence that may be tried by a court in the requested country or

(b) is serving a sentence imposed by a court in the requested country,

then until discharge (by acquittal, the expiration or remission of sentence, or otherwise) extradition will either be precluded by law or be subject to refusal by the competent executive authority as the law of the requested country may provide.

(2) Subject to the provisions of this Scheme, a prisoner serving such a sentence who is also a person sought may, at the discretion of the competent executive authority of the requested country, be extradited temporarily to the requesting country to enable proceedings to be brought against the prisoner in relation to the extradition offence on such conditions as are agreed between the respective countries.

PRIORITY WHERE TWO OR MORE REQUESTS MADE

19. (1) Where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests.

(2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular -

(a) the relative seriousness of the offences,

(b) the relative dates on which the requests were made, and

(c) the citizenship or other national status and ordinary residence of the person sought.

SPECIALTY RULE

20. (1) This clause relates to a person sought who has been extradited from one country to another, so long as the person has not had a reasonable opportunity of leaving the second mentioned country.

(2) In the case of a person sought to whom this clause relates, detention or trial in the requesting country for any offence committed prior to extradition (other than the one for which the person was extradited or any lesser offence proved by the facts on which extradition was based), without the consent of the requested country, will be precluded by law.

(3) When considering a request for consent under paragraph (2) the executive authority of the requested country may seek such particulars as it may require in order that it may be satisfied that the request is otherwise consistent with the principles of this Scheme

(4) Consent under paragraph (2) shall not be unreasonably withheld but where, in the opinion of the requested country, it appears that, on the facts known to the requesting country at the time of the original request for extradition, application should have been made in respect of such offences at that time, that may constitute a sufficient basis for refusal of consent.

(5) The requesting country shall not extradite a person sought who has been surrendered to that country pursuant to a request for extradition, to a third country for an offence committed prior to extradition, without the consent of the requested country .

(6) In considering a request under paragraph (5) the requested country may seek the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.

(7) Nothing in this clause shall prevent a court in the requesting country from taking into account any other offence, whether an extradition offence or not under this Scheme, for

the purpose of passing sentence on a person convicted of an offence for which he or she was surrendered, where the person consents.

RETURN OF ESCAPED PRISONERS

21. (1) In the case of a person who -

(a) has been convicted of an extradition offence by a court in any country and is unlawfully at large before the expiry of the sentence for that offence, and

(b) is found in another country,

the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern extradition to the country in which the person was convicted.

(2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence for which there is a conviction and, in particular -

(a) any reference to a person sought shall be construed as including a reference to such a person as is mentioned in paragraph (1); and

(b) the reference in clause 5(4) to evidence that establishes a prima facie case shall be construed as a reference to such evidence as establishes that the person has been convicted.

(3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

ANCILLARY PROVISIONS

22. Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate -

(a) the transit through its territory of a person sought who is being extradited under this Scheme;

(b) the delivery of property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and

(c) the proof of warrants, certificates of conviction, depositions and other documents.

ALTERNATIVE ARRANGEMENTS AND MODIFICATIONS

23. Nothing in this Scheme shall prevent -

(a) the making of arrangements between Commonwealth countries for further or alternative provision for extradition, or

(b) the application of the Scheme with modifications by one country in relation to another which has not brought the Scheme fully into effect.

ANNEX C

KINGSTOWN DECLARATION ON LAND AND DEVELOPMENT

Commonwealth Law Ministers, meeting in Kingstown, St Vincent and the Grenadines, welcomed the opportunity, in this their first meeting in the 21st Century, to debate the strong link between the use, access to, and ownership of land and development and poverty reduction.

Ministers recognized that land sustains both the souls and the bodies of all peoples of the Commonwealth. As a finite resource, land must be able to be used productively for the current generation and at the same time preserved and protected for future generations and accordingly they resolved to keep this subject on future meeting agendas so that they could continue to contribute to the development of positive national strategies involving the law governing land.

Law Ministers stressed the need for the law, where appropriate, to deal with the issues arising from corporate development of land resources and the ensuing need to ensure that corporate governance principles recognized the responsibility of companies to adhere to national standards for the preservation and protection of land and its natural resources.

They conclude that the law must ensure that lawful access to land is promoted and protected and at the same time recognized the very important role played in many Commonwealth countries by systems of customary and community land use and ownership laws. Law Ministers recognize the need in some countries to address appropriately, and within the framework of the law, the concerns of those communities and groups who have been and remain dispossessed of their land and they acknowledged the need in various member countries to reconcile common law concepts of land ownership with the customary law concepts of the sharing of the collective benefits of land.

Law Ministers recognize that there may be tension between developed country concepts of land tenure that are expected by major corporations based in those countries and the needs of developing countries to address their special land development needs and agree to work on this issue at future meetings.

AGENDA AND INDICATIVE TIMETABLE AS RECOMMENDED BY SENIOR OFFICIALS

DAY 2: TUESDAY, 19 NOVEMBER 2002

0900		Opening Remarks by The Rt Hon Don C McKinnon, Commonwealth Secretary-General
		Election of Chairperson
		Adoption of Agenda
Agenda Item 1:		**GOOD GOVERNANCE AND HUMAN RIGHTS**
	1(a)	**Democracy and Human Rights**
0930 – 1015		(i) Human Rights Issues [paper LMM(02)3]
1015 – 1115		(ii) Latimer House Guidelines [paper LMM(02)5]
1115 – 1145		*Tea/Coffee*
Agenda Item 3:		**INTERNATIONAL CO-OPERATION TO COMBAT CRIME**
1145 – 1300	3(a)	**Terrorism**
		(i) The Commonwealth Legal Response to Terrorism: Progress Report on Action taken on the Recommendations of the Commonwealth Ministerial Committee on Terrorism [paper LMM(02)13]
		(ii) Commonwealth Legal Response to Terrorism: Furthering the Work Mandated by Heads of Government [paper LMM(02)14]
1300 – 1430		***Lunch (Cruise Ship Terminal for Heads of Delegation)***
	3(b)	**Commonwealth Co-operation in Administration of Criminal Justice**
1430 – 1500		(i) The London Scheme [paper LMM(02)15]
1500 – 1530		(ii) The Harare Scheme [paper LMM(02)16]
1530 – 1600		*Tea/Coffee*
1600 – 1700		(iii) Model Law on Computer and Computer Related Crime [paper LMM(02)17]
1830 – 2000		**Commonwealth Secretary-General's Reception**

DAY 3: WEDNESDAY, 20 NOVEMBER 2002

Agenda Item 1(b)	Model Legislation	
0900 – 0930	(i)	Modernisation of the Laws of Evidence [paper LMM(02)4]
Agenda Item 2(b)		
0930 – 1000	(i)	Model Law on Competition [paper LMM(02)10]
Agenda Item 2(a)	STRATEGIES FOR ENHANCING DEMOCRACY BY ELIMINATING LEGAL BARRIERS TO DEVELOPMENT	
1000 – 1100	Law and Development [paper LMM(02)9]	
1100 – 1130	*Tea/Coffee*	
1130 – 1300	Law and Development [continued]	
1300 – 1400	*Lunch*	
Agenda Item 1(b) continued		
1400 – 1445	(ii)	Freedom of Information [paper LMM(02)6]
1445 – 1515	(iii)	Privacy [paper LMM(02)7]
1515 – 1545	(iv)	Protection of Personal Information [paper LMM(02)8]
1545 – 1615	*Tea/Coffee*	
Agenda Item 2(b) continued	LAW AND TECHNOLOGY	
1615 – 1645	(ii)	Model law on e-commerce [paper LMM(02)11]
1645 – 1715	(iii)	Model law on e-evidence [paper LMM(02)12]

DAY 4: THURSDAY, 21 NOVEMBER 2002

Agenda Item 4:	ROUND TABLE DISCUSSION
0900 – 1100	Current Issues (including consideration of any report to Law Ministers from the meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions) [paper LMM(02)18]
1100 – 1130	*Tea/Coffee*
1130	Senior Officials meet to draft communiqué for Ministers (over a working lunch if necessary)

Agenda Item 5:	ACTIVITIES OF THE COMMONWEALTH AND ITS PARTNERS IN THE LEGAL FIELD
1500 – 1530	Report on Legal Activities [paper LMM(02)19]
	Advice to Law Ministers from Senior Officials on various issues [paper LMM(02)20]
Agenda Item 6:	ANY OTHER BUSINESS
1530 – 1630	Discussion to include -
	(i) Communiqué
	(ii) Acknowledgements
	(iii) Next Meeting
	Close

MEMORANDA

GOOD GOVERNANCE AND HUMAN RIGHTS

HUMAN RIGHTS

INTRODUCTION

1. Senior Officials of Law Ministries considered, at their November 2001 meeting, a number of issues relevant to the legal protection of human rights. They recommend for consideration by Ministers, three specific issues.

HUMAN RIGHTS IMPACT ASSESSMENT

2. At their last meeting Law Ministers considered the concept of a Human Rights Impact Assessment as a technique that would aid the entrenchment of the Commonwealth's fundamental values for the benefit of the citizens and urged the Secretariat to further refine the concept for consideration by Senior Officials.

3. Senior Officials considered the issue and have noted a number of different techniques used in Commonwealth countries to ensure compliance with human rights norms. In some countries, Human Rights Commissions have been established and empowered to investigate and report on the observance of human rights. Some Ombudsmen also have specific responsibilities in respect of human rights. The relationship between proposed legislation and national Bills of Rights or international human rights instruments is also dealt with through a variety of mechanisms. In some countries the courts (or a special Constitutional Court) can rule on the compatibility of legislation with such human rights norms; in others, the matter is the subject of specific report to Parliament by the sponsoring Minister, or is a particular concern of a scrutiny committee of Parliament.

4. They recognised that the notion of a human rights impact assessment could be broadened, to encompass a holistic consideration of good governance issues, but the meeting considered that a specific focus on human rights norms was desirable. They further noted that there are a number of cost effective means by which scrutiny of proposals can be carried out and that it is for each country to determine which method best suites its circumstances. They commend to Law Ministers the introduction of appropriate national mechanisms to ensure that legislative and policy proposals by government do not derogate from the fundamental human rights of citizens.

VICTIMS RIGHTS

5. Senior Officials also considered the question of the rights, and hence the protections, which should be accorded to the victims of crime. They noted that victims of crime can be subjected to unjust loss, damage or injury and that in addition they may suffer hardship when assisting in the prosecution of offenders. They welcomed this issue being addressed. They recognised that in some cases the rights of victims may not be justiciable, however, they considered that the interests of victims were very important and that it was appropriate that Law Ministers give consideration to the issue of how best to afford justice to the victims of crime and the abuse of power.

6. Senior Officials recommend for the consideration of Law Ministers the draft statement contained in the *Annex* to this paper.

FREEDOM OF ASSEMBLY AND ASSOCIATION

7. Senior Officials recognised that the issues of freedom of assembly and association were of central importance to the creation and continuation of vibrant democracies and were relevant to

democratic governance, particularly in the area of preserving the place of opposition parties in Parliaments. The said issues have become prominent in recent times with the subject of globalisation becoming a catalyst for demonstrations en masse. An appropriate balance between the right to assemble and the public interest in the maintenance of a safe and secure environment for citizens therefore required consideration.

8. Senior Officials recommend for the consideration of Law Ministers that each member country should, if necessary and where appropriate:-

- Constitutional review
  review its Constitution or other paramount laws to ensure that they in no way inhibit freedom of assembly, association and other fundamental human rights and that such review involve all stakeholders, and not just parliament.

- Legislation
  review of all legislation to ensure that it is in accordance with international human rights standards and any derogation therefrom is reasonable and necessary in a democratic society.

- Opposition parties
  recognise Opposition Parties as an integral part of democratic governance and allow them fair access to any public financial subsidies and publicly funded media.

- Trade unions and NGOs
  While it may be necessary or desirable to enact legislation dealing with trade unions and NGOs, countries should ensure that such laws should not restrict fundamental freedoms. There must be recognition that civil society enhances democracy.

- Law and order
  Whilst it is the responsibility of governments to promulgate laws to maintain law and order, these laws must not be used to stifle political opposition.

- Demonstrations
  Give consideration to the laws, police practices and other public regulatory regimes dealing with public meetings and demonstrations to ensure that there is an appropriate balance between the right to demonstrate and the maintenance of public order. In particular they may wish to consider whether this process should include an assessment of the adequacy of:-

  - *constitutional guarantees*
  - *legal frameworks*
  - *notification provisions*
  - *constraints*
  - *the capacity to appeal against constraints imposed by authorities; and*
  - *mechanisms for liaison between police and stewards provided by organisers*

9. Following the meeting of Senior Officials a Commonwealth Expert Group Meeting was also convened in June 2002 to Develop Guidelines of Best Practice to Promote Freedom of Expression, Assembly and Association The Expert Group, set out minimum guidelines and standards on Freedom of Assembly and Association which would recognise:-

- the right of peaceful assembly including the right to peacefully demonstrate. No restrictions may be placed on the exercise of this right other than those imposed by law

and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others;

- the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes. No restrictions may be placed on the exercise of this right other than those imposed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or the protection of the rights and freedoms of others.

FREEDOM OF EXPRESSION

10. In relation to Freedom of Expression, the Expert Group suggested as the minimum standards that:-

- Everyone shall have the right to hold opinions without interference.

- Everyone shall have the right to freedom of expression. This right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of one's choice.

- The exercise of the aforesaid rights may be subject to certain restrictions as provided by law and are necessary in a democratic society.

POSSIBLE ACTION BY LAW MINISTERS

11. Law Ministers may wish:-

(a) to consider the Draft Commonwealth Statement on Victims Rights which is *annexed* to this paper and to express any views they may have and advise any amendments they would wish to be reflected in the Statement;

(b) endorse the views expressed by Senior Officials in paragraph 8 of this paper; and/or

(c) consider whether they wish to issue a statement on the fundamental democratic values enshrined in the concept of freedom of assembly and association and freedom of speech.

ANNEX

VICTIMS RIGHTS

DRAFT COMMONWEALTH STATEMENT FOR CONSIDERATION BY LAW MINISTERS

Commonwealth Law Ministers recall the adoption by the United Nations General Assembly of Resolution 40/34 which recognised "that the victims of crime and the victims of abuse of power, and also frequently their families, and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders" and the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Basic Principles).

To express their commitment to the Basic Principles, Ministers agree that member countries would give consideration to the national implementation of measures designed to give practical effect to these Principles. They believe that:-

1. Guidelines and training programmes should be developed to ensure that **Police:-**

    - are sensitive to the needs of victims; and
    - are informed, knowledgeable, and supportive of existing social services and programmes for victims;
    - establish procedures in association with prosecuting authorities for the prompt return of property to victims. Alternative methods of procuring evidence such as the taking of photographs to be used as evidence should be determined; and
    - establish procedures to ensure that victims of crime are periodically informed of the status of investigations.

2. **Prosecutors,** in the exercise of their powers and duties as officers of the court:-

    - should be sensitised to the fact that public interest should specifically take into consideration the views of victims;
    - have the ultimate responsibility for informing victims of the status of a case from the time of the initial court appearance to the conclusion of the case;
    - have an obligation to bring to the attention of the court the views of victims of violent crime on bail decisions, postponements, plea bargains, dismissal of cases and restitution;
    - should charge and pursue defendants who harass, threaten, injure or otherwise attempt to intimidate or retaliate against victims or witnesses;
    - should use a victim and witness on-call system, where practicable, to ensure that victims do not waste time unnecessarily in court;
    - establish procedures to ensure the prompt return of victim's property, and in so far as is possible, do away with the need for the actual physical evidence to be produced in court;
    - establish and maintain liaison with victim support structures;
    - be sensitised to the trauma and well being of victims of serious crimes.

3. **Parole Boards,** in the performance of their functions, should give consideration to:-

    - notifying victims of crime and their families in advance of parole hearings as far as is practicable;

- allowing victims of crime, their families, or their representatives to attend parole hearings and make known the effect of the offenders crime on them; and
- taking whatever steps are necessary to ensure that parolees charged with a crime whilst on parole are immediately returned to custody and kept there until the case is adjudicated.

4. Law Ministers also commend for the consideration of the Chief Justice and other members of the Judiciary the following suggestions that they believe will assist in the achievement of national adherence to the Basic Principles:-

- participation in a training programme addressing the needs and legal interest of victims of crime;
- allowing victims and witnesses to be on-call for court proceedings;
- in so far as possible, ensuring that their court officials establish separate waiting rooms for prosecution and defence witnesses;
- means by which members of the judiciary can bear their share of responsibility for reducing court congestion by ensuring that all participants fully and responsibly utilise court time;
- allowing a victim to make representations at bail hearings, postponements, plea bargains, dismissal of cases, sentencing and restitution;
- ordering restitution to the victims in all cases in which the victim has suffered material loss or physical or mental harm, unless they state compelling reasons for a contrary ruling on the record;
- allowing the victim and a member of the victims family to attend the trial, even if identified as witnesses, unless there is a compelling need to the contrary; and
- giving substantial weight to the victim's interest in the speedy return of property before trial in ruling on the admissibility of photographs of that property as being sufficient evidence.

5. Ministers also agree that they should give consideration to the passage, where necessary or appropriate, of legislation that will assist in the realisation of adherence to the Basic Principles. To this end they recognise that national legislation and practise should be reviewed to:-

- ensure that it does not inhibit the ability of courts and justice authorities to allow the views to victims of violent crime to be considered on bail decision, postponements, plea bargains, dismissal of cases and restitution.

- facilitate the receipt by courts of victim impact statements prior to sentencing; and
- require consideration of restitution in all cases;
- provide guidance on the fair treatment of victims of crime and witnesses.

They further agreed that national consideration should be given to the development of appropriate mechanisms designed to provide assistance to the victims. They recognise that the precise form that such mechanisms could take must remain a matter for national decision taking into account economic, social and cultural norms of each member country.

LATIMER HOUSE GUIDELINES ON PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE

INTRODUCTION

1. The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence (henceforth referred to as "The Guidelines") which were adopted in June 1998 at the conclusion of a Joint Colloquium on "Parliamentary Supremacy and Judicial Independence....Towards a Commonwealth Model", were presented to the Commonwealth Law Ministers at their Meeting held in May 1999 in Trinidad and Tobago. In their Communiqué, Commonwealth Law Ministers "*noted a set of Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights ..... and asked their Senior Officials to study the Guidelines and to report to the next Law Ministers Meeting*".

2. The Guidelines were considered further by the Law Ministers and Attorneys Generals of Small Commonwealth Jurisdictions Meeting in May, 2000, where they were welcomed as "*reflecting valuable and fundamental concepts, including the concept of judicial appointment regardless of gender.... Ministers believed that differences over issues such as funding should not be permitted to detract from overwhelming support for Commonwealth commitments to the concept of accountability of the three arms of government*".

CONSIDERATION BY SENIOR OFFICIALS

3. Senior Officials of Law Ministers examined the Guidelines as requested by Ministers. They were assisted in this work by a paper prepared by the sponsoring organisations which are the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association. Continuing concern was expressed by Senior Officials at aspects of the Guidelines – those recommending that a majority of members of Judicial Services Commissions should be senior members of the judiciary, those seeking to ensure that responsibility for managing the funds voted for the judiciary should lie with the judges, and those dealing with the accountability and disciplining of judges.

4. Senior Officials noted that the principles of good governance and judicial independence had been clearly endorsed by Commonwealth Heads of Government, and welcomed the general thrust of the development of those principles in the Guidelines. On the issues of judicial appointment mechanisms and the control of funds voted for judicial purposes, Senior Officials agreed that the Guidelines needed revision. A revised text should stress the importance of ensuring that any appointment mechanism should be widely accepted as guaranteeing the quality of those selected, and that the resources provided for the judiciary should be adequate and protected from misuse. With such revisions the Guidelines could be laid before Ministers for endorsement.

THE REVISED GUIDELINES

5. Taking into account the comments of Law Ministers in 1999 and the subsequent consideration of the guidelines by Senior Officials, the sponsoring organizations have revised the Guidelines. Over the past three years the sponsoring organisations have also, following wide-raging consultation, included a number of footnotes to explain the intended scope, or where relevant, alternative methods of achieving the agreed aims.

6. The amended Guidelines are annexed to this paper.

ACTION BY LAW MINISTERS

7. Law Ministers, taking account of the consideration of the guidelines by Senior Officials, and noting the revisions made by the sponsoring organizations, may wish to signify their agreement with the attached annex.

PARLIAMENTARY SUPREMACY AND JUDICIAL INDEPENDENCE: LATIMER HOUSE GUIDELINES FOR THE COMMONWEALTH

A Joint Colloquium on *"Parliamentary Supremacy and Judicial Independence...towards a Commonwealth Model"* was held at Latimer House in the United Kingdom, from 15-19 June 1998. Over 60 participants attended representing 20 Commonwealth countries and 3 overseas territories.

The Colloquium was sponsored by the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association with the generous support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office.

The following Guidelines for the Commonwealth are a result of deliberations during the Colloquium and subsequent discussions. *The Guidelines were considered by Commonwealth Law Ministers in 1999 and were referred by them to Senior Officials who discussed the Guidelines at their meeting in London in November 2001. They "noted that the principles of good governance and judicial independence had been clearly endorsed by Commonwealth Heads of Government and welcomed the general thrust of the declaration of those principles in the Guidelines". Subject to revisions of the provisions of the Guidelines relating to judicial appointment mechanisms and the control of funds (now incorporated into the text of this document), Senior Officials agreed that the Guidelines would be laid before Law Ministers at their meeting in November 2002. The Guidelines were also considered by the Law Ministers and Attorney Generals of Small Commonwealth Jurisdictions Meeting in May 2000, where the Guidelines were welcomed as "reflecting valuable and fundamental concepts".*

The sponsoring organisations have therefore made some refinements after further judicial consultation, since November 2001 in relation to II (1) and (2) of the Guidelines* and these have been incorporated in this document.

Explanatory footnotes have also been included in this document following the discussions which were held at the Commonwealth Law Conference in 1999 and the CMJA Edinburgh 2000 Conference.

*Updated March 2002

Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles.

PREAMBLE

RECALLING the renewed commitment at the 1997 Commonwealth Heads of Government Meeting at Edinburgh to the Harare Principles and the Millbrook Commonwealth Action Programme and, in particular, the pledge in paragraph 9 of the Harare Declaration to work for the protection and promotion of the fundamental political values of the Commonwealth:

- democracy;
- democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary;
- just and honest government;
- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- equality for women, so that they may exercise their full and equal rights.

Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association meeting at Latimer House in the United Kingdom from 15 to 19 June 1998:

HAVE RESOLVED to adopt the following **Principles and Guidelines** and propose them for consideration by the Commonwealth Heads of Government Meeting and for effective implementation by member countries of the Commonwealth.

PRINCIPLES

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights[1]. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

[1] The final paragraph does not refer expressly to other forms of discrimination, e.g. on ethnic or religious grounds. There are a number of approaches to the redress of existing imbalances, such as selection based on "merit with bias", i.e. where, for example, if two applicants are of equal merit, the bias should be to appoint a woman where there exists gender imbalance.

GUIDELINES

I PARLIAMENT AND THE JUDICIARY

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may[2] be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

II PRESERVING JUDICIAL INDEPENDENCE

1. Judicial appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission[3].

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[2] It has been suggested that judges "shall" have a duty to adopt a constructive and purposive approach to the interpretation of legislation, particularly in a human rights context, as indicated in paragraph 3.

[3] The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure[4].

Judicial vacancies should be advertised.

2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.[5]

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

3. Training[6]

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training[7].

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[4] The making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions.

[5] The provision of adequate funding for the Judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of Justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available.

[6] This is an area where the sponsoring associations can play a cost-effective role in co-operation with the Commonwealth Secretariat. Resources need to be provided in order to support the judiciary in the promotion of the rule of law and good governance.

[7] The drafters of the Guidelines did not wish by this provision to impinge on either the independence of the judiciary or the

III PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS[8]

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

> *"That the Freedome of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement."*

2. Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:

(a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices[9];
(b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;
(c) the cessation of membership of a political party of itself should not lead to the loss of a member's seat.

3. In the discharge of their functions, members should be free from improper pressures and accordingly:

(a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;
(b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;
(c) the offence of contempt of parliament should be drawn as narrowly as possible.

IV WOMEN IN PARLIAMENT[10]

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, including the appointment of more women to executive roles within political parties.

2. Pro-active searches for potential candidates should be undertaken by political parties.

3. Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.

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independence of the legal profession. However, in many jurisdictions throughout the Commonwealth magistrates and judges are given no formal training on commencement of their duties. It was felt that appointees to the bench would benefit from some training prior to appointment in order to make them more aware of the duties and obligations of judicial officers and would aid their passage to the bench.

[8] It has been observed that the Guidelines are silent about the elected composition of the popular Chamber. In a number of jurisdictions nominated members may have a decisive influence on the outcome of a vote. If properly used, however, the power of nomination may be used to redress for example gender imbalance and to ensure representation of ethnic or religious minorities. The role of non-elected senates or upper chambers must also be considered in this context.

[9] There remains controversy about the balance to be struck between anti-floor crossing measures as a barrier against corruption and the potential threat to the independence of MPs.

[10] The emphasis on gender balance is not intended to imply that there are not other issues of equity in representation which need to be considered. Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance. Some countries have experimented with regulation of national political parties to ensure, for example, that their support is not confined to one regional or ethnic group, a notion which would be profoundly hostile to the political culture in other jurisdictions.

4. Where there is no proportional representation, candidate search and/or selection committees of political parties should be gender balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party constitutions; women should be put forward for safe seats.

5. Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national constitutions whilst useful, tends to be insufficient for securing adequate and long term representation by women.

6. Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

V JUDICIAL AND PARLIAMENTARY ETHICS

1. JUDICIAL ETHICS

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;
(b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development[11];
(c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

2. PARLIAMENTARY ETHICS

(a) Conflict of interest guidelines and Codes of Conduct should require full disclosure by ministers and members of their financial and business interests;
(b) members of parliament should have privileged access to advice from statutorily-established Ethics Advisors;
(c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

V ACCOUNTABILITY MECHANISMS

1. Judicial Accountability

(a) Discipline:
  (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

    (A) inability to perform judicial duties; and
    (B) serious misconduct.

  (ii) In all other matters, the process should be conducted by the chief judge of the courts;

[11] Following discussion of the Guidelines it has been accepted by the Working Group that a "uniform" Model Code of Judicial Conduct is inappropriate. Judicial Officers in each country should develop, adopt and periodically review codes of Ethics and Conduct appropriate to their jurisdiction. The CMJA will promote that process in its programmes and will serve as a repository for such codes when adopted.

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism[12]:
(i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

2. Executive Accountability

(a) Accountability of the Executive to Parliament:
Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:
(i) a committee structure appropriate to the size of Parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;
(ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;
(iii) the Public Accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;
(iv) the chair of the Public Accounts Committee should normally be an opposition member;
(v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.

(b) Judicial Review:
Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

VI THE LAW-MAKING PROCESS

1. Women should be involved in the work of national law commissions in the law-making process. Ongoing assessment of legislation is essential so as to create a more gender balanced society. Gender-neutral language should be used in the drafting and use of legislation.

2. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:

(a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;
(b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber; and
(c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.

[12] In certain jurisdictions, the corruption of the judiciary is acknowledged as a real problem. The recommendations contained in the Guidelines are entirely consistent with the Framework for Commonwealth Principles in Promoting Good Governance and Combating Corruption approved by CHOGM in Durban in 1999. There is some support for the creation of a Judicial Ombudsman who may receive complaints from the public regarding the conduct of judges.

3. Model standing orders protecting members rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.

4. Parliament should be serviced by a professional staff independent of the regular public service.

5. Adequate resources to government and non-government back benchers should be provided to improve parliamentary input and should include provision for:

(a) training of new members;
(b) secretarial, office, library and research facilities;
(c) drafting assistance including private members bills.

6. An all party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive.

7. Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.

8. It is recommended that "sunset" legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

VII THE ROLE OF NON-JUDICIAL AND NON-PARLIAMENTARY INSTITUTIONS

1. The Commonwealth Statement on Freedom of Expression[13] provides essential guarantees to which all Commonwealth countries should subscribe.

2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.

3. An independent, organised legal profession is an essential component in the protection of the rule of law.

4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.

5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.

6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.

7. Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule of law issues and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard.

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[13] Since the Guidelines were drafted, the draft Statement on Freedom of Expression has been subject to further consideration and the reference should take account of the new developments. The Commonwealth Heads of Government, in the Coolum Declaration of 5 March 2002 included a commitment to freedom of expression: "We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights..."

Such institutions should be empowered to provide access to alternative dispute resolution mechanisms.

VIII MEASURES FOR IMPLEMENTATION AND MONITORING COMPLIANCE

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government[14].

If these Guidelines are adopted, an effective **monitoring procedure**, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines.

Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

[14] Under active consideration the creation of a monitoring procedure outside official Commonwealth processes. This initially may involve an "annual report" on the implementation of the Guidelines in all Commonwealth jurisdictions, noting "good" and "bad" practice.

MODERNISATION OF THE LAWS OF EVIDENCE

BACKGROUND

1. In Port of Spain, Law Ministers asked that consideration be given to the question of modernisation of evidence laws particularly in respect of introduction of computer evidence.

2. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions at their meeting in Jersey in May 2000 recognized that existing laws of evidence were not adequate to deal with technological advances and they welcomed the convening of an expert group to consider modernisation of laws in that respect. They requested that the group also consider hearsay evidence, including business and computer records, corroboration, receiving of evidence by video–link of both vulnerable witnesses and witnesses in foreign jurisdictions, DNA evidence and the questioning of victims of sexual violence.

3. Given the broad range of issues, the Secretariat decided to proceed with separate expert groups to consider the three main topics identified – Electronic Commerce, Computer Crime and Related Criminal Law issues, and Evidentiary issues. The two expert groups on law and technology issues examined evidentiary questions and made recommendations that are reflected in the model laws arising from the work of those groups.

4. The third expert group considered evidence issues in relation to the topics identified. The Report of the Expert Group on Evidence (the Report) is enclosed. It formed the basis for the development of draft evidentiary provisions, which were then submitted to Senior Officials. Senior Officials considered the draft provisions and recommended the attached Model Evidentiary Provisions (the Model) be submitted to Law Ministers for approval.

THE MODEL EVIDENTIARY PROVISIONS

5. The Model contains seven (7) Parts covering the following topics:

- Documentary Evidence (including computer evidence and foreign documents)
- Foreign Testimonial Evidence
- Evidence by Technology (Foreign)
- Measures for the Assistance of witnesses
- Witness Anonymity
- Corroboration and Competency to Testify
- DNA

6. The Model is intended to be a flexible tool that Commonwealth jurisdictions can use to modernize existing laws or adopt new provisions in relation to the specific evidence topics identified above. Each part of the Model can be used separately to develop laws on the individual subject areas. Alternatively a jurisdiction could also use the Model as a whole to enact a general miscellaneous evidence law.

7. There are two optional approaches to Section 26 of the Model relating to evidence of sexual reputation or sexual experience with a person other than the accused, reflecting different policy views. It is left to countries using the Model to choose as between the options.

8. The Report outlines the discussion and recommendations of the expert group and thus provides an explanation and rationale for the various provisions that are included in the Model. Given the detailed explanation provided in the Report, the content of the proposed Model will not be reviewed in this paper.

ACTION BY LAW MINISTERS

9. Law Ministers are requested to consider recommending the *Model Evidentiary Provisions*, as annexed to this paper, to countries for use in the development of domestic evidence legislation.

ANNEX

MODEL EVIDENTIARY PROVISIONS

AN ACT to make provision for the modernisation of certain laws relating to the admission of evidence in proceedings.

BE IT ENACTED by the Parliament of .....*[name of country]* as follows:

Short Title

1. This Act may be cited as the Evidence (Modernisation) Act *(year of enactment)*.

Application

2. This Act applies to all legal proceedings, including criminal and civil proceedings, for which (Parliament) (legislature) has jurisdiction, unless the contrary is specifically stated.

Note: *This provides for the broadest possible application to proceedings including inquiries and tribunals. The rules are not exclusive and so can be supplemented by other rules.*

PART I
DOCUMENTARY EVIDENCE

Definitions

3. In this Act,

"business" means

(a) any business, profession, trade, calling, or undertaking of any kind, carried on in (country) or elsewhere, whether or not for profit,
(b) any government, including any department, ministry, branch, board, commission or agency of any government in (country) or elsewhere, and
(c) any court or tribunal or other body or authority performing a function of government in (country) or elsewhere;

Note: *This is the broadest possible definition. It recognises three main activities: commercial, governmental and judicial, both domestic and foreign.*

"copy" means any readable reproduction, or an extract, of a document and includes microfiche and a photograph;

Note: *Countries satisfied with the general term "readable reproduction" can opt to delete the specific language of "microfiche" and "photograph".*

"court" means (court) unless the contrary is indicated;

"document" means a record of information kept in any form;

"judge" means a judge of the court unless the contrary is indicated;

"qualified person", means a person in charge of the document or any person with management responsibility for the document.

"young person" means a person under the age of [.....] years.

Admissibility of business documents

4. (1) Subject to this section, if oral evidence of a matter would be admissible in a legal proceeding, a business document created in the usual or ordinary course of business is admissible as evidence of the truth of its content upon the production of the document.

Note: *The intention of the words "evidence of the truth of its content" is to ensure that the document becomes evidence of what it says and not just as to its existence. As with all evidence however the presumption of evidence of truth is rebuttable. Countries that wish to clarify the point further could include the term rebuttable in the clause.*

Hearsay and opinion statements

(2) A business document is admissible under subsection (1) whether or not it contains hearsay or a statement of opinion.

Note: *This is an option to ensure admissibility of the document and proper weight is given to it.*

Exceptions

(3) The following are not admissible under subsection (1) in a criminal proceeding:

(a) an out of court statement made to a person in authority by a suspect in a criminal investigation or an accused, and

(b) a business document created in the course of a criminal investigation or prosecution.

Proof by affidavit

(4) Evidence that a business document was created in the usual or ordinary course of business may be adduced by an affidavit of a qualified person.

Admissibility of a copy

(5) A copy of a document is admissible in evidence as if it were the original of the document.

Notice and a copy

(6) A business document is admissible under subsection (1) if the party seeking its admission gives 28 days notice of the intention to produce the document to all other parties to the proceeding. The party seeking the admission of the document shall, upon request, provide a copy of the document or if it is not feasible to produce a copy of the document because of the volume of documents or other factors, the requesting party shall be given an opportunity to inspect the document within 7 days of their request.

Note: *The time limit included can be adapted as appropriate for specific countries.*

(7) In urgent circumstances the court may abridge the time periods set out in paragraph 6.

Opinion or clarification of document by affidavit

5. If a business document is admitted under section 3, an affidavit of a qualified person providing an opinion or clarification of the document may be admitted with the document.

Inference from absence of information

6. (1) If a business document does not contain information which might reasonably be expected to be recorded in the document if a matter had occurred or existed, the person conducting the proceedings may admit the document in evidence to prove the absence of the information and draw the inference that the matter did not occur or exist.

Proof of non issuance of document

(2) If a document is routinely issued by any business, an affidavit of the person in charge of the documents or any person with management responsibility for the documents stating that after a careful search he or she is unable to locate any record of a particular document having been issued, is admissible and in the absence of evidence to the contrary, proof that the document was not issued.

Proof of official character

7. If evidence is offered by affidavit under this Part, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of the person is set out in the affidavit.

Foreign business document

8. Where under this Part there are requirements for an affidavit, in the case of evidence from a foreign jurisdiction, such evidence may be adduced by way of an unsworn statement or certificate, in which the person attests that there is no provision under the law of that jurisdiction for an affidavit and it shall be admitted as if it were an affidavit.

Public document defined

9. (1) In this section, "public document" means a document that

(a) is required to be made under the authority of a public office;
(b) concerns a public matter;
(c) is intended to be a permanent record; and
(d) is publicly available.

Proof of public document

(2) A public document is admissible as evidence of the truth of its content upon the production of the document or a copy.

Court records

10. Evidence of any proceeding or document of any court in (country) or elsewhere may be given by the production of a copy of the proceeding or document purporting to be under the seal of the court or certified by an officer of the court without proof of the seal or the official character of the officer or any other proof.

Examination of document maker and affidavit

11. On the application of a party or on its own motion, the person conducting the proceedings may order the examination of the person who made the business document or a statement in the document admitted under section 3, or a person providing an affidavit if

(a) in a criminal proceeding the judge is satisfied that it would otherwise prejudice the person's right to a fair trial;
(b) in other legal proceedings it would otherwise seriously impair the fairness of the proceedings.

PART II
FOREIGN TESTIMONIAL EVIDENCE IN A CRIMINAL PROCEEDING

Definition

12. In this Part

"testimony" means oral evidence of a witness in a foreign country and any document produced as an exhibit during the giving of the oral evidence, obtained by (country) by

(a) a request for mutual assistance made by (country) under a scheme or treaty for mutual assistance in criminal matters; or
(b) if no treaty or scheme exists, a letter of request or other means for obtaining assistance from a foreign country.

Form of Testimony

13. Testimony may be reduced to writing or recorded on an audio or video tape or by other electronic means and need not be in the form of an affidavit or a transcript of a proceeding.

Admissibility

14. (1) Subject to this Part, testimony is admissible in evidence in a criminal proceeding as truth of its content if

(a) it was taken on oath or affirmation; or
(b) it was taken according to the law of the foreign country; and

either

(i) a foreign judge certifies that it was so taken; or
(ii) the (responsible authority for mutual assistance or an authorized official of that authority) in (country) certifies that the testimony was obtained as a result of a request to a foreign country.

Note: *This evidence while admitted for its truth is rebuttable. Countries that wish to clarify the point further could include the term rebuttable in the clause.*

Disclosure

(2) Testimony is not admissible for the prosecution unless it has been disclosed to the accused within a reasonable time prior to the criminal proceeding.

Note: *Countries that have existing laws with respect to disclosure may wish to delete this provision in its entirety. Other countries may wish to make it more precise by specifying the applicable time frame for disclosure*

Mandatory exclusion of testimony

(3) Testimony shall not be admitted in evidence if the presiding judge is satisfied that:

(a) the person who provided the testimony is in (country) and available to testify; or
(b) the evidence would not be admissible according to the usual rules of admissibility.

Discretionary exclusion of testimony

(4) The presiding judge may refuse to admit the testimony if satisfied that the interests of justice require its exclusion. Without limiting the matters which may be considered in making this decision, the judge must consider

(a) the extent to which the testimony provides evidence that is not otherwise available;
(b) the probative value of the testimony for any issue that will likely need to be decided;
(c) the extent to which there is a need to allow cross-examination of the person who provided the testimony;
(d) the expense and delay that would be caused by the exclusion of the testimony; and
(e) whether exclusion of the testimony would unfairly prejudice the prosecution or the accused.

PART III
PROVIDING AND RECEIVING EVIDENCE IN LEGAL PROCEEDINGS BY TECHNOLOGY

Definition

15.(1) In sections 15 and 16, "technology" means a technology that permits

(a) the virtual presence of a person before a legal proceeding; or
(b) the person conducting the proceedings and the parties to hear and examine the person.

Foreign request for evidence by technological means

16. If a request for assistance is made by a foreign country or court to compel a person to provide evidence in a foreign legal proceeding by a technology, any person may apply, ex parte, for an order.

Note: *The language "any person" allows for direct applications by a foreign authority to avoid delays. A jurisdiction could also restrict the provision to applications by the Minister or Attorney General.*

Order for video or audio link

17.(1) The judge who hears an application shall make the order for the taking of evidence by a technology if satisfied that

(a) there is a legal proceeding in the foreign country;
(b) the foreign country believes that the person's evidence would be relevant to the foreign legal proceeding; and
(c) the technology for providing the evidence is available.

Provisions of order

(2) An order made under subsection (1) shall order the person

(a) to attend at the place fixed by the judge for the taking of the evidence by the technology and to remain in attendance until excused by the person in charge of the foreign proceeding;
(b) to answer any questions asked of the person according to the law that applies in the foreign country;
(c) to make a copy of a document and bring the copy, if required; and
(d) to bring the original of any document or anything, if required, in order to show it to the person in charge of the proceeding by means of the technology.

Law of non-disclosure and privilege apply

(3) Evidence shall be taken, according to an order under subsection (1), as though the person were physically before the foreign legal proceeding in the foreign country. The foreign laws relating to evidence and procedure apply but only to the extent that giving the evidence would not disclose information protected by the (country) law of non-disclosure of information or privilege.

Contempt of court and perjury

(4) If a person gives evidence under this section, the (country) law of perjury applies and the (country) law of contempt of court apply to a refusal by the person to answer a question or produce a document or thing as ordered by the judge.

Terms and conditions of order

(5) An order made under subsection (1) may include any terms that the judge considers desirable, including those relating to the protection of the interests of the person named in it and third parties.

Variation

(6) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Arrest Warrant

18.(1) The judge who made the order under subsection 16(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information on oath that

(a) the person did not attend or remain in attendance as required by the order or is about to abscond; and

(b) the order was personally served on the person.

Arrest

(2) An arresting officer who arrests a person in execution of a warrant issued under subsection (1) shall, without delay, bring the person before the judge who issued the warrant.

Receiving evidence by video technology

19. Evidence of a person, other than the accused, who is outside (country) shall be received in a legal proceeding in (country) by a technology that permits the person to testify in the virtual presence of the legal proceeding unless the person conducting the legal proceeding is satisfied that:

(a) on the basis of relative costs, the feasibility of the witness appearing and the conditions under which the evidence would be taken in the foreign country, there is no justification for the receipt of the evidence in this manner; or

(b) the reception of the evidence would be contrary to the interests of justice in the particular circumstances.

Receiving evidence by audio technology

20. Evidence of a person, other than an accused, who is outside (country) may be received in a legal proceeding in (country) by a technology that permits the person conducting the proceeding and the parties to hear and examine the person, if the person conducting the proceeding is of the opinion that it would be appropriate in the circumstances, including

(a) the nature of the person's anticipated evidence; and

(b) any potential prejudice to a party caused by the fact that the witness would not be seen at the proceeding.

Notice

21.(1) A party who wishes to call a witness to give evidence under section 19 or 20 shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less then 14 days before the witness is scheduled to testify.

(2) A party who wishes to call a person to give evidence under section 19 or 20, shall make an application to the person conducting the legal proceeding on 14 days notice to the person conducting the proceeding and the parties for an order permitting the receiving of the evidence.

Oath, affirmation or other requirement

22.(1) Except in the case of a person who would not be required to give sworn or affirmed evidence in (country), evidence under section 19 or 20 shall be taken

(a) under oath or affirmation according to the law of (country),
(b) according to the law of the foreign country where the person is located, or
(c) in any other manner that demonstrates that the person understands the obligation to tell the truth.

Note: *As some countries have legislation that restricts the persons who may administer an oath, consideration needs to be given to whether such laws need to be amended to allow the officials in the foreign country to administer the oath.*

Other laws to apply

(2) Subject to subsection (3), evidence taken from a person who is outside (country) under section 19 or 20 shall be subject to the laws of (country) relating to evidence, procedure, contempt of court and perjury.

No contempt of court

(3) A person shall not be found in contempt under the laws of (country) for refusing to answer a question if the refusal is based on a law in the foreign country that applies to the taking of the evidence. If there is an objection based on the law of the foreign country, a judge of the foreign country may decide the objection or if no judge is present, provide an opinion later.

Costs of technology

(4) (a) In a criminal proceeding, a party who wishes to call a witness to give evidence under section 19 or 20 shall pay any costs associated with the use of the technology.
(b) In other proceedings, costs will be determined by order of the court.

PART IV
MEASURES FOR THE ASSISTANCE OF WITNESSES

Definition

23. In this Part "vulnerable witness" means a witness in a proceeding whose ability to give evidence is likely to be affected by one or more of the following:

(a) age or maturity;
(b) mental or physical disability;
(c) trauma suffered as a result of the conduct that is the subject of the proceeding;
(d) fear of intimidation as a result of testifying;
(e) linguistic or cultural background;
(f) relationship to the accused;
(g) the nature of the evidence the witness is expected to give; or
(h) any other ground affecting the ability of the witness to testify.

Mandatory order by the court

24.(1) A complainant in a criminal proceeding who is a young person is a vulnerable witness and the presiding judge shall order that the testimony be taken according to paragraph 25(1)(a), (b) or (c). The judge may also order that the testimony be taken according to any other provision of subsection 25(1) if it would assist the witness to give complete and accurate testimony or it is in the best interests of the witness.

Application for an order by the prosecutor

(2) Unless the complainant objects, the prosecutor shall apply to the presiding judge for a finding that an adult witness who is the complainant in a criminal proceeding involving a serious sexual offence is a vulnerable witness. If so found, the presiding judge shall order that the testimony be taken according to paragraph 25(1)(a), (b) or (c). The judge may order that the testimony be taken according to any other provision of subsection 25(1) if it would assist the witness to give complete and accurate testimony or it is in the best interests of the witness.

Note: *Clause 24(2) obliges the prosecutor to make an application to the court in these circumstances unless the complainant objects. While the objection of the complainant removes the obligation on the prosecution to do so, it would still be open to the prosecutor to make such an application on a discretionary basis despite the complainant's objection.*

Application for an order in other cases

(3) In any legal proceeding, on the application of a party, a witness, or on the motion of the person conducting the proceeding, the person conducting the proceeding may make a finding that a witness is a vulnerable witness and order that the testimony of that witness be taken according to one or more of the provisions of subsection 25(1).

Measures to assist a witness

25.(1) An order made under section 24 shall require a witness's testimony to be taken according to one or more of the following:

(a) behind a screen or similar device in the courtroom that allows the witness not to see the accused, provided that the screen or other device does not prevent the witness from seeing or being seen by
  (i) the judge or jury,
  (ii) counsel, or
  (iii) any interpreter or other person appointed to assist;

(b) from an appropriate place outside the courtroom by closed circuit television or other means of technology which allows the witness to be seen and heard in the courtroom and the persons listed in subparagraphs 25(1)(a)(i) to (iii) to be seen and heard by the witness[1];

(c) by a video recording of an interview of the witness made before the hearing, which represents the examination in chief of the witness. If the examination in chief is entered by a video recording under this paragraph, the cross-examination and any re-examination may also be ordered to be provided at the same time by a video recording;

(d) in the absence of the public or any member of the public;

(e) through an interpreter;

(f) with the assistance of a support person; or

(g) with the assistance of any device which improves the ability of the witness to hear or understand the proceedings and communicate answers to the questions.

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[1] In some countries it may be imperative that the accused also be able to see the witness when this particular technology is available. If a country thinks the accused should be included and has the technology to do so both in respect of one way screens and closed circuit television, then the list in 23(1) (a) should be amended to add the accused. If the technology to do so would only be available in the context of closed circuit television or other similar technology, then subsection (b) should be amended by adding after "the persons listed in subparagraphs 23(1)(a)i –iii" the words "and the accused".

Formalities of proceedings

(2) The person conducting the proceeding may dispense with any formalities in the proceeding including the wearing of gowns and wigs.

Questioning by an unrepresented accused

26.(1) The accused in a criminal proceeding involving a sexual offence or domestic violence is not entitled to personally cross examine a witness who is a young person or the complainant.

Questioning by judge or person appointed

(2) An unrepresented accused who is precluded from questioning a witness by subsection (1) may have his or her questions asked of the witness by the presiding judge or a person appointed by the judge for that purpose.

Note: *Some countries may prefer to limit this provision to a person appointed by a judge.*

Approval of questions

(3) For each question sought to be asked under subsection (2), the judge may

(a) ask the question or allow the question to be asked by the person appointed;
(b) rephrase the question, or
(c) refuse to allow the question to be asked of the witness.

Note: *In some countries this may be considered to give the judge too much power with respect to the questioning of a witness. An alternative phrasing would be to provide that the judge can rephrase or restrict any questions that are inappropriate or which are posed in an unnecessarily aggressive manner.*

PART V
EVIDENCE IN CASES OF SEXUAL OFFENCES

Evidence of sexual reputation and experience with a person other than the accused

OPTION 1

27. In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness regarding:

(a) the sexual reputation of the complainant; or
(b) the sexual experience of the complainant with a person other than the accused

unless the presiding judge is satisfied that such evidence would be of substantial relevance to material facts in issue or would impair confidence in the reliability of the evidence of the complainant.

OPTION 2

27. (1) In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness regarding:

(a) the sexual reputation of the complainant; or
(b) the sexual experience of the complainant with a person other than the accused

for the purpose of supporting an inference that the complainant was likely to have consented to the sexual activity that is the subject of the charge, or is not worthy of belief.

(2) Evidence as described in paragraph (1) is not admissible for any other purpose, unless:

(a) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and

(b) in exceptional circumstances, the presiding judge being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Evidence of sexual experience with the accused

28. In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness, regarding the sexual experience of the complainant with the accused, that does not form the subject matter of the charge unless:

(a) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and

(b) the presiding judge, being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Permissible questions

29. In a criminal proceeding involving a sexual offence, nothing in sections 27 or 28 precludes the admissibility of evidence or the questioning of a witness regarding the sexual conduct that is the subject of the charge.

Publication ban in sexual offence proceeding

30. In a criminal proceeding involving a sexual offence, the presiding judge:

(a) shall order a ban on the publication of the identity of the complainant or information that could disclose the identity of the complainant, unless the complainant consents to publication;

(b) may order a ban on the publication of the identity of the accused or a witness or information that could disclose the identity of the accused or a witness or order a general ban on publication of testimony if satisfied that it would be in the interests of justice to do so.

PART VI
WITNESS AND POLICE ANONYMITY IN A CRIMINAL PROCEEDING

Definitions

31. In sections 32 and 33

"witness" means a person who gives evidence in a criminal proceeding;

"witness anonymity order" means an order made by a court in a criminal proceeding restricting disclosure of the identity of the witness in the course of giving evidence, through the use of devices or technology.

Application for witness anonymity order

32.(1) The prosecutor, an accused charged with an indictable offence or a person who expects to be called as a witness may apply to the court for a witness anonymity order.

Affidavit

(2) An application under subsection (1) shall be supported by an affidavit of the witness concerned.

Independent counsel inquiry

(3) If after considering the affidavit the judge is satisfied that the witness or another person or any property will be exposed to serious harm if the witness testifies without restrictions as to the disclosure of his or her identity, the judge may appoint an independent counsel:

(a) to conduct an inquiry into the witness's truthfulness; and reliability and the evidence the witness will give; and

(b) provide a report to the judge.

Conduct of inquiry

(4) In conducting the inquiry, the independent counsel must safeguard the interests of any party adverse to the witness and protect the anonymity of the witness.

Information of prosecution witness

(5) If the witness is to be a prosecution witness, the police officer in charge of the investigation must provide the independent counsel with all relevant information available to the police and an affidavit sworn by the police officer confirming that all relevant information has been provided.

Information of witness for accused

(6) If the witness is to be a defence witness, the accused and any counsel must provide the independent counsel with all relevant information available to the accused and an affidavit sworn by the accused confirming that to the best of his or her belief all relevant information has been provided.

Records reports and advice

(7) The independent counsel

(a) if the witness is to be a prosecution witness, shall be entitled to all police records relating to the investigation including all reports and advice available to the police;

and

(b) if the witness is to be a defence witness, shall be entitled to all records held by the accused or his or her counsel relating to the defence including all reports and advice available to the accused.

Voir dire[2]

(8) After receiving the report of the independent counsel, the judge may conduct a voir dire or dispose of the application.

Directions for voir dire

(9) The independent counsel and the parties may participate in the voir dire and make submissions. The court may give directions for the conduct of the voir dire to preserve the anonymity of the witness including the exclusion of the public or a party or counsel, and the use of any device to preserve anonymity.

Fees and expenses

(10) An independent counsel is entitled to be paid a reasonable fee and expenses.

Witness anonymity order

33. (1) The judge may make a witness anonymity order if satisfied:

(a) on reasonable grounds that the witness or another person or any property will be exposed to the risk of serious harm if the witness gives evidence;

(b) there is no basis to doubt the truthfulness and reliability of the witness; and

(c) that the unfairness to the witness of requiring disclosure of the witness's identity exceeds the possibility of unfairness to the accused from the trial being conducted without disclosure, having

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[2] This term is used to describe the hearing of an application within a trial in the absence of the jury.

regard to:

(i) the general right of an accused to know the identity of a witness;

(ii) the principle that witness anonymity orders are justified only in exceptional circumstances to discourage intimidation of witnesses;

(iii) the importance of the witness's evidence to the case;

(iv) the effect that a witness anonymity order would have on the ability of the accused to conduct a full defence;

(v) whether other means can be used to protect the witness; and

(vi) the seriousness of the offence.

Terms of order

(2) If the court makes a witness anonymity order, the court may give any necessary directions to preserve the anonymity of the witness, including excluding the public and screening the witness from persons other than counsel calling the witness, the judge, the jury and court officials.

Effect of order

(3) If the court makes a witness anonymity order:

(a) the order applies to all stages of the proceeding;

(b) the witness shall not be required to state his or her true name, address or occupation or to give any particulars likely to lead to the discovery of that name, address or occupation;

(c) no evidence can be given and no question asked of the witness or any other witness relating to the true name, address or occupation of the witness; and

(d) no counsel (barrister or solicitor) officer of the court or other person involved in the proceeding can state in court the true name, address or occupation of the witness or give any particular likely to lead to the discovery of that name, address or occupation.

Discharge of order

(4) The court may at any time, either on the application of a party or on its own motion discharge or vary a witness anonymity order.

Definitions

34. (1) In this section

"serious offence proceeding" means a proceeding in which a person will be proceeded against by indictment for:

(a) an offence that is punishable by imprisonment for life or a term of not less than [7[3]] years or a more grave penalty; or

(b) an offence of conspiracy or attempt to commit an offence in paragraph (a);

"undercover police officer" means a member of the police whose identity was concealed for the purposes of an investigation.

Certificate of (Commissioner of Police)

(2) If an undercover police officer will be called as a witness for the prosecution in a serious offence proceeding, the (Commissioner of Police) may, before an indictment is presented, file in the court a certificate stating:

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[3] The appropriate period of punishment will need to be determined by each jurisdiction on the basis of the penalties applicable to indictable offences.

(a) that during the period stated in the certificate, the witness was a member of the police and acted under an assumed name as an undercover police officer;
(b) the offences for which the witness has been convicted or that the witness has not been convicted of any offences;
(c) the offences under the (Police Act) for which the witness has been found guilty or that the witness has not been found guilty of such offences; and
(d) the particulars of any adverse comment made by a judge in another proceeding regarding the truthfulness of the witness.

Lack of particulars

(3) The information provided under subsection (2) shall not contain the true name or address of the witness or provide sufficient detail so that the true name or address may be determined.

Police anonymity

(4) If the (Commissioner of Police) files a certificate under subsection (2):

(a) it is presumed that the certificate was given for a witness who is called by the prosecution and testifies that he or she was a member of the police and acted as an undercover police officer under the name specified in the certificate;
(b) the witness will be identified by the name set out in the certificate or some other name assigned by the court, and unless leave is given under paragraph (c) the witness shall not be required to state his or her true name or address or to give any particulars likely to lead to the discovery of that name or address;
(c) except with leave of the court, no evidence can be given and no question can be asked of the witness or any other witness relating to the true name or address of the witness; and
(d) unless leave is given under paragraph (c), no counsel (barrister or solicitor) officer of the court or other person involved in the proceeding can state in court the true name or address of the witness or give any particulars likely to lead to the discovery of that name or address.

Application for leave

(5) An application for leave under paragraph 4(c) shall be dealt with in chambers, in the absence of the jury.

Factors to be considered

(6) The judge shall not grant leave under paragraph (4) (c) unless satisfied that:

(a) there is some evidence before the court that the witness is not telling the truth; and
(b) the accused cannot properly test the truthfulness of the witness without being informed of the true name or address of the witness.

Notice

(7) If the (Commissioner of Police) files a certificate under this section, the (Commissioner of Police) must serve a copy on the accused or his or her counsel at least 14 days before the witness is to testify.

PART VII
CORROBORATION AND COMPETENCY TO TESTIFY

Corroboration required

35.(1) A conviction for perjury, treason or sedition may not be founded on the uncorroborated evidence of a witness.

Note: *Some jurisdictions may decide to extend the requirement for corroboration to other offences such as where the only evidence is that of an anonymous witness.*

Corroboration not required

(2) In any other case, there is no requirement for corroboration to convict a person or to warn the jury regarding corroboration of a witness and the requirements for corroboration to convict a person and to warn the jury regarding corroboration are abrogated.

Presumption of competence

36.(1) A person of any age is presumed to be competent to testify as a witness in any legal proceeding.

Evidence of children

(2) In any legal proceeding, the person conducting the proceeding shall instruct a child under the age of [.....] years on the importance of telling the truth and not telling lies but shall not take the child's evidence under oath or affirmation.

Evidence deemed sworn

(3) Evidence taken according to subsection (2) is deemed to have been taken under oath.

Note: *Some jurisdictions may decide to exclude this provision and allow for the admission of the evidence only as an unsworn statement.*

Inquiry into competence

(4) If the capacity of a proposed witness to testify is challenged and the person conducting the proceeding is satisfied that there is a basis for the challenge, before permitting the person to testify, the person conducting the proceeding shall carry out an inquiry to determine if the person is able to understand questions and provide intelligible answers.

(5) If the person conducting the proceedings determines that a person referred to in subsection (2) will not understand questions or will not be able to provide intelligible answers, the witness shall not testify.

PART VIII
DNA EVIDENCE IN CRIMINAL PROCEEDINGS

Definitions

37. In this Part

"designated offence" means an offence punishable by a term of more than [.....] years imprisonment;

Note: *These provisions can be made applicable to a broader or narrower range of offences depending on the position of the authorities within the relevant jurisdiction. Some countries may not have designated sentences and therefore may wish to use a different formulation.*

"DNA" means deoxyribonucleic acid;

"forensic DNA analysis" means a forensic DNA analysis of a bodily substance taken from a person under this Part and comparison of the results of that analysis with the results of an analysis of the DNA in a bodily substance identified by a police investigation of a designated offence and includes any incidental tests associated with the analysis;

"expert report" means a report of a qualified expert containing a forensic DNA analysis.

Obtaining Bodily Substances from Victims of Crime

38. Nothing in this Act precludes the taking of a bodily substance from the victim of a crime by consent.

Bodily substance obtained with consent

39.(1) A police officer may cause to be obtained a bodily substance by a suitably qualified person by an investigative procedure described in subsection 38(5) for a forensic DNA analysis, if

(a) consent is given after a police officer has informed the person of :

(i) the nature of the procedure to be used to obtain the bodily substance;
(ii) the purpose for obtaining a bodily substance;
(iii) the possibility that the results of a forensic DNA analysis may be used in evidence;
(iv) the fact that the person may refuse consent; and
(v) the consequences of not consenting i.e. that a warrant may be obtained;

and

(b) a police officer of the rank of [inspector] or higher authorizes it to be taken.

Note: *Some jurisdictions may require that bodily substances can only be taken by obtaining a court order, and not by consent.*

Written consent

(2) For the purposes of subsection (1), consent means the written consent of the person from whom the bodily substance is to be taken, if the person is 18 years of age or older and is not mentally disabled;

Authorization of police officer

(3) A police officer may only give an authorization under paragraph (1) (b) if he or she:

(a) has reasonable grounds to suspect the person from whom the bodily substance will be taken of having committed a designated offence; or
(b) believes that forensic DNA analysis of the bodily substance will exclude the person from suspicion of having committed a designated offence.

Bodily substance warrant

40.(1) A judge may issue a warrant authorizing a police officer to obtain or cause to be obtained a bodily substance from a person, for forensic DNA analysis, by a procedure described in subsection 35(5), if satisfied by information on oath that there are reasonable grounds to believe:

(a) a designated offence has been committed;
(b) a bodily substance has been found:

(i) at the place where the offence was committed,
(ii) on or within the body of the victim of the offence;
(iii) on anything worn or carried by the victim at the time when the offence was committed; or
(iv) on or within the body of any person or thing or at any place associated with the commission of the offence;

(c) the person was a party to the offence;

(d) a forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person; and

(e) the person from whom the bodily substance is to be obtained is not under ten years old.

Requirements of application

(2) An application under subsection (1) shall be made ex parte and supported by an affidavit.

Oral evidence

(3) In a case of urgency, a judge under subsection (1) may receive oral evidence for the purpose of establishing reasonable grounds provided that an information on oath is filed with the court as soon as practicable.

Application by other means of communication

(4) If a police officer believes that it would be impracticable to appear personally before a judge to make an application under subsection (1), a warrant may be issued on information submitted by telephone or other means of telecommunication establishing reasonable grounds, provided that an information on oath is filed with the court as soon as practicable.

Investigative procedures

(5) A warrant issued under subsection (1) authorizes a suitably qualified person accompanied by a police officer to obtain and seize a bodily substance from a person by:

(a) the plucking of individual hairs from the person, including the root sheath;

(b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or

(c) the taking of blood by pricking the skin surface with a sterile lancet.

Terms of warrant

(6) A warrant issued under subsection (1) shall contain any terms the judge considers necessary to ensure that the seizure of a bodily substance is reasonable in the circumstances.

Execution of warrant

41.(1) Before executing a warrant, a police officer shall inform the person against whom it is to be executed of:

(a) the contents of the warrant;

(b) the nature of the investigative procedure to be used to obtain the bodily substance from the person;

(c) the purpose of obtaining a bodily substance;

(d) the possibility that the results of a forensic DNA analysis may be used in evidence;

(e) the authority of the police officer and any other person under his or her direction to use as much force as is necessary to execute the warrant; and

(f) in the case of a young person or a mentally disabled person, the requirements of subsection (4).

Detention of person under warrant

(2) A person against whom a warrant is executed:

(a) may be detained for a reasonable period to obtain a bodily substance from the person; and

(b) may be required by the police officer who executes the warrant to accompany the police officer.

Respect for privacy

(3) A police officer or person responsible for executing the warrant shall ensure that the privacy of the person is respected in a reasonable manner. The person taking the bodily substance shall be suitably qualified and shall be of the same sex as the person from whom the bodily substance is taken, unless the person consents to a person of the opposite sex taking the sample.

Execution of warrant against young person or mentally disabled person

(4) A young person or a mentally disabled person against whom a warrant is executed has the right to a reasonable opportunity to consult and have the warrant executed in the presence of a legal representative and a parent; or

(a) in the absence of a parent, an adult relative; or

(b) in the absence of a parent and an adult relative, any other adult chosen by the person.

Waiver of rights

(5) A young person may waive his or her rights under subsection (4), but any waiver:

(a) must be made in writing or recorded on audio or video tape or other technological means; and

(b) contain a statement by the young person that he or she has been informed of the right being waived.

Limitations on use of bodily substance

(6) No person shall use a bodily substance that is obtained in execution of a warrant and the results of the forensic DNA analysis except in the course of an investigation of the designated offence or any other designated offence and any subsequent prosecution without the consent of the person from whom the bodily substance was obtained.

Destruction of bodily substance

42.(1) A bodily substance that is obtained from a person in execution of a warrant and the results of a forensic DNA analysis shall be destroyed if:

(a) the results of the analysis establish that the bodily substance was not from that person;

(b) the person is finally acquitted of the designated offence and any other offence from the same transaction except for a verdict of not criminally responsible on account of mental disorder; or

(c) one year expires after:

(i) the person is discharged after a preliminary inquiry into the designated offence or any other offence from the same transaction;

(ii) the dismissal, for any reason other than acquittal or the withdrawal of any information charging the person with the designated offence or any other offence from the same transaction; or

(iii) any proceeding against the person for the offence or any other offence from the same transaction is stayed unless during the year a new information is laid or an indictment preferred charging the person with the designated offence or any other offence from the same transaction or the proceeding is recommenced.

Exception

(2) Despite subsection (1), a judge, on application supported by an affidavit with notice to the parties, may order that a bodily substance and the results of a forensic DNA analysis not be destroyed during any period the judge considers appropriate if the judge is satisfied that the bodily substance or analysis might be required in an investigation or prosecution of:

(a) the person for another designated offence;

(b) another person for the designated offence or any other offence from the same transaction.

Waiver of notice requirement

(3) A judge may waive notice being given to another party under subsection (2) if it would be in the interests of justice to do so.

Expert report

43.(1) Subject to subsection (2), an expert report is admissible as evidence in a criminal proceeding upon its production.

(2) A copy of the expert report shall be provided to the person from whom the bodily substance was obtained as soon as it becomes available.

Non attendance of expert

(3) If the expert making the report is not going to attend the proceeding to give oral evidence, the report is not admissible without leave of the court.

Considerations

(4) For the purpose of determining whether to grant leave under subsection (2) the judge shall consider:

(a) the contents of the report;

(b) the reasons for dispensing with the attendance of the expert;

(c) the need for cross examination of the expert and any resulting unfairness to the accused if cross examination does not take place; and

(d) any other relevant matter.

Probative value of report

(5) An expert report, if admitted, is evidence of the truth of its contents.

Note: *The information set out in the report is rebuttable and some jurisdictions may wish to make this explicit.*

REPORT OF THE EXPERT WORKING GROUP ON EVIDENCE

The Expert Working Group on Evidence met during the week of January 15, 2001 to consider and make recommendations for model law in relation to specific topics[1] as follows:

I	Documentary evidence including business, banking and public documents
II	Foreign Evidence
III	Video/Satellite Evidence in relation to persons outside the country
IV	Vulnerable Witnesses
V	Corroboration
VI	DNA

I DOCUMENTARY EVIDENCE

A BUSINESS DOCUMENTS

The Group considered the content of a model law on business documents, applicable to both civil and criminal proceedings. In making specific recommendations, the Group noted that in enacting legislation of this nature, each jurisdiction would have to consider the existing laws relating to hearsay and the related exceptions. To the extent that there are statutory exceptions or modifications to the hearsay rule, these proposals may have to be adapted for consistency with existing laws.

The Group considered and recommended the following:

i. Definition of document

"Document" means information recorded in any form.

The Group was of the opinion that the definition of document should be framed in broad and simple terms. As recommended by the Expert Groups on Information Technology issues[2], the Group was of the view that the definition should include all types of documents, however generated or stored, including electronic records. In addition, the opinion was that the definition must be framed in flexible terms so that it would apply not only to documents created with today's technology but also future technology. The Group determined, therefore, that the term should be defined to apply to all information however recorded, which definition would provide the necessary scope and flexibility to encompass all types of records, documents and technology.

ii. Definition of business

"Business" means any business, profession, trade, calling, or undertaking of any kind carried on in X (name of country or jurisdiction) or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in X (name of country or jurisdiction) or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.[3]

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1 The Expert Group also considered the topic of Information Technology Issues with particular emphasis on evidence laws relating to e-commerce. That part of the report of this Group has been incorporated in a separately published report on Law in Cyberspace.

2 The Secretariat had earlier convened two expert groups on information technology issues – E-commerce and computer crime. Some of the issues addressed by those groups were also considered by the evidence group.

3 In some jurisdictions this exception is limited to banking or financial institutions. This definition is framed broadly to encompass the activity of various forms of private business as well as the "business" of government.

iii. Admissibility of Business Documents

(a) Subject to subsection(c), where oral evidence in respect of a matter would be admissible in a proceeding, a statement made in a document that was created by a person in the usual or ordinary course of business, is admissible as evidence of the truth of its content in a proceeding, upon production of the document.

(b) Evidence that the document was created in the usual or ordinary course of business may be adduced in the form of an affidavit.

(c) This provision shall not apply to:
- *(i) an out of court statement made to a person in authority[4] by a suspect or accused in the course of a criminal investigation;*
- *(ii) materials created in the course of a criminal investigation.[5]*

(d) The party producing a document under this section shall, at least 14 days before its production, give notice of the intention to produce it to each other party to the proceeding and, within seven days of receiving a request from another party, provide that party with an opportunity to inspect the document.

The purpose of these provisions is to facilitate the introduction and use of documentary evidence in court proceedings, by overriding the application of the hearsay rule in the case of certain types of documents and records. The underlying rationale for such provisions was noted to be the general reliability of documents generated in a usual manner as a part of business and the necessity to provide for flexibility because of the complex and varied nature of documentation in modern times and the essential nature of the evidence for many proceedings. Several jurisdictions have already enacted legislation of this nature for various types of documentary evidence.
The Group considered the types of documents that should be covered by the model law. In some jurisdictions that have an existing law of this nature, the provision is limited to the narrow area of banker's books. In others, the law is applied broadly to all forms of business documents.

The Group was of the view that a model law should follow the latter course and be broadly framed to cover both private enterprise and government activity. It would, however, be open to jurisdictions to limit the application of the provision to only certain types of business.

The Group then considered what types of pre-conditions to admissibility should apply. After lengthy discussion, the Group concluded that the pre-conditions should be of a very limited nature. They recommended only two; that oral evidence would be admissible on the matter and that the document

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[4] This provision is intended to clearly exclude statements taken by police or other authorities from an accused or suspect in a criminal case, which statements may only be admitted if demonstrated to have been given freely and voluntarily. Therefore the term "person in authority" is used deliberately here and is intended to capture the common law definition of the term, which is " Anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution. "(Cross on Evidence, 5th ed. p.541)

[5] It was the opinion of the Group that these exceptions were necessary, as arguably such documents would constitute business documents. In addition, in some jurisdictions a broader range of exceptions has been adopted excluding matters such as documents subject to privilege etc. The Group was of the view that such an extended list of exceptions was not necessary, as the requirement for the evidence to be otherwise admissible would cover this. However, for those jurisdictions that wish to include a more explicit list, an example would be section 30(10) of the *Canada Evidence Act* which provides: *Nothing in this section renders admissible in evidence in any legal proceeding*
- *(a) such part of any record as is proved to be*
  - *(i) a record made in the course of an investigation or inquiry;*
  - *(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding;*
  - *(iii) a record in respect of the production of which any privilege exists and is claimed, or*
  - *(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind, would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;*
- *(b) any record the production of which would be contrary to public policy; or*
- *(c) any transcript or recording of evidence taken in the course of another legal proceeding.*

was created in the usual and ordinary course of business. The Group was of the view that such an approach was necessary to facilitate the introduction of such records, particularly in light of the complex and detailed nature of business records today, which are often generated solely by electronic means.

The need for specific exceptions to the application of the provision, was discussed at length. Generally, the Group was of the view that the requirement that the evidence must be "otherwise admissible" was probably sufficient to cover such matters. However, after considering some existing legislation, it was recommended that confessions and material gathered in a criminal investigation should be specifically excluded, for greater certainty. While the Group did not recommend other additional exceptions found in existing legislation, some options in that regard have been included in footnote 3.

The Group considered whether there should be a specific provision giving the court the discretion to exclude such evidence in certain prescribed circumstances. After debate, the Group concluded that there was no requirement to include this as a statutory provision. In their opinion, once admitted, the court could determine what weight, if any, would be accorded to the evidence. In this respect, the parties could always attack the reliability of the evidence under normal rules and procedures. In the opinion of the Group, the general law already provided sufficient protection and thus, no provision on the discretion to exclude has been recommended.

iv. Admissibility of Copies

Copies of business documents, including microfiche or other photograph images, are admissible in evidence in the same manner as if it were the original of the document.

For several reasons, the Group was of the view that copies of documents should be admissible in place of the original, thus eliminating the requirement for strict compliance with the best evidence rule. The Group noted that with modern technology, it is often impossible to distinguish between originals and copies, as is the case, for example, with documents printed off of a computer. In addition, documentation is often stored on microfiche or using other photographic imagery in order to save space. In those circumstances, it may be difficult or impossible to produce an original. Thus, the Group recommended a simplified provision for admission of copies of documents. The Group was also of the view that there was no need to require certification of the copies given the nature of the technology that is used today to produce copies. It still would be open to any party to challenge the authenticity of the copy produced, either at the time of production or once it has been admitted into evidence.

v. Examination or Cross–Examination

Upon application of a party or on its own motion, the court may order the examination or cross-examination of the maker of a statement contained in a document admitted in evidence under section 3, if it would otherwise prejudice the right of a person to a fair trial.[6]

The Group was of the view that there should be reference to the ability of the court to order the examination or cross-examination of the maker of the statement in the document in appropriate cases. At the same time, the Group wanted to avoid constant applications of this nature, which would defeat the underlying purpose of the legislation. The recommendation is to include a discretion but establish a high threshold of prejudice to fair trial rights, before an order will issue.

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[6] As this provision relates to both foreign and domestic business records, jurisdictions may wish to add a provision which encourages the use of technology for such a cross –examination if the witness is outside of the country. See Part IV on the use technology to take the evidence of a witness.

vi. Explanation of Document by Affidavit

Where a document under section 3 requires clarification, an affidavit from a person qualified to provide the clarification is admissible in the same manner as the document.

This provision is intended to address the situation where the document admitted requires some kind of explanation. For example, this would be necessary where the document contains figures in columns but without any titles to the columns that would give context to the figures. For this type of technical evidence, the Group was of the view that affidavit evidence should be admissible and that there should be no pre-conditions for admissibility. The Group considered that the affidavit should be admitted in the same manner as the document would be admitted under section 3 i.e. the affidavit would be produced to the court without any further explanation or the calling of any vive voce evidence.

vii. Proof of non–issue of licence or document

Where a statute or regulation provides for the issue of a license or other document by a government department, board, commission or agency, an affidavit of an officer of that department, board, commission or agency, attesting to the fact that he or she has charge of the appropriate records and after a careful search of those records he or she has been unable to find any record of a particular license or document having been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that no licence or other document has been issued.

The Group was of the view that it would be very useful to include a provision allowing for proof of the absence of certain records by way of affidavit. This is the intent of this recommendation.

viii. Proof of Official Character

Where evidence is offered by affidavit under sections 3, 6 or 7, it is not necessary to prove the signature or official character of the person making the affidavit, if the official character of that person is set out in the body of the affidavit.

This provision was included to ensure that in filing an affidavit under this law, it would not be necessary to call additional evidence to establish that the person swearing the affidavit is, who he or she states that they are. Thus, if the affidavit tendered states: "I, John Smith, Deputy Registrar of the High Court of Australia, ..." this will be sufficient proof that Mr. Smith is the Deputy Registrar in absence of any evidence to the contrary.

B PUBLIC DOCUMENTS

On a related point, the Group considered the content of a model law relating to public documents and recommended the following provisions.

1. "Public Document" means a document that:

(a) is part of a record made by someone holding a public office which obliges him or her to enquire into and record facts;

(b) concerns a public matter;

(c) must be compiled as what was intended to be a permanent record; and

(d) must be available for public inspection.

A public document or a certified copy[7] *of a public document is admissible as evidence of the truth of its content.*

The intention of this provision is to codify the existing common law exception to the hearsay rule with respect to public documents. The category of documents to be covered is those generated by persons who have a statutory or public duty to compile and record the information. It relates to information of a public nature that is to be permanently retained. The document must also be available for inspection. The Group noted however that the category of documents that are considered to be "public" and thus admissible under this provision can be expanded and additionally the legislation can provide for certificates to be issued for such documents, as in the case of certificates of incorporation under the UK Companies Act.[8]

II FOREIGN EVIDENCE

A FOREIGN PUBLIC DOCUMENTS

The Group considered the issue of foreign public documents and the difficulty of proving such material in accordance with traditional rules, which usually required complicated certifications as to authenticity. The Group was of the view that the best means to facilitate proof of such documents was through adoption and implementation of the *Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*.

The Group recommended that countries that have yet to do so should ratify the Hague Convention and enact domestic legislation to implement that Convention. An example of implementing provisions can be found in the Australian Foreign Evidence Act.

B FOREIGN BUSINESS DOCUMENTS

The law relating to the admissibility of domestic business documents should be drafted in sufficiently broad terms so as to apply equally to foreign business documents. In particular, the definition of "business" should cover foreign and domestic entities and governments. That law should also include the following addition:

"Where under this law evidence may be adduced by way of affidavit, in the case of evidence from a foreign jurisdiction, a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, shall be admissible, whether or not it is in the form of an affidavit attested to before an official of the foreign state."

The Group considered the question of the admission of foreign business documents. After discussion, it was decided that the provisions relating to domestic business documents should apply equally to foreign business documents. The recommendations relating to domestic business documents were reviewed with this in mind. The Group determined that the definition of business was sufficiently broad to cover foreign business, both private and government, and was satisfied that the admissibility provisions were also sufficient for foreign business records.

As some of the business document provisions allow for evidence by way of affidavit, the Group considered the problem of obtaining affidavits in foreign jurisdictions. It was recognized that often it is difficult or impossible to obtain such documents from foreign jurisdictions of a different legal tradition. The Group recommended a provision in the Business Documents law, which would allow for the admission of evidence by certificate as opposed to affidavit, in the case of a foreign record.

C FOREIGN TESTIMONIAL EVIDENCE

The Group recommended the following content for a model law on foreign testimonial evidence:

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[7] The process for certification would be that provided for generally under domestic law.

[8] See section 13(7) of the Companies Act 1985.

i. Application to evidence obtained in response to a mutual assistance request

(a) This law shall apply to testimony and any exhibit annexed to such testimony obtained as a result of a request made by (name of jurisdiction/ name of responsible mutual assistance authority e.g. Attorney General) under a mutual assistance in criminal matters scheme or treaty [9]

ii Pre-conditions to admissibility

"To be admissible the testimony must:

(a) have been taken:
- *(i) on oath or affirmation; or*
- *(ii) under such caution or admonition as would be accepted by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts; and*

(b) either
- *(i) purport to be signed or certified by a judge, magistrate or officer in or of the foreign jurisdiction to which the request was made; or*
- *(ii) the (responsible authority for mutual assistance or an authorized officer of that authority) by signed writing has certified that the testimony and any annex was obtained as a result of a request made to a foreign country by or on behalf of the (responsible authority) in which case it is presumed (unless evidence sufficient to raise a doubt about the presumption is adduced) that the testimony and annex was obtained as a result of the request.*

iii. Form of testimony

(a) Testimony may be reduced to writing or be recorded on an audio or video tape.

(b) Testimony need not:
- *(i) be in the form of an affidavit; or*
- *(ii) constitute a transcript of a proceeding in a foreign court.*

The Group was of the view that the evidence obtained in the foreign jurisdiction could be in alternative forms such as in writing or recorded through the use of technology. The Group recommended the inclusion of a flexible provision to this effect.

iv. Admissibility

(a) Subject to subsection(b), foreign testimony may be adduced in a criminal proceeding.

(b) The foreign testimony is not to be adduced as evidence if:
- *(i) it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing; or*
- *(ii) the evidence would not have been admissible had it been adduced from the person at the hearing*

v. Discretion to prevent foreign testimony being adduced

(a) The court may direct that foreign testimony not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign testimony were not adduced as evidence.

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[9] The precise language used in this provision will depend on the nature of the mutual assistance legislation within the relevant jurisdiction. The principle the Group agreed upon was the provision should be of limited application applying to evidence received as a result of a requests made under a mutual assistance scheme.

(b) *Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:*

(i) *the extent to which the foreign testimony provides evidence that would not otherwise be available; and*

(ii) *the probative value of the foreign testimony with respect to any issue that is likely to be determined in the proceeding; and*

(iii) *the extent to which statements contained in the foreign testimony could, at the time they were made, be challenged by questioning the persons who made them; and*

(iv) *whether exclusion of the foreign testimony would cause undue expense or delay; and*

(v) *whether exclusion of the foreign testimony would unfairly prejudice any party to the proceeding.*

vi. Prior disclosure required

In order for the prosecution to adduce foreign evidence under this law in a criminal proceeding, the evidence must have been disclosed to the defence within a reasonable time prior to the proceedings.

The Group discussed at length the possible problems that could arise with legislation that allows for the admission of testimonial evidence, even though there had been no opportunity to cross-examine on that evidence. This will be a particular concern for jurisdictions that have a written constitution, including a bill of rights. It was noted that such legislation could be challenged on the basis of a constitutional right to cross–examine or on the basis that the process would affect the fairness of the trial. Even for countries without a written constitution, such arguments would arise.

However, the Group did note that because of the inherent difficulties surrounding the introduction of evidence from another state, this type of legislation could still be very useful. The Group was of the opinion that it would be of practical value particularly where the evidence to be admitted is of a technical nature or comprised a small part of the case. Examples were given where the evidence related to a technical analysis conducted in another country, chain of possession or explanation of documentation being adduced. The Group was firmly of the view that the provisions could not be used to admit key evidence where there had been no opportunity for the defence to cross-examine.

The Group was of the opinion that while some countries may not be able to adopt such legislation because of constitutional constraints, it might be very useful for those jurisdictions that were able to implement such a scheme, provided appropriate safeguards were included.

With these issues in mind, the Group recommended that, as in the Australian legislation, the model law should give the judge a broad discretion to decide on admission or exclusion of the evidence, after considering all of the circumstances surrounding the taking of the evidence, including any opportunity to cross-examine.

III VIDEO/SATELLITE EVIDENCE (PERSONS OUTSIDE THE COUNTRY)

A VIDEO EVIDENCE – WITNESS OUTSIDE OF THE JURISDICTION[10]

The Group considered the content of a model law on video/satellite evidence relating to witnesses who are outside the jurisdiction. The Group determined that the model law should be divided into two distinct sections. The first section would address the necessary legislation for the country providing the evidence of a witness to a foreign state i.e. the jurisdiction in which the witness is physically present. The second section would address the legislation required in the jurisdiction receiving the evidence i.e. the place where the relevant trial or proceeding is being held. For purposes of clarity, the terms "sending" and "receiving" are used in reference to the two separate sections of the law.

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[10] The Group recommendations in this regard relate to witnesses outside of the country where the proceeding is being held. However, the Group noted that in the case of a country with a large geographic area, such a provision could also apply with respect to the giving of evidence from one part of the jurisdiction to another.

In addition, to ensure that the legislation is flexible and capable of application to both existing and future technology, the Group recommendation uses neutral language such as the "provision of evidence by way of technology" and "technology that allows for the virtual presence of the witness".

Section 1 – Sending evidence by way of technology from (name of jurisdiction) to a foreign jurisdiction (Model law for the Sending Jurisdiction)

i. Evidence to be provided in response to a request for mutual assistance or under other provisions relating to foreign requests for assistance.

The provisions should apply where evidence is sought by a foreign jurisdiction pursuant to a mutual assistance request or, if applicable, a letter of request from a foreign court.

After considering some existing legislative examples, the Group was of the view that the process should be initiated in the sending jurisdiction by some form of request from the foreign jurisdiction. The two most common types of requests are those presented under mutual assistance treaties or schemes or traditional letters of request or *letters rogatory*. The Group was of the view that the law should apply to all such requests.

ii. Orders to issue under mutual assistance or other legislation

Countries should amend existing mutual assistance legislation or legislation relating to the execution of requests by foreign courts to provide for orders to issue from the relevant authority[11] *for the sending of evidence by way of technology*[12] *to the foreign jurisdiction.*

Existing legislation relating to mutual assistance or *letters rogatory* will generally set out the procedures to be used in the case of the taking of testimony from witnesses. Thus, to effectively implement a scheme for sending evidence by way of technology, that legislation should be amended to make specific reference to the power of the relevant authority to order that the testimony be given via technology.

iii. Power to compel witness to attend at location where technology available

If a person is to give evidence by way of technology under (refer to mutual assistance or other foreign request legislation) in a court or other place within the jurisdiction where the technology is available, the court shall issue a subpoena to the witness to compel his or her attendance at the court or at that place.

The Group noted that it was necessary to provide a power for the court to compel the witness to attend at a location where the necessary technology would be available for the live link. While some court facilities may now or in the future have such capacity, in many instances that will not be the case. Therefore, it is important to include in the legislation this power to compel the witness to attend at a location where the technology is available.

iv Laws of perjury and contempt still apply

Where a person gives evidence for a foreign proceeding by way of technology under (refer to mutual assistance or other foreign request legislation), the laws of the sending jurisdiction relating to contempt and perjury shall apply to that testimony.

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[11] In some jurisdictions, the mutual assistance scheme provides for court orders while under others the order will be made by an executive authority.

[12] As noted, the recommendation is framed in neutral terms. The phrase by way of technology contemplates evidence being given from one jurisdiction to another by means of video, satellite or other live link technology that may be developed in future.

The Group discussed which laws of perjury and contempt would apply to testimony that is given, effectively in two jurisdictions. The Group was of the view that because the witness is physically located in the sending jurisdiction, most often, it is those laws which will be the most convenient to apply. Therefore, to the extent that any issue could be raised as to the application of the law of the sending jurisdiction, given the actual proceeding is in another state, the Group recommended that this point be made clear in the law. At the same time, as will be seen later in the report, the Group was of the view that it would be appropriate to have dual jurisdiction in relation to these matters and recommended that the perjury and contempt laws of the receiving jurisdiction should apply also.

v. Applicable Law of Evidence and Procedure

Where a person gives evidence for a foreign proceeding by way of technology that allows for the virtual presence of the person before the court outside (name of jurisdiction) or that permits the parties and the court to hear and examine the witness, the evidence shall be given as though the person were physically before the court outside (name of jurisdiction) for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the (name of jurisdiction)law of non- disclosure of information or privilege.

One of the most complex and difficult issues in relation to this subject, is the question of what procedures and which evidentiary laws will apply to the taking of the evidence. In practical terms, since the evidence is being adduced at a proceeding in the receiving jurisdiction, it would make most sense to apply the procedural and evidentiary laws of that jurisdiction. The laws of the sending jurisdiction would not be relevant to a proceeding in a foreign jurisdiction. For example, if the witness is in a common law country and the proceeding is in a civil law country, it would not be helpful to allow for objections on the basis of the hearsay rule when no such rule exists in the civil law jurisdiction.
However, in most jurisdictions, there are some evidentiary and procedural rules that are based on fundamental societal precepts and values. For example, privileges in relation to communications within the context of certain relationships – spouses, legal counsel and client, priest/penitent – have developed because of the need to protect such relationships and the underlying trust associated to them. Given that throughout "virtual" proceedings, the witness is still physically present in the sending jurisdiction, it is still necessary to respect those rules in the sending jurisdiction, which reflect fundamental principles and values in that society.

The Group was of the view that the appropriate solution would be to apply the procedural and evidentiary laws of the receiving jurisdiction to the greatest extent possible, with the limitation that the laws of the sending jurisdiction, with respect to privileges and the protection of information[13], should continue to be respected.

In the discussion, the Group recognized that this approach would have to be reconciled with any existing laws on mutual assistance, which generally contain provisions on the laws that will apply when the evidence is taken in a traditional manner for transmission to another state. In some jurisdictions, the witness will be entitled to object to answering questions on the basis of the laws of both jurisdiction or some other combination of the two. Therefore, consideration will have to be given to whether the laws on this point should be reconciled or if there should be a distinction maintained.

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[13] This is intended to cover laws relating to the non-disclosure of matters such as national security information or cabinet documentation.

Section II Receiving evidence by way of technology from a foreign jurisdiction (Model law for the Receiving Jurisdiction)

i. Evidence through technology that allows for virtual presence

Option 1

A person other then the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction), but evidence may not be so given without leave of the court.

Option 2

(a) A court shall receive evidence given by a witness outside (name of jurisdiction) by means of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction) unless one of the parties satisfies the court that the reception of such testimony would be contrary to the interests of justice.

(b) A party who wishes to call a witness in (name of jurisdiction) under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than ten days before the witness is scheduled to testify.

Despite lengthy debate, the Group could not reach a consensus as to whether evidence given by live technology link should require the permission of the court or not. The majority view, reflected in Option 1 was that leave of the court should be required in all such cases. In the view of the majority, live link evidence constitutes a variation from the ordinary means by which evidence is given and therefore it should require the approval of the court. Those holding this view noted that the court in each instance should consider the matter with particular regard to issues such as the reasons why the witness could not be present, efforts made to secure his or her attendance, issues of cost with respect to attendance as well as the conditions under which the evidence would be given in the foreign state. In the opinion of the majority, the court should then decide in each case whether or not to receive the evidence in this manner.

The minority view was that the legislation should be framed to allow for the reception of the evidence without leave of the court, but a discretion should be retained for the court to refuse to receive the evidence if satisfied that it would be contrary to the interests of justice to do so. Those adhering to this view were of the opinion that unlike "alternative" means of giving evidence, there is little distinction to be drawn between live evidence and live link evidence. In both instances the witness can be heard and observed by all parties and the examination and cross-examination will be in real time. Thus there is no reason why adducing evidence in this way should require the leave of the court. They were also of the view that in order to overcome the potential for bias towards existing approaches and away from technology, it was necessary to allow for the evidence to be received in the absence of a party satisfying the court, on a standard of interests of justice, that it should not be done.

For this reason two options have been included for consideration in relation to the reception of this evidence.

ii. Audio evidence

A person other than the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the parties and the court in (name of jurisdiction) to hear but not see, and examine, the witness if the court is of the opinion that it would be appropriate considering all the circumstances including the nature of the witness' anticipated evidence and any potential prejudice caused by the fact that the witness would not be seen by the parties or the court.

The Group was of the opinion that the model law should cover not only live video link but audio link as well. In their view, while audio evidence would not be appropriate for all situations, it could be very useful where the nature of the evidence to be given is of a technical or minor nature and video technology is either not available or otherwise impracticable. However, unlike the case of "virtual" technology, here the Group agreed that, because the witness cannot be seen, the court must have a discretion to consider all of the circumstances and determine whether or not to receive the evidence.

iii. Application of laws of contempt of court and perjury

(a) *Subject to subsection (b), where evidence is received by a court in (name of jurisdiction) from a witness who is outside the jurisdiction, pursuant to sections 1 or 2, the evidence is deemed to be given in (name of jurisdiction) for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.*

(b) *A witness shall not be found in contempt under the laws of the receiving state for refusing to answer a question, where that refusal is based on a law in the sending jurisdiction that applies to the proceedings. Where there is an issue as to the law of the sending jurisdiction or its applicability to the proceeding, the matter may be determined by a ruling of a judge of the sending jurisdiction present during the taking of the evidence or if no judge is present, by a certificate of a judge of the sending jurisdiction, provided subsequently.*[14]

As mentioned earlier, the Group was of the view that it would be appropriate to provide for dual jurisdiction over matters such as perjury or contempt of court. This provision would allow for the jurisdiction receiving the evidence via the technology to have jurisdiction in the case of perjury or contempt. While realistically it will be difficult to exercise the jurisdiction because the person in question is not present in the territory, it was still the view that there may be some instances where the receiving jurisdiction would want to pursue the matter.

At the same time, with reference to contempt, the Group was of the opinion that it was necessary to include a protection for the witness in those cases where the law of the receiving jurisdiction would require an answer to a question but the applicable evidentiary law of the sending jurisdiction would preclude it. For example, a witness is giving evidence from Switzerland to a proceeding in the UK. He or she objects to answering a question put by counsel in the UK, on the basis that the Swiss banking confidentiality law prohibits the disclosure of the information. Nothing in the UK law would permit or prevent the witness from answering the question. It would however be inappropriate for the witness, caught between the law of two jurisdictions, to have to face sanction in the UK for refusing to answer the question. Therefore the Group was of the opinion that in such cases, it should be clear that the witness could not be found in contempt in the receiving jurisdiction for relying on an applicable law of the sending jurisdiction in which he or she is located.

The Group considered the very difficult practical problems that arise because the laws of both jurisdictions, in some respects, apply to the proceedings. In particular, they discussed how decisions would be made in relation to objections raised in the course of the proceedings.

Where the objection is based on the law of the receiving jurisdiction, the Group determined that the judge at the proceeding in the receiving jurisdiction would be in a position to rule on such matters at

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[14] As is the case where evidence is taken in one jurisdiction for use in a foreign jurisdiction, in any manner, it may be necessary to resolve issues relating to the laws of the foreign jurisdiction. To that end, many jurisdictions will have existing provisions in their mutual assistance legislation, which describes how to resolve questions that arise with respect to foreign law. Where such provisions already exist, they should be amended as necessary to apply to evidence taking by way of technology. Alternatively, if there are no existing provisions on resolution of these issues, it will be necessary to provide for this in any amendments to allow for video evidence. Examples of such schemes can be found in the Australian Mutual Assistance legislation and Canadian Mutual Assistance in Criminal Matters Act.

the time. However, when the objection was based on the evidentiary law of the sending jurisdiction, e.g. a privilege was invoked, there were practical problems.

If a judge of the sending jurisdiction is present for the giving of the evidence, then he or she could rule on the matter during the proceeding. However, as the actual proceeding is being held in the receiving jurisdiction, in most instances there will be no judge present. For this reason, the Group decided that there should be a specific provision for a ruling by a judge in the sending jurisdiction to be submitted by way of certificate, subsequent to the proceedings.

In considering this issue, the Group noted that in some jurisdictions, similar provisions exist with respect to the taking of evidence generally, in response to a mutual assistance request. Thus, it would be important to ensure again that these provisions are consistent with those under existing general law.

iv. Oath, affirmation or other requirement

Except in the case of a witness who would not be required to give sworn or affirmed evidence if physically present in (name of jurisdiction), evidence given under sections (1) or (2) shall be given:

(a) under oath or affirmation in accordance with the law of (name of jurisdiction) administered via the technology[15]*; or*

(b) under or oath or affirmation in accordance with the law in the place in which the witness is physically present and administered in that place; or

(c) in any other manner that demonstrates that the witness understands that they must tell the truth.

The Group recognized that when evidence is taken in this manner, there must be provision in the law to address the differences that exist between legal systems with reference to the administration of an oath or affirmation. While in most common law systems, evidence is taken under a sworn oath or on affirmation, in many other legal systems this is not the case. For example, in some legal systems the witness will not be sworn but will confirm his or her evidence after it is taken. As a result of these differences, the Group recommended the inclusion of a flexible provision that would allow for evidence to be admissible even where not taken in accordance with the normal rules respecting oath or affirmation.

v. Other uses for video technology

The Group also noted that in addition to using video technology for the taking of evidence, countries can consider enacting legislative provisions to allow for its use in matters such as remands of persons in custody and bail applications. A sample of legislation in this regard can be found in section 515(2.2) and (2.3) of the Canadian Criminal Code.

IV VULNERABLE WITNESSES

The Group discussed the issue of special legislative provisions addressing vulnerable witnesses and recommended the following provisions for a model law.

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[15] This provision may also require consequential amendments to existing law with respect to the administering of an oath to allow for an official in the receiving jurisdiction to administer the oath via technology to the witness located in another jurisdiction.

i. Definition of Vulnerable witness[16]

A vulnerable witness means a witness, whose ability to give evidence or the quality or whose evidence, is likely to be affected by one or more of the following factors:

(a) age or maturity;
(b) physical, intellectual, or psychiatric disability;
(c) trauma suffered by the witness;
(d) the witness's fear of intimidation;
(e) the linguistic or cultural background of the witness;
(f) the nature of the proceeding;
(g) the nature of the evidence that the witness is expected to give;
(h) the relationship of the witness to any party to the proceeding;
(i) the absence of the witness from (name of country);
(j) any other ground of similar nature

The Group was of the view that the term "vulnerable witness" should be broadly defined, using a non-exhaustive list of factors that a court could consider in determining if any particular witness should be considered as "vulnerable" in a specific case. The Group recommended in that regard the factors listed in the New Zealand Law Reform Commission document. The Group considered that such an approach would provide flexibility and ensure that all types of witnesses can be protected as may be necessary.

ii. Application for directions by the Court

(a) Where the witness is the complainant in the case and is [14] years of age or under, he or she shall be taken to be a vulnerable witness and shall give evidence in a manner described in subsection 3(i),(ii) or(iii) as directed by the judge, and the judge may also apply any other measure outlined in subsections 3(iv)-(ix) in relation to that testimony.

(b) In any other case, the judge may, either on the application of a party or a witness or on the judge's own initiative, direct that a vulnerable witness is to give evidence in a manner described in Section 3.

Because of the special vulnerability of children, particularly those who are the victims of violent offences, the Group was of the view that they should always be considered to be vulnerable and their evidence should be given using a measure that will avoid a face-to-face confrontation with the accused. The Group recommended a mandatory provision to that effect for children who are complainants in the case.

The Group was of the view that such measures should also be available to other witnesses that may fall within the definition of "vulnerable witness" in a particular case. The Group recommended a section empowering the judge to direct the use of special measures in relation to particular witnesses.

(c) (i) Subject to subsection (ii), the prosecution shall apply to the court for directions in accordance with subsection 2(b) in relation to the complainant in any serious sexual offence case.

(ii) The complainant may waive the requirements of subsection 2(c)(i).

The Group considered whether the use of such measures should also be mandatory in the case of victims of serious sexual offences. Ultimately the group decided that the matter was not as clear as with children. There may be circumstances where such measures would not be appropriate for an

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[16] The group decided against any attempt to actually define vulnerable witness exhaustively in favour of a general definition and criteria. There was however discussion of the types of witnesses that were intended to be covered which included mentally or physically handicapped persons, witnesses who are ill or dying and witnesses who have reason to be fearful of facing the accused.

adult complainant even in a serious sexual offence case. At the same time, the Group did consider that some form of presumption should apply in the case of such witnesses, so that such measures would automatically be considered in every case of this nature. The Group recommended that in the case of such witnesses, the prosecution should be obligated to make an application to the court for special measures to apply. However, the Group also recognized that an adult complainant should be able to waive the requirement and choose to face the accused without the use of any special measure.

iii. Measures available in the case of vulnerable witnesses

(a) *The judge may direct under Section 2 that:*

(i) the witness gives evidence while in the courtroom but unable to see the defendant or specified party or witness by virtue of a screen or other device provided that the screen or other device does not prevent the witness from seeing or being seen by
1) the judge and/or jury;
2) the legal representatives acting in the proceedings; and
3) any interpreter or other person appointed to assist.

(ii) the witness gives evidence from an appropriate place outside the courtroom, either in (name of jurisdiction) or elsewhere by means of technology which allows for the witness to see or and hear a person in the courtroom and be seen and heard by the persons listed in subsection 3(a)il-3;

(iii) a video recording of an interview of the witness, or a portion thereof made before the hearing be admitted as evidence in chief[17];

(iv) where the examination in chief is tendered in accordance with subparagraph (iii), cross – examination and any re-examination be video – recorded and any such recording or a portion thereof be admitted as the witness' evidence on cross-examination or re- examination;

(v) no person other then those specified in subsection 3(a)(i), 1-3 and the accused, be present in the courtroom during the giving of the testimony;

(vi) the wearing of wigs or gowns be dispensed with during the giving of the evidence;

(vii) the examination, cross-examination and/or re-examination of the witness be conducted through an interpreter or other person approved by the court;

(viii) the witness be assisted in the giving of evidence by a person approved by the court; or

(ix) the witness gives evidence using a device to overcome any disability, disorder or impairment that may affect the ability of the witness to hear or understand the questions and communicate answers.

(b) In giving directions under this section, the court may provide for more then one measure in any particular case.

As previously noted, the decision had been taken by the Group to cover a spectrum of witnesses who, for one reason or another, may meet the definition of "vulnerable witness" in a particular case. This is intended to cover a range of persons, from those who may be traumatized by having to come face to face with the defendant to those who may have difficulties with communication by virtue of physical or mental impairment. As a result, it was considered necessary to include a broad range of measures that the court could draw from in giving directions in any particular case. The list was crafted on the basis of this principle, drawing from legislative examples in the UK and New Zealand. The first three of those measures were identified to be of particular importance in cases where face–to-face confrontation with the accused will be very difficult. Thus, it is one of those three measures that the judge will have to apply in the case of a child witness. Other provisions such as the use of interpreters or devices could be used in the case of a witness with an impairment affecting the ability to communicate. In addition, the Group recommended that there be a specific provision to reflect that the judge could choose to apply a combination of measures in any particular case.

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[17] In some jurisdictions, the legislation or related rules will specify either generally or in detail the manner in which such interviews should be conducted. An example of that type of provision is Section 4 of the Evidence (Special Provisions) Act No. 32 of 1999, Sri Lanka.

The majority of the Group was of the view that it would be sufficient to require only that the judge, jury , legal counsel and interpreters to be able to see and hear the witness giving evidence from outside the court via technology, without making special provision for the accused being able to see and hear. Others in the Group were concerned the accused may have a right to personally observe the witness as a part of the right of confrontation. They noted while this will not always be possible where a screen device is used under subsection (a) (depending on the types of screens available), that is because of necessity. In the case of video or other live link, the technology is such in many places that provision can be made for the witness to see and hear only those questioning him or her while all others in the courtroom can see the witness. In light of this difference, some members of the Group felt that the provision should reflect that the accused must also be able to see and hear the witness personally. If a jurisdiction considers it necessary to provide for this, subsection (ii) should be amended to add the accused at the end of the list of persons from subsection 3(i) 1-3.

Careful consideration should be given to the inclusion of a provision which allows for the admission of video taped cross - examination of the witness. If it can be argued that this requirement hampers the ability of the defence to cross-examine effectively, for example, because it will require cross-examination at an early stage of the proceedings, the legislation may be subject to challenge. Jurisdictions may wish to consider special conditions for the use of this measure such as a higher threshold before it will be ordered or a requirement that the defence must agree with the timing of the cross-examination.

The Group noted that in each jurisdiction, careful consideration would have to be given to what, if any, consequential amendments would be needed to existing legislation in order for these provisions to be effectively implemented. For example, if there is a requirement at law or by statute for trial evidence be given in the courtroom and not anywhere else, an exception will have to be created for cases where such special measures are ordered, in order that the evidence will be admissible. A good example of how this issue has been dealt with can be seen in The Evidence (Special Provisions) Act No 32 of 1999, Sri Lanka.

The Group noted that, whether by practice or by legislation, the evidence of vulnerable witnesses, particularly children and victims of serious sexual offences, should always be video recorded when given at the first proceeding (preliminary or trial), even in instances where it is not introduced by way of video tape at the proceeding. This is to ensure that if a re- trial becomes necessary for any reason, an application can be made to introduce the tape, as opposed to requiring the witness to testify again. A provision to allow for the introduction of such evidence in the case of a re-trial or subsequent proceeding, either on a discretionary or mandatory basis, should also be included in the law, unless it is already permitted under general rules.

The Group recognized that provisions of this nature, which place restrictions on the manner in which cross-examination will be conducted, could be subject to constitutional challenge. As noted above, some members of the Group were particularly concerned about the effect of such measures on the right of the accused to "confront" his or her accusers. At the same time, it was noted that such challenges have not been successful to date,[18] in those jurisdictions where they have been advanced. In addition, the Group was of the view that the fundamental concern with any such provision had to be whether it infringes on the right to a fair trial. In so far as the measures are clearly designed to permit cross-examination and the testing of the evidence, the Group was of the view that arguments that the resulting trial is unfair were unlikely to succeed.

iv. Anonymous witnesses

The Group discussed the possibility of provisions allowing for witness testimony on an anonymous basis. It was noted that in cases of terrorist groups or organized crime, such a provision could be of critical importance, to obtain any witness testimony. On the other hand, the Group was concerned

[18] See for example *R.v. D.O.L* [1993] 4 S.C.R. 419, Supreme Court of Canada, (SCC); *R. v. Levogiannis* [1993] 4 SCR 475 (SCC).

about the impact of such provisions on the rights of the accused and particularly his or her ability to cross-examine fully without knowledge of the identity of the witness. The Group recommended consideration of such provisions but only with appropriate safeguards to protect the rights of the accused, such as the use of an independent counsel for cross-examination of such persons.

v. Questioning of complainant by unrepresented accused

(a) *An accused in a sexual offence or domestic violence case is not entitled to personally cross-examine the complainant or any child witness*[19].

(b) *An unrepresented accused, who is precluded from personally questioning a witness under section (1), may have his or her questions put to the witness by the judge or a person appointed by the judge for that purpose.*

(c) *In respect of each question, the judge may*
- (i) *put the question or allow the question to be put to the witness;*
- (ii) *put the question or require the question to be put to the witness in a form rephrased by the judge; or*
- (iii) *refuse to put or refuse to allow the question to be put to the witness.*

The Group was of the view that in certain types of cases i.e. sexual offences, child abuse, domestic violence, personal cross-examination by the accused should not be permitted. In some jurisdictions with such a prohibition, there is a requirement for the court to appoint counsel to conduct the cross-examination for the accused. However, the Group recognized that small jurisdictions might not have the resources or capacity to provide counsel in every case of this nature. Thus, the alternative set out in the New Zealand Law Reform Commission Evidence Code was recommended, providing flexibility for either the judge or another person appointed by him or her (which could include counsel) to question the witness.

vi. Complainants in Sexual Offence Cases

The Group considered what legislative restrictions should apply to evidence adduced by way of cross-examination or otherwise in relation to the sexual experience of complainants in sexual assault cases. Three areas of concern were identified – evidence of sexual reputation, prior sexual history generally and prior sexual history with the accused.

The Group determined that any model law in this area would have to strike an appropriate balance between protecting complainants from abuse and further victimization and preserving the fair trial rights of the accused.

The Group recommended the following content for a model law restricting the evidence to be adduced with respect to complainants in sexual offence cases.

vii. Sexual reputation

In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters.

The Group considered that evidence of general sexual reputation should not be permitted. In the opinion of the Group, such evidence could never be relevant to the issues in the case and precluding such evidence would not in any way prejudice the fair trial rights of the accused. At the same time such evidence is highly offensive to the witness and allows for unacceptable inferences to be drawn.

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[19] The term complainant includes a child complainant.

viii. Evidence of prior sexual history with persons other then the accused

In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other then the defendant.

The Group held the same view with respect to evidence of sexual experience with persons other then the accused. Despite reflection and discussion, the Group could not think of an instance where such evidence would be relevant to the defence of the accused. Thus, on the basis of the same reasoning as outlined in relation to reputation evidence, the Group recommended that the model law prohibit such evidence.

ix. Sexual experience with the accused

(a) In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused for the purpose of supporting an inference that the complainant:

(i) is more likely to have consented to the sexual activity that forms the subject-matter of the charge or;
(ii) is less worthy of belief.

(b) For any other purpose, in the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused, other than in relation to the sexual activity that forms the subject matter of the charge, unless:

(i) an application for leave is made to the judge ,in the absence of the jury[20]*; and*
(ii) the judge is satisfied that a refusal to allow the evidence to be given or the question to be put would prejudice the fair trial of the accused person.

In the case of evidence of sexual experience with the accused, the Group acknowledged that in some limited circumstances such evidence could be relevant and even critical to the defence and an absolute prohibition could prejudice fair trial rights. At the same time, the Group was of the view that the right to adduce such evidence should not be unlimited but rather should be allowed only where appropriate, as determined by the trial judge. The Group concluded that the evidence should never be allowed to draw the inference of propensity nor for the purposes of general credibility. Where the evidence is to be adduced for other reasons, it should be only with the leave of the court. In addition, because of problems with entrenched views and bias, even within the judiciary, the Group was of the view that there should be a very high threshold for admissibility.

x. Other protective measures in sexual offence cases

(a) In the case of a sexual offence, the judge shall order a ban on the publication or broadcast of the identity of the complainant or information that could disclose the identity of the complainant, unless the complainant consents to publication or broadcast.

(b) The judge may order a ban on the publication or broadcast of the identity of other witnesses or information that could disclose the identity of those witness, or order a general ban on publication or broadcast of testimony, where satisfied that it would be in the interests of justice to do so[21]*.*

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[20] The reference to the absence of the jury would only be applicable to those jurisdictions that have a jury system.

[21] The Group also considered the possibility of allowing for a ban on publication of the identity of the accused in sexual offence cases, because of the possible damage to reputation despite the presumption of innocence. However, the majority view was that this would be very difficult to provide for given the generally public nature of criminal proceedings and charges. It would also be difficult to justify such a measure in one case as opposed to another. For this reason, the Group did not include such a recommendation but some jurisdictions may wish to consider the possibility of doing so.

The Group also noted additional measures that should apply in the case of sexual offences. In particular they recommended a mandatory ban on the publication of the identity of the complainant, unless the complainant waives the requirement. In addition, the Group recommended a general discretion for a judge to order a ban on publication of the identity of other witnesses or a ban on publication of testimony, in cases where it would be in the interests of justice to do so.

V CORROBORATION

The Group considered the common law rules relating to corroboration. It was recognized that historically there were two types of requirements with respect to corroboration. In some cases, as a matter of law, a conviction could not be based on the uncorroborated evidence of a witness. Two common examples of the application of this rule were in relation to perjury offences and the unsworn testimony of a child witness.

In addition to the rule of law, the judges developed rules of practice, which required a warning to juries or a self-instruction, in certain cases, about the danger of convicting on the evidence of a particular witness alone. Two common instances were in the case of accomplices and the evidence of the complainant in a sexual assault case.

The Group considered the content of a model law relating to corroboration.

i. Requirement at law for corroboration

(a) *Except in relation to the offences listed in subsection (b), there shall be no requirement for corroboration in order for a person to be convicted of a criminal offence.*[22]

(b) *In the case of perjury*[23]*, treason and sedition, a conviction may not be founded on the uncorroborated evidence of a witness.*

The Group first considered requirements at law for corroboration in order to convict. It was noted that in many common law jurisdictions, such a rule is still applied in relation to certain types of offences or certain types of evidence. The Group considered that, with the exception of perjury and related false evidence offences and treason or sedition, there was no justification to maintain the requirement for corroboration as a rule of law in any case.

With respect to perjury and related offences (false statements, false oaths, false testimony) it was the view of the Group that a requirement for corroboration is necessary as a matter of law, for the purposes of the proper administration of justice. To encourage participation and cooperation in the justice system, witnesses need to have the assurance that even if they are vigorously cross-examined at a proceeding and their evidence is discredited, they will not face subsequent prosecution on that basis alone.

With respect to treason and sedition, the Group was of the view that the underlying rationale – the potential for abuse particularly in context of political instability- justified the maintenance of the requirement for corroboration in such cases as well.

ii. Mandatory Warnings or instruction

There shall be no mandatory requirement for a judge in any criminal case to warn the jury or instruct him or herself on the danger of convicting on the evidence of a particular witness alone.

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22 This type of provision will work for a jurisdiction that has requirements for corroboration under common law. If there are any statutory provisions requiring corroboration, those should be repealed specifically.

23 If a jurisdiction has other related offences such as giving false testimony or making false statements, these should also be subject to the same requirement for corroboration.

The Group was of the view that all requirements for mandatory warnings should be abolished. All evidence, whether emanating from an accomplice or any other particular witness should be assessed and weighed in the same manner. The Group noted however that the abolishment of mandatory warnings was entirely without prejudice to the general discretion of a judge to instruct him or her self or the jury on issues of evidence in any case.

The Group discussed as well, whether it might be necessary to go even further and prohibit such warnings being given at all. The point was made that in the absence of a general prohibition of warnings based on the type of evidence or witness, judges accustomed to the rules might well revert back in practice to the common law position. After consideration, the Group decided not to include a specific recommendation on this point because it may be too prescriptive of the judge's discretion for many jurisdictions. However, the Group noted that in considering amendments on corroboration, a jurisdiction might wish to include a general prohibition if that is what is necessary to eliminate warnings in relation to certain types of evidence or witnesses.

iii. Evidence of children

(a) *A witness, including a child witness, shall be presumed competent to give evidence and no inquiry into competence is required unless the judge has reason to believe the witness is unable to understand questions or provide intelligible answers.*

(b) *The evidence of a child under the age of [12] shall not be taken on oath or affirmation. However, before hearing the evidence of such a witness, the judge should instruct the child on the importance of telling the truth and not telling lies.*

(c) *Evidence given in accordance with subparagraph (b) shall be deemed to have been given under oath or affirmation.*

As noted above, the Group recommended the abolishment of a legal requirement for corroboration in the case of unsworn testimony from a child. On a related point, the Group considered the question of the evidence of children more generally and in particular the testing of competence and the requirement to determine if the evidence should be sworn or not. The Group was of the view that such requirements were outdated and inconsistent with the approach taken in relation to other types of evidence. The Group was of the view that the Court should be able to presume all witnesses competent to testify and only if there was a basis should questions of competency be examined. In addition, the Group recommended that the evidence of all children[24] be taken unsworn but at the same time be treated in the same manner as any other evidence.

VI DNA

The Group considered existing legislation in some Commonwealth jurisdictions as well as the "Recommendation" adopted by the Committee of Ministers of the Council of Europe.[25]The Group took cognisance of the fact that forensic DNA analysis would assist in the determination of guilt or innocence of persons in criminal trials. However, in noting its potentially positive impact, the Group was especially careful to ensure that fundamental principles such as the inherent dignity of the individual, respect for the human body and the rights of accused persons to a fair trial should be taken into account when considering legislation.

More so "although DNA analysis is sometimes referred to as "DNA fingerprinting" the analogy is incorrect. The differentiation achieved by a genetic profile will depend on a number of factors, such

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[24] The definition of child would depend on the relevant law of the particular jurisdiction.

[25] The use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system; explanatory memorandum.Recommendation No. R (92) 1 adopted by the Committee of Ministers of the Council of Europe on 10 February 1992 and explanatory memorandum.

as the technique employed and, particularly the quality of the original material. At best a profile may produce odds of several million to one against the DNA having originated from someone other than the individual involved. At the other end of the scale the differentiation achieved may be low. It is accordingly not possible to generalise over the use of DNA analysis as the sole basis for a conviction: it will be for the court to decide in any particular case."[26]

A. *Taking of Samples*

The Group strongly felt that unless there was informed consent, authorisation for the taking of bodily samples should be obtained from a court on application in accordance with specified criteria . Provision was made for urgent cases , with safeguards against abuse.

1. *A sample may be taken from a person only:*

   (a) If a police officer of at least the rank of [.....] authorises it to be taken and;

   (b) If appropriate written consent is given.

   "appropriate consent", in this context means,

   (i) the written consent of the person from whom the sample is to be taken if the person is 17 years or older;
   (ii) the written consent of the parent or guardian and the consent of the person from whom the sample is to be taken if the person is 14 years or older but under 17 years old;
   (iii) the written consent of the parent or guardian of the person from whom the sample is to be taken if the person is under the age of 14.

2 *A police officer may only give an authorisation under [subsection 1(a)] if he or she has reasonable grounds :*

   (a) for suspecting the involvement of the person from whom the sample is to be taken in an [offence][27]; and

   (b) for believing that the sample will tend to confirm or disprove the involvement of the suspect in the offence.

3 *In the absence of consent, a sample must be obtained by a warrant from a judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe*

   (a) that a [specified/designated][28] offence has been committed,

   (b) that a bodily substance has been found
   (i) at the place where the offence was committed,
   (ii) on or within the body of the victim of the offence,
   (iii) on anything worn or carried by the victim at the time when the offence was committed, or
   (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,

   (c) that a person from whom a sample is sought was a party to the offence, and

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[26] Ibid; Par.13, pg. 14.

[27] Different jurisdictions may wish to distinguish between minor and more serious offences, and accordingly use terminology relevant to its legal system.

[28] Different jurisdictions will use different terms.

(d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a police officer to obtain, or cause to be obtained under the direction of the police officer, a bodily substance from that person, by means of an investigative procedure described below for the purpose of forensic DNA analysis.

4 *The ex parte application must be supported by an affidavit setting out the grounds on which the sample is required.*

5 *In urgent matters, the ex parte application may be supported by oral evidence, provided that an affidavit is filed with the court as soon as is practicable.*

6 *Telewarrant*

Where a police officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication setting out the grounds referred to in paragraph 1.3 above. In such case, as soon as practicable thereafter, the police officer should submit in writing an affidavit outlining the information provided by telephone or other means of telecommunication.

B. *Investigative procedures*

The warrant authorizes a police officer or another person under the direction of a police officer to obtain and seize a bodily substance from the person named in the warrant.[29]

C. *Terms and conditions*

The warrant shall include any terms and conditions that the judge considers advisable to ensure that the seizure of a bodily substance authorized by the warrant is reasonable in the circumstances.

D. *Execution of warrant*

1. *Before executing a warrant, a police officer shall inform the person against whom it is to be executed of*

(a) the contents of the warrant;
(b) the nature of the investigative procedure by means of which a bodily substance is to be obtained from that person;
(c) the purpose of obtaining a bodily substance from that person;
(d) the possibility that the results of forensic DNA analysis may be used in evidence;
(e) the authority of the police officer and any other person under the direction of the police officer to use as much force as is necessary for the purpose of executing the warrant; and

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[29] The term "bodily substance" includes the following:
(a) individual hairs plucked from the person, including the root sheath;
(b) buccal swabs obtained by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
(c) blood obtained by pricking the skin surface with a sterile lancet, or
(d) a dental impression.

2. *In the case of a young person or a mentally disabled person, the information set out in paragraphs (a) to (e) above must be given in the presence of a legal representative or a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person or mentally disabled person.*

E. *Detention of person under warrant*

A person against whom a warrant is executed:

(a) may be detained for the purpose of executing the warrant for a period that is reasonable in the circumstances for the purpose of obtaining a bodily substance from the person; and

(b) may be required by the police officer who executes the warrant to accompany the police officer to the place where the warrant is to be executed.

F. *Respect of privacy*

A police officer who executes a warrant against a person or a person who obtains a bodily substance from the person under the direction of the police officer shall ensure that the privacy of that person is respected in a manner that is reasonable in the circumstances. The person taking the sample shall be of the same sex as the person from whom the sample is being taken.

G. *Execution of warrant against young person or mentally disabled person.*

The Group noted that special care should be taken in respect of obtaining samples from vulnerable persons, viz. young persons and mentally disabled persons.

A young person or a mentally disabled person against whom a warrant is executed has, in addition to any other rights arising from his or her detention under the warrant,

(a) the right to a reasonable opportunity to consult with, and

(b) the right to have the warrant executed in the presence of a legal representative or a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.

H. *Waiver of rights of young person*

A young person may waive his or her rights under subsection (.....) but any such waiver

(a) must be recorded on audio tape or video tape or otherwise; or

(b) must be made in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

I. *Destruction of bodily substances*

Whilst there was some discussion on the retaining of all samples obtained in a databank, the Group was of the view that this would be an infringement of an individual's rights and accordingly decided to allow such retention and usage in specified and limited circumstances.

A bodily substance that is obtained from a person in execution of a warrant and the results of forensic DNA analysis shall be destroyed forthwith after

(a) *the results of that analysis establish that the bodily substance referred was not from that person;*

(b) *the person is finally acquitted of the designated offence and any other offence in respect of the same transaction otherwise than by reason of a verdict of not criminally responsible on account of mental disorder; or*

(c) *the expiration of one year after*

(i) *the person is discharged after a preliminary inquiry into the designated offence or any other offence in respect of the same transaction, .*

(ii) *the dismissal, for any reason other than acquittal, or the withdrawal of any information charging the person with the designated offence or any other offence in respect of the same transaction, or*

(iii) *any proceeding against the person for the offence or any other offence in respect of the same transaction is stayed, unless during that year a new information is laid or an indictment is proferred charging the person with the designated offence or any other offence in respect of the same transaction or the proceeding is recommenced.*

J. *Exception*

Notwithstanding the above, a judge, on application supported by affidavit and upon notice to the affected party, may order that a bodily substance that is obtained from a person and the results of forensic DNA analysis not be destroyed during any period that the judge considers appropriate if the judge is satisfied that the bodily substance or results might reasonably be required in an investigation or prosecution of the person for another designated offence or of another person for the designated offence or any other offence in respect of the same transaction. A Judge may waive notice being given to the other party upon application, if it is found to be in the interests of justice. [30]

K. *Expert Reports*

(1) *Subject to (2) an expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.*

(2) *If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.*

(3) *For the purpose of determining whether to give leave the court shall have regard –*

(a) *to the contents of the report;*

(b) *to the reasons why it is proposed that the person making the report shall not give oral evidence;*

(c) *to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and*

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[30] Some jurisdictions who may wish to ensure that there are further express safeguards in the use of the bodily substances and the results of forensic DNA analysis should add the following clause:

"Limitations on use of bodily substances

(1) No person shall use a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence for the purpose of forensic DNA analysis.

Limitations on use of results of forensic DNA analysis

(2) No person shall use the results of forensic DNA analysis of a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence or any other designated offence in respect of which a warrant was issued or a bodily substance found in the circumstances in the application for the warrant or in any proceedings for such an offence."

(d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.

(5) In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

Note: The Expert Group was of the view that this was an appropriate scenario to apply for the taking of the expert witnesses evidence by video-link in view of the cost factors for small jurisdictions.

Commonwealth Expert Group on
Modernisation of the Law of Evidence

London, 15-19 January 2001

MEMBERS

Botswana	**Mrs Leatile I Dambe** Senior Asst Attorney General
Jamaica	**Mr C. Dennis Morrison, Q.C** Attorney-at-Law
New Zealand	**Judge Margaret Lee** Commissioner in Charge Law Commission
Sri Lanka	**Mr K Kanag-Isvaran** President's Counsel
United Kingdom	**Ms Helen Garlick** Senior Legal Adviser Serious Fraud Office
Other	**Professor John Hatchard** Commonwealth Legal Education Association
Commonwealth Secretariat	**Ms Kimberly Prost** **Mr Hanif Vally** Co-Convenors

FREEDOM OF INFORMATION

INTRODUCTION

1. Commonwealth Heads of Government at their Durban Meeting in 1999 noted the Commonwealth Freedom of Information Principles, which were endorsed by the Commonwealth Law Ministers at their Meeting in 1999 in Trinidad and Tobago. They recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.

DRAFT MODEL FREEDOM OF INFORMATION BILL

2. The object of a law on freedom of information is to safeguard the right of members of the public to access information held by public authorities with the aim of increasing transparency and accountability of government. To assist member countries which have yet to enact laws providing for access to information, the Secretariat prepared a draft model Bill for examination by Senior Officials, drawing on the laws in existence in various member countries and reflecting the principles adopted by Ministers.

3. Senior Officials examined the model Bill and advised the Secretariat of detailed amendments they considered necessary to improve the Bill. The model Bill as so amended is set out in the *Annex* to this paper

4. Many of the laws upon which the model annexed to this paper draws, establish an office of Information Commissioner. The Bill does not do so because small island states and developing countries often experience human resource constraints which would make the staffing of such a position difficult. It is the view of the Secretariat that freedom of information legislation can work in small countries without the assistance of a dedicated officer. What is needed is commitment of each department of state to the principle that the people should have access to information.

5. Senior Officials recommend to Law Ministers that they support the use of the model Bill by those countries desiring to give effect to the Commonwealth Freedom of Information Principles who seek assistance in the development of an appropriate legislative framework.

ACTION BY LAW MINISTERS

6. Law Ministers may wish to endorse the annexed Freedom of Information Model Bill and commend it to member countries for adoption (or adaptation to national circumstances).

FREEDOM OF INFORMATION ACT *[.....]*

Arrangement of Sections

PART I
PRELIMINARY

Section

PART II

PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

PART III

RIGHT OF ACCESS TO INFORMATION

PART IV

EXEMPT DOCUMENTS

PART V

MISCELLANEOUS

FREEDOM OF INFORMATION MODEL BILL

AN ACT to give members of the public rights of access to official documents of the Government and public authorities and to provide for connected matters.

BE IT ENACTED by the Parliament of [*name of country*] as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the Freedom of Information Act, [*year of enactment*].

Commencement

2. This Act shall come into operation on a day to be appointed by the Minister, by Order published in the *Gazette*.

Object of Act

3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by -

(a) making available to the public information about the operations of public authorities and, in particular, ensuring that the rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those rules and practices;

(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities; and

(c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect or misleading.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

Interpretation

4. In this Act -

"applicant" means a person who has made a request in accordance with section 13;

"document" means any medium in which information is recorded, whether printed or on tape or film or by electronic means or otherwise and includes any map, diagram, photograph, film, microfilm, video-tape, sound recording, or machine-readable record or any record which is capable of being produced from a machine-readable record by means of equipment or a programme (or a combination of both) which is used for that purpose by the public authority which holds the record;

"enactment" means an Act or an instrument (including rules, regulations or by-laws) made under an Act;

"exempt document" means a document which, by virtue of any provision of Part IV, is an exempt document;

"exempt information" means information the inclusion of which in a document causes the document to be an exempt document;

"Minister" means the Minister who has been assigned responsibility for [*information/public administration*] under the Constitution;

"official document" means a document held by a public authority in connection with its functions as such, whether or not it was created -

(a) by that authority; or

(b) before the commencement of this Act,

and, for the purposes of this Act, a document is held by a public authority if it is in its possession, custody or control;

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing -

(a) information relating to the race, national or ethnic origin, religion, age or marital status of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;

(f) correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence; or

(g) the views or opinions of any other person about the individual.

"prescribed" means prescribed by the Minister by regulations made under this Act;

"public authority" includes -

(a) a House of Parliament or a committee of any House of Parliament;

(b) the Cabinet as constituted under the Constitution;

(c) a Ministry or a department or division of a Ministry, or the private office of a Minister, wherever located;

(d) a local authority;

(e) a public statutory corporation or body;

(f) a body corporate or an incorporated body established for a public purpose, which is owned or controlled by the state;

(g) any other body designated by the Minister by regulation made under this Act, to be a public authority for the purposes of this Act;

"responsible Minister" in relation to a public authority means the Minister of Government to whom responsibility for the public authority is assigned.

Non - application of Act

5. (1) This Act does not apply to -

(a) the [*President*]; or

(b) a commission of inquiry issued by the [*President*]

(2) For the purposes of this Act -

(a) a court, or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, shall not be regarded as a public authority; or

(b) a registry or other office of court administration, and the staff of such a registry or other office of court administration in their capacity as members of that staff in relation to those matters which relate to court administration, shall be regarded as part of a public authority.

Act to bind state

6. This Act shall bind the state.

PART II

PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

Publication of information concerning functions, etc, of public authorities

7. (1) A public authority shall, with the [approval of/in consultation with] the Minister -

(a) cause to be published in the *Gazette* as soon as practicable, but not later than twelve months, after the date of commencement of this Act, in a mode approved by the Minister -

(i) a statement setting out the particulars of the organisation and functions of the public authority, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions, and particulars of any arrangement that exists for consultation with or representations by, bodies and persons outside the Government administration in relation to the formulation of policy in, or the administration of, the public authority;

(ii) a statement of the categories of documents that are maintained in the possession of the public authority;

(iii) a statement of the material that has been prepared by the public authority under this Part for publication or inspection by members of the public, and the places at which a person may inspect or obtain that material; and

(iv) a statement of the procedure to be followed by a person when a request for access to a document is made to a public authority.

(b) during the year commencing on the first day of January next following the publication, in respect of a public authority, of the statement under subparagraph (i), (ii), (iii) or (iv) of paragraph (a) that is the first statement published under that subparagraph, and during each succeeding year, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements published under that subparagraph.

(2) The mode approved by the Minister under subsection (1) shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under this Act.

(3) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document would cause that document to be an exempt document.

(4) Where a public authority comes into existence on or after the date of commencement of this Act, it shall comply with subsection (1) as soon as practicable after the date it so comes into existence.

Certain documents to be available for inspection and purchase

8. (1) This section applies to documents that are provided by the public authority for the use of, or are used by, the public authority or its officers in making decisions or recommendations, under or for the purposes of any enactment or scheme administered by the public authority, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject, being -

(a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents including, but without limiting the generality of the foregoing, precedents in the nature of letters of advice providing information to bodies or persons outside the public authority;
(b) documents containing particulars of such a scheme, not being particulars contained in any other enactment; and
(c) documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme,

but not including documents that are available to the public as published otherwise than by the public authority or as published by another public authority.

(2) A public authority shall -

(a) cause copies of all documents to which this section applies that are in use from time to time to be made available for inspection and for purchase by members of the public;
(b) not later than twelve months after the date of commencement of this Act, cause to be published in the *Gazette*, a statement (which

may take the form of an index) specifying the documents of which copies are, at the time of preparation of the statement, so available and the place or places where copies may be inspected and may be purchased; and

(c) within twelve months after the date of first publication of the statement under paragraph (b) and thereafter at intervals of not more than twelve months, cause to be published in the *Gazette*, statements bringing up to date information contained in the previous statement or statements.

(3) The public authority may not comply fully with paragraph (2)(a) before the expiration of twelve months from the date of commencement of this Act, but shall, before that time, comply with that paragraph as far as is practicable.

(4) This section does not require a document of the kind referred to in subsection (1) containing exempt information to be made available in accordance with subsection (2), but, if such a document is not so made available, the public authority shall, if practicable, cause to be prepared a corresponding document, altered only to the extent necessary to exclude the exempt information, and cause the document so prepared to be dealt with in accordance with subsection (2).

(5) Where a public authority comes into existence on or after the date of commencement of this Act, subsections (2) and (3) shall apply in relation to that public authority as if the references in those subsections to the date of commencement of this Act were references to the date the public authority so comes into existence.

Unpublished documents not to prejudice public

9. If a document required to be made available in accordance with section 8, being a document containing a rule, guideline or practice relating to a function of a public authority, was not made available and included in a statement in the *Gazette*, as referred to in that section, a member of the public who was not aware of that rule, guideline or practice shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice.

PART III

RIGHT OF ACCESS TO INFORMATION

Right of access

10. Subject to this Act, every person shall have a right of access in accordance with this Act, to an official document other than an exempt document.

Access to certain documents

11. Where -

(a) a document is open to public access, as part of a public register or otherwise, in accordance with another enactment; or

(b) a document is available for purchase by the public in accordance with arrangements made by a public authority,

the access to that document shall be obtained in accordance with that enactment or arrangement, as the case may be.

Access to documents otherwise than under this Act

12. Nothing in this Act shall prevent a public authority from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where it has the discretion to do so or is required by law to do so.

Requests for access

13. (1) A person who wishes to obtain access to a document of a public authority shall make a request in writing to the public authority for access to the document.

(2) A request shall identify the document or shall provide such information concerning the document as is reasonably necessary to enable the public authority to identify the document.

(3) A request may specify in which of the forms of access set out in section 20 the applicant wishes to be given access.

(4) Subject to section 22, a request may be made for access to all documents of a particular description that contain information of a specified kind or relate to a particular subject matter.

Duty to assist applicant

14. (1) A public authority shall take reasonable steps to assist any person who -

(a) wishes to make a request under section 13; or
(b) has made a request which does not comply with the requirements of subsection 13(2),

to make a request in a manner which complies with that section.

(2) Where a request in writing is made to a public authority for access to a document, the public authority shall not refuse to comply with the request on the ground that the request does not comply with subsection 13(2), without first giving the applicant a reasonable opportunity of consultation with the public authority with a view to the making of a request in a form that complies with that section.

Transfer of request for access

15. (1) Where a request is made to a public authority for access to a document and the request has not been directed to the appropriate public authority, the public authority to which the request is made shall transfer the request to the appropriate public authority and inform the person making the request accordingly.

(2) Where a request is transferred to a public authority in accordance with this section, it shall be deemed to be a request made to that public authority and received on the date on which it was originally received.

Time-limit for determining requests

16. A public authority shall take reasonable steps to enable an applicant to be notified of the decision on a request (including a decision for deferral of access under section 21) as soon as practicable but in any case not later than thirty days from the date on which the request is duly made.

Access to documents

17. Where a request for access to a document is duly made and -

(a) the request is approved by the public authority; and

(b) subject to section 19, any fee required to be paid before access is granted has been paid,

access to the document shall be given forthwith in accordance with this Act.

Deletion of exempt information

18. (1) Where -

(a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document;
(b) it is practicable for the public authority to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and
(c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy,

the public authority shall give the applicant access to such a copy of the document.

(2) Where access is granted to a copy of a document in accordance with subsection (1), the applicant shall be informed that it is such a copy and also be informed of the provisions of this Act by virtue of which any information deleted is exempt information.

Fees

19. The Minister may, by regulation -

(a) prescribe the fee to be charged by a public authority for the making of a request for access to a document;
(b) prescribe the fee payable where access to a document is to be given in the form of printed copies or copies in some other form such, as on tape, disk, film or other material;
(c) prescribe the manner in which any fee payable under this Act is to be calculated and the maximum amount it shall not exceed; and
(d) exempt any person or category of persons from paying any fees under this Act, where the information contained in the document for which access is requested is in the public interest.

Forms of access

20. (1) Access to a document may be given to a person in one or more of the following forms:

(a) a reasonable opportunity to inspect the document;
(b) provision by the public authority of a copy of the document;
(c) delivery by the public authority of a copy of the document in electronic form;
(d) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images; or
(e) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the public authority of a written transcript of the words recorded or contained in the document.

(2) Subject to subsection (3) and to section 18, where the applicant has requested access in a particular form, access shall be given in that form.

(3) If the form of access requested by the applicant -

(a) would interfere unreasonably with the operations of the public authority; or
(b) would be detrimental to the preservation of the document or, having regard to the physical nature of the document, would not be appropriate; or
(c) would involve an infringement of copyright (other than copyright owned by the Government) subsisting in the document,

access in that form may be refused and access given in another form.

Deferral of access

21. (1) A public authority which receives a request may defer the provision of access to the document concerned until the happening of a particular event (including the taking of some action required by law or some administrative action), or until the expiration of a specified time, where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices.

(2) Where the provision of access to a document is deferred in accordance with subsection (1), the public authority shall, in informing the applicant of the reasons for the decision, indicate, as far as practicable, the period for which the deferment will operate.

Refusal of access in certain cases

22. A public authority dealing with a request may refuse to grant access to a document in accordance with the request, without having caused the processing of the request to have been undertaken, if the public authority is satisfied that the work involved in processing the request would substantially and unreasonably interfere with the normal operations of the public authority, and if before refusing to provide information on these grounds, the public authority has taken reasonable steps to assist the applicant to reformulate the application so as to avoid causing such interference.

Decisions to be made by authorised persons

23. A decision in respect of a request made to a public authority may be made, on behalf of the public authority, by the responsible Minister, or the chief executive officer of the public authority or, subject to the regulations, by an officer of the public authority acting within the scope of authority exercisable by him in accordance with the arrangements approved by the responsible Minister or the chief executive officer of the public authority.

Reasons for decisions to be given

24. (1) Where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice in writing of the decision, and the notice shall -

(a) state the findings on any material question of fact, referring to the material on which those findings were based, and the reasons for the decision;
(b) where the decision relates to a public authority, state the name and designation of the person giving the decision;

(c) where the decision does not relate to a request for access to a document which if it existed, would be an exempt document but access is given to a document in accordance with section 18, state that the document is a copy of a document from which exempt information has been deleted;
(d) where the decision is to the effect that the document does not exist, state that a thorough and diligent search was made to locate the document; and
(e) inform the applicant of the right to apply to court for a review of the decision in accordance with section 41.

(2) A public authority is not required to include in a notice under subsection (1) any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document.

PART IV

EXEMPT DOCUMENTS

Cabinet documents

25. (1) A document is an exempt document if it is -

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister of Government to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;
(b) an official record of any deliberation or decision of the Cabinet;
(c) a document that is a draft of copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) Subsection (1) does not apply to a document that contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of Cabinet.

(3) For the purposes of this Act, a certificate signed by the Secretary to the Cabinet or a person performing the duties of the Secretary, certifying that a document is one of a kind referred to in a paragraph of subsection (1), establishes conclusively that it is an exempt document of that kind.

(4) Where a document is a document referred to in paragraph (1)(c) or (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under subsection (3) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(5) In this section, any reference to "Cabinet" shall be read as including a reference to a committee of the Cabinet.

Formulation of policy

26.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on –

(a) the free and frank provision of advice; or
(b) the free and frank exchange of views for the purposes of deliberation.

(2) Where a document is a document referred to in subsection (1) only by reason of a matter contained in a particular part or particular parts of a document, a public authority shall identify that part or those parts of the document that are exempt.

Documents affecting national security, defence, and international relations

27. (1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure -

(a) would prejudice the security, defence or international relations of [*name of country*];

(b) would divulge any information or matter communicated in confidence by or on behalf of the Government of another country to the Government of [*name of country*].

(2) Where the responsible Minister is satisfied that the disclosure under this Act of a document would be contrary to the public interest for a reason referred to in subsection (1), such Minister may sign a certificate to that effect and such a certificate, so long as it remains in force, shall establish conclusively that the document is an exempt document referred to in subsection (1).

(3) Where the responsible Minister is satisfied as mentioned in subsection (2) by reason only of the matter contained in a particular part or particular parts of a document, a certificate under that subsection in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) For the purposes of this section "responsible Minister" in relation to Parliament shall mean [.....].

Documents affecting enforcement or administration of the law

28. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to -

(a) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance;
(b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
(c) disclose, or enable a person to ascertain the identity of a confidential source of information in relation to the enforcement or administration of the law;

(d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement.

Documents affecting legal proceedings or subject to legal professional privilege

29. (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document of the kind referred to in section 8(1) is not an exempt document by virtue of subsection (1) by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1).

Documents to which secrecy provisions apply

30. A document is an exempt document if it is a document to which a prescribed provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies.

Documents affecting personal privacy

31. (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information of any individual (including a deceased individual).

(2) Subject to subsection (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(3) Where a request by a person other than a person referred to in subsection (2) is made to a public authority for access to a document containing personal information of any individual (including a deceased individual) and the public authority decides to grant access to the document, the public authority shall, if practicable, notify the individual who is the subject of that information (or in the case of a deceased individual, that individual's next-of-kin) of the decision and of the right to apply to [court] for a review of the decision in accordance with section 41.

(4) Where a request is made to a public authority for access to a document that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the public authority that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the public authority may direct that the document containing that information, that would otherwise be given to that person is not to be given to him or her but is to be given instead to a medical practitioner to be nominated by that person.

Documents relating to trade secrets, business affairs etc

32. (1) A document is an exempt document if its disclosure under this Act would disclose –

(a) trade secrets;

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

(c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an undertaking, being information -

(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that undertaking in respect of its lawful business; commercial or financial affairs; or

(ii) the disclosure of the information under this Act would be contrary to public interest by reason that the disclosure would be reasonably likely to prejudice the ability of the Government or a public authority to obtain similar information in the future for the purpose of administration of a law or the administration of matters administered by the public authority.

(2) The provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of information concerning -

(a) the business or professional affairs of that person; or

(b) the business, commercial or financial affairs of an undertaking of which that person, or a person on whose behalf that person made the request, is the proprietor.

Documents affecting national economy

33. (1) A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have an adverse effect on the national economy.

(2) The kinds of documents to which subsection (1) may apply include but are not restricted to, documents containing information relating to -

(a) currency or exchange rates;
(b) interest rates;
(c) taxes, including duties of customs or of excise;
(d) the regulation or supervision of banking, insurance and other financial institutions;
(e) proposals for expenditure;
(f) foreign investment in [*name of country*]; or
(g) borrowings by the Government.

Documents containing material obtained in confidence

34. (1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to a public authority, and -

(a) the information would be exempt information if it were generated by a public authority; or

(b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of a public authority to obtain similar information in the future.

(2) This section does not apply to information -

(a) acquired by a public authority from a business, commercial or financial undertaking; and
(b) that relates to trade secrets or other matters of a business, commercial or financial nature.

Documents disclosure of which would be contempt of court or contempt of Parliament

35. A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the state -

(a) be in contempt of court;
(b) be contrary to an order made or given by a commission or by a tribunal or other person or body having power to take evidence on oath; or
(c) infringe the privileges of Parliament.

Disclosure of exempt document in the public interest

36. Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in all the circumstances of the case, to do so is in the public interest, having regard both to any benefit and to any damage that may arise from doing so in matters such as, but not limited to -

(a) abuse of authority or neglect in the performance of official duty;
(b) injustice to an individual;
(c) danger to the health or safety of an individual or of the public; or
(d) unauthorised use of public funds.

[Minister may declare document exempt in certain cases]

36. [*(1). The Minister may, in consultation with a public authority, by Order, declare a document to which sections 25 to 36 are not applicable, to be an exempt document for the purposes of this Act if its disclosure would cause exceptional damage to the national interest.*][1]

Duty to act in good faith

(2) In considering whether or not to claim exemption under this Part, the public authority, [or the Minister, as the case may be][2], shall act in good faith and use its or the Minister's best endeavours to achieve the object of this Act to afford to members of the public maximum access to official documents consistent with *[national]* or public interest.

PART V

MISCELLANEOUS

Correction of personal information

*38. (1) Where a document of a public authority to which access has been given under this Act or otherwise, contains personal information of a person and that person claims that the information -

(a) is incomplete, incorrect or misleading; or
(b) not relevant to the purpose for which the document is held,

the public authority may, subject to subsection (2), on the application of that person, amend the information upon being satisfied of the claim.

(2) An application under subsection (1) shall -

(a) be in writing; and
(b) as far as practicable, specify:

(i) the document or official document containing the record of personal information that is claimed to require amendment;
(ii) the information that is claimed to be incomplete, incorrect or misleading;
(iii) whether the information is claimed to be incomplete, incorrect or misleading;
(iv) the applicant's reasons for so claiming; and
(v) the amendment requested by the applicant.

(3) To the extent that it is practicable to do so, the public authority shall, when making any amendment under this section to personal information in a document, ensure that it does not obliterate the text of the document as it existed prior to the amendment.

(4) Where a public authority is not satisfied with the reasons for an application under subsection (1), it may refuse to make any amendment to the information and inform the applicant of its refusal together with its reasons for so doing.

[*Note: This section is to be included only if no privacy legislation is enacted]

Protection against actions for defamation or breach of confidence

39. (1) Where access has been given to a document and -

(a) the access was required by this Act to be given; or
(b) the access was authorised by a Minister, or by an officer having authority, in accordance with section 23, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

no action for defamation or breach of confidence lies by reason of the authorising or giving of the access, against the Government or a public authority or against the Minister or officer who authorised the access or any person who gave the access.

(2) The giving of access to a document (including an exempt document) in consequence of a request shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the access was given.

Protection in respect of offences

40. Where access has been given to a document and -

(a) the access was required by this Act to be given; or
(b) the access was authorised by a Minister or by an officer having authority, in accordance with section 23, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

neither the person authorising the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the authorising or giving of the access.

Review of decision of public authority [or Minister]

41. (1) Any person aggrieved by a decision of a public authority under this Act or Minister under subsection 26(2) [or subsection 37(1)][3] may apply to the [*name court*] for a review of the decision and the court, after considering the application, may confirm, vary, remit or set aside the decision.

(2) Any person aggrieved by the issue of a certificate under subsection 25(3) or 27(2), [or an Order under subsection 37(1)] may apply to the court for a review as to whether the document referred to in the certificate is [one] of a kind referred to in section 25 or section 27, or a document described in section 26 [or subsection 37(1)] as the case may be, and if the court finds that it is not, may quash the certificate or the decision of the Minister.

[(3) Notwithstanding any other law to the contrary, where an application for judicial review of a decision of a public authority under this Act or a Minister under section 26 [or subsection 37(1)] is made under subsection (1), that application shall be heard and determined by a Judge in Chambers, unless the Court, with the consent of the parties, directs otherwise.]

(4) In this section, "decision of a public authority" includes the failure of a public authority to comply with provisions of this Act.

Report to Parliament

42. (1) The Minister shall, as soon as practicable after the thirty-first of December of each year, prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before Parliament.

(2) Each responsible Minister shall, in relation to the public authorities within his or her portfolio, furnish to the Minister such information as he or she requires for the purposes of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.

Regulations

43. (1) The Minister may make regulations for giving effect to the purposes of this Act and for prescribing anything required or authorised by this Act to be prescribed.

(2) Notwithstanding the generality of subsection (1), regulations made under this section may prescribe -

(a) the fees in respect of access to documents (including the provision of copies or transcripts) in accordance with this Act;
(b) the officers who may make decisions on behalf of a public authority; or
(c) requirements concerning the furnishing of information and keeping of records for the purposes of section 42.

(3) All regulations made under this Act shall be laid before Parliament as soon as may be after the making thereof and shall be subject to *[negative/affirmative]* resolution.

Preservation of records and documents

44. (1) A public authority shall maintain and preserve or cause to be maintained and preserved records in relation to its functions and a copy of all official documents which are created by it or which come at any time into its possession, custody or power, for such period of time as may be prescribed.

(2) A person who wilfully destroys or damages a record or document required to be maintained and preserved under subsection (1), commits an offence and is liable on summary conviction to a fine of *[.....]* and imprisonment for *[.....]*.

(3) A person who knowingly destroys or damages a record or document which is required to be maintained and preserved under subsection (1) while a request for access to the record or document is pending commits an offence and is liable on summary conviction to a fine of *[.....]* and imprisonment for *[.....]*.

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1. Clause 37(1) is included in square brackets as an optional clause for use by those countries that consider it essential to expand the grounds enumerated in clauses 25 to 36.
2. The words in square brackets are to be included only if subsection 37(1) is enacted.
3. The cross references to subsection 37(1) in subsections (1), (2) and (3) of section 41 are to be included if subsection 37(1) is enacted.

   Consequences of including 37(1) must be considered carefully, as subsection 37(1) may significantly expand states' rights to withhold information.

FREEDOM OF INFORMATION BILL

AMENDMENTS PROPOSED FOR CONSIDERATION OF MINISTERS BY SENIOR OFFICIALS

Senior Officials recommend that Ministers endorse the Model Bill contained in paper LMM(02)6 with the following amendments:

A new clause be inserted after Clause 25 as follows:-

Formulation of policy

25A.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on –

(a) the free and frank provision of advice, or
(b) the free and frank exchange of views for the purposes of deliberation.

Formulation of policy

(2) Where a document is a document referred to in subsection (1) by reason only of the matter contained in a particular part or particular parts of the document, a public authority shall identify that part or those parts of the document that are exempt.

(3) Subsection (1) does not apply to a document in so far as it contains publicly available factual, statistical, technical or scientific material or the advice of a scientific or technical expert which analyses or gives an expert opinion of such material.

Clause 35 be deleted and replaced with the following: -

Disclosure of exempt document in the public interest

35. Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in all the circumstances of the case, to do so is in the public interest, having regard both to any benefit and to any damage that may arise from doing so in matters such as, but not limited to -

(a) abuse of authority or neglect in the performance of official duty;
(b) injustice to an individual;
(c) danger to the health or safety of an individual or of the public; or
(d) unauthorised use of public funds.

Clause 36 be amended as follows:-

[Minister to declare document exempt in certain cases]

36. [*(1). The Minister may, in consultation with a public authority, by order, declare a document to which sections 25 to 35 are not applicable, to be an exempt document for the purposes of this Act if its disclosure would cause exceptional damage to the national interest.*][1]

Duty of authorities to act in good faith

(2) In considering whether or not to claim exemption under this Part, the public authority, or the Minister, as the case may be, shall act in good faith and use its or the Minister's best endeavours to achieve the object of this Act to afford to members of the public maximum access to official documents consistent with *[national]* or public interest.

Amend Clause 40 to read as follows: -

Review of decision of public authority [or Minister]

40. (1) Any person aggrieved by a decision of a public authority under this Act [or Minister under subsection 36(1)][2] may apply to the [*name court*] for a review of the decision and the court, after considering the application, may confirm, vary, remit or set aside the decision.

(2) Any person aggrieved by the issue of a certificate under subsection 25(3) or 26(2) may apply to the court for a review as to whether the document referred to in the certificate is [one] of a kind referred to in section 25 or section 26 [or subsection 36(1)] as the case may be, and if the court finds that it is not, it may quash the certificate [or the decision of the Minister].

[(3) Notwithstanding any other law to the contrary, where an application for judicial review of a decision of a public authority under this Act [or a Minister under subsection 36(1)] is made under subsection (1), that application shall be heard and determined by a Judge in Chambers, unless the Court, with the consent of the parties, directs otherwise.]

(4) In this section, "decision of a public authority" includes the failure of a public authority to comply with provisions of this Act.

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[1] Clause 36(1) is included in square brackets as an optional clause for use by those countries that consider it essential to expand the grounds enumerated in clauses 25 to 35.

[2] The cross reference to subsection 36(1) is to be included only if that subsection is enacted.

THE PROTECTION OF PRIVACY

INTRODUCTION

1. Commonwealth Law Ministers, at their meeting in 1999 in Trinidad and Tobago, endorsed the Commonwealth Freedom of Information Principles. Believing that the obverse side of the freedom of information coin is the protection of personal privacy, the Secretariat proposed for consideration by Senior Officials at their meeting in November 2001 that model legislation to implement the Commonwealth commitment to freedom of information should be a model Bill on privacy.

2. The intent of the proposed model legislation is to ensure, that governments accord personal information an appropriate measure of protection, and also that such information is collected only for appropriate purposes and by appropriate means. The model seeks, in accordance with general practice in member countries only to deal with information privacy which is the most common aspect of privacy regulated by statute and which involves the establishment of rules governing the collection and handling of personal information such as those relating to status of credit or medical records. Other aspects of privacy such as privacy of communications, bodily privacy and territorial privacy were not dealt with in the model Bill.

MODEL PRIVACY BILL

3. In 1981, the OECD, in recognizing the magnitude of the problems affecting the privacy rights of individuals and the public, issued guidelines for the protection of personal privacy in the information context. These OECD principles have been used as a guide for developing many national privacy laws.

4. The draft model Privacy Bill prepared for consideration of Senior Officials, sought to give effect to these principles which were set out more fully in the paper presented to Senior Officials (SOLM(01)17). It also sought to create a legal regime which can be administered by small and developing countries without the need to create significant new structures.

5. Some privacy laws make provisions for the establishment of an independent Privacy Commissioner with a range of functions and powers. Recognising that small and developing countries may not be able to create such an office and may need to rely on courts or tribunals to deal with allegations of damage caused by breach of the privacy law, the model Bill, provisions dealing with the creation of a Privacy Commissioner are included on an optional basis. Accordingly they could be omitted in the case of a country having an insufficient resource base to allow the creation of an additional public officer, thereby making it necessary for the enacting country to designate a person to perform certain critical functions relating to the protection of personal privacy. It is the view of the Secretariat that provided such person has, in the exercise of his or her duties under the Act, adequate independence, the integrity of the legislation would not be jeopardized.

DISCUSSION OF THE ISSUE BY SENIOR OFFICIALS

6. The draft Bill proposed by the Secretariat was considered and revised by Senior Officials and is now submitted, incorporating the revisions required by Senior Officials, for consideration and endorsement by Law Ministers. The proposed model legislation is annexed to this paper.

7. Senior Officials expressed their intention to recommend to Ministers that they support the use of the model Bill by member countries desiring to enact legislation on this subject and who seek assistance in the development of an appropriate legislative framework.

8. In their discussion of the general principles of the model Bill, Senior Officials noted that the Bill before them applied only to personal information held by the public sector. They expressed the view that global developments rendered it highly desirable that member countries enacting privacy legislation relating to personal information held by the public sector should also enact legislation to protect personal information held by the private sector. Accordingly, the Secretariat has prepared for separate consideration, a draft Protection of Personal Information Model Bill which is annexed to paper LMM(02)8 before this meeting.

ACTION BY LAW MINISTERS

9. Law Ministers may wish to endorse the annexed model Privacy Bill and commend it to member countries for adoption (or adaptation to national circumstances) as a Commonwealth model of good practice.

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http://www.austlii.edu.au/au/other/plpr/vol2/vol2No05/v02n05i.html

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New Zealand Privacy Commissioner Act 1991 in Commonwealth Law Bulletin Volume 18, No 2, April 1992, Commonwealth Secretariat, pp 435 –436

PRIVACY ACT [.....]

Arrangement of Sections

PART I

PRELIMINARY

Section

PART II

COLLECTION, USE, DISCLOSURE AND RETENTION OF PERSONAL INFORMATION

[PART III

PRIVACY COMMISSIONER

PART IV

INVESTIGATION OF COMPLAINTS

PART V

MISCELLANEOUS

PRIVACY MODEL BILL

AN ACT to make provision for the promotion and protection of the privacy of individuals, and for connected matters

BE IT ENACTED by the Parliament of [*name of country*] as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the Privacy Act, *[year of enactment]*.

Commencement

2. This Act shall come into operation on a day to be appointed by the Minister, by Order published in the *Gazette*.

Object of Act

3. The object of this Act is to make provision for the collection, holding, use, correction and disclosure of personal information in a manner that recognises the right of privacy of individuals with respect to their personal information.

Interpretation

4. In this Act -

"administrative purpose", in relation to the use of personal information about an individual, means the use of that information in a decision making process that directly affects that individual;

["Commissioner" means the Privacy Commissioner appointed under section 15];

"correct" in relation to personal information, means to alter that information by way of correction, deletion, or addition; and "correction" has a corresponding meaning;

"document" means any medium in which information is recorded, whether printed or on tape or film or by electronic means or otherwise and includes any map, diagram, photograph, film, microfilm, video-tape, sound recording, or machine-readable record or any record which is capable of being produced from a machine-readable record by means of equipment or a programme (or a combination of both) which is used for that purpose by the public authority which holds the record;

"Minister" means the Minister who has been assigned responsibility for [*information/public administration*] under the Constitution;

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing –

(a) information relating to the race, national or ethnic origin, religion, age or marital status of the individual;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
(c) any identifying number, symbol or other particular assigned to the individual;
(d) the address, fingerprints or blood type of the individual;
(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
(f) correspondence sent to a public authority by the individual that is explicitly or implicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence; or
(g) the views or opinions of any other person about the individual;

"public authority" includes –

(a) a House of Parliament or a committee of any House of Parliament;
(b) the Cabinet as constituted under the Constitution;
(c) a Ministry, a department or division of a Ministry, or the private office of a Minister, wherever located;
(d) a local authority;
(e) a public statutory corporation or body;
(f) a body corporate or an incorporated body established for a public purpose, which is owned or controlled by the state;
(g) any other body designated by the Minister by regulation made under this Act, to be a public authority for the purposes of this Act.

Saving of certain other enactments

5. This Act shall not affect the operation of any enactment that makes provision with respect to the collection, holding, use, correction or disclosure of personal information and is capable of operating concurrently with this Act.

Act to bind state

6. This Act shall bind the state.

PART II

COLLECTION, USE, DISCLOSURE AND RETENTION OF PERSONAL INFORMATION

Collection of personal information

7.(1) A public authority shall not collect personal information unless –

(a) the information is collected for a lawful purpose directly related to a function or activity of the authority; and
(b) the collection of the information is necessary for, or directly related to, that purpose.

(2) A public authority shall not collect personal information -

(a) by unlawful means; or

(b) by means that, in the circumstances of the case -
  (i) are unfair; or
  (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Source of personal information

8.(1) A public authority shall, subject to subsection (3), collect personal information directly from the individual concerned.

(2) At or before the time, or if that is not practicable, as soon as practicable after, a public authority collects personal information under subsection (1), the authority shall take such steps as are, in the circumstances, reasonable to ensure that the individual concerned is aware of -

(a) the purposes for which the information is being collected;
(b) the fact that the collection of the information is authorised or required by or under law, if such collection is so authorised or required; and
(c) the intended recipients of the information.

(3) A public authority is not obliged to comply with subsection (1) where -

(a) the information is publicly available information;
(b) the individual concerned authorises the collection of the information from someone else;
(c) non-compliance will not prejudice the interests of the individual concerned;
(d) non-compliance is necessary -
  (i) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law;
  (ii) for the enforcement of a law imposing a pecuniary penalty;
  (iii) for the protection of public revenue;
  (iv) for the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or
  (v) in the interests of national security, [national] defence or international relations;
(e) compliance would prejudice the purpose of the collection; or
(f) compliance is not reasonably practicable in the circumstances of the particular case.

Accuracy etc of personal information to be checked before use

9. Where a public authority holds personal information, having regard to the purpose for which the information is proposed to be used, it shall not use that information without taking such steps as are, in the circumstances, reasonable to ensure that, the information is complete, accurate, up to date, relevant and not misleading.

Limits on use of personal information

10. Subject to section 12, where a public authority holds personal information that was collected in connection with a particular purpose, it shall not use that information for any other purpose unless –

(a) the individual concerned authorises the use of the information for that other purpose;
(b) use of the information for that other purpose is authorised or required by or under law;

(c) the purpose for which the information is used is directly related to the purpose for which the information was collected;

(d) the information is used -

(i) in a form in which the individual concerned is not identified; or

(ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned;

(e) the authority believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or other person, or to public health or safety; or

(f) use of the information for that other purpose is necessary -

(i) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law;

(ii) for the enforcement of a law imposing a pecuniary penalty;

(iii) for the protection of public revenue;

(iv) for the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or

(v) in the interests of national security, [national] defence or international relations.

Limits on disclosure of personal information

11.(1) Subject to section 12, where a public authority holds personal information, it shall not disclose the information to a person, body or agency (other than the individual concerned), unless -

(a) the individual concerned has expressly or impliedly consented to the disclosure;

(b) the disclosure of the information is required or authorised by or under law;

(c) the disclosure of the information is one of the purposes in connection with which the information was collected, or is directly connected to that purpose;

(d) the individual concerned is reasonably likely to have been aware or made aware under section 8 (2)(c) that information of that kind is usually passed on to that person, body or agency;

(e) the information is to be disclosed -

(i) in a form in which the individual concerned is not identified; or

(ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(f) the authority believes on reasonable grounds that disclosure of the information is necessary -

(i) to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or other person, or to public health or safety;

(ii) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law;

(iii) the enforcement of a law imposing a pecuniary penalty;

(iv) the protection of public revenue;

(v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or

(vi) in the interests of national security, [national] defence or international relations.

(2) Any person, body or agency to whom personal information is disclosed under subsection (1) shall not use or disclose the information for a purpose other than the purpose for which the information was given to that person, body or agency.

Condition for use or disclosure of personal information

12. A public authority shall only use or disclose personal information under section 10 or section 11, where such use or disclosure would not amount to an unreasonable invasion of privacy of the individual concerned, taking into account the specific nature of the personal information and the specific purpose for which it is to be so used or disclosed.

Storage and security of personal information

13. Where a public authority holds personal information, it shall ensure that -

(a) the information is protected, by such security safeguards as is reasonable in the circumstances to take, against loss, unauthorised access, use, modification or disclosure, and against other misuse; and
(b) where it is necessary for the information to be given to a person, body or agency in connection with the provision of a service to the authority, everything reasonably within the power of the authority is done to prevent unauthorised use or disclosure of the information.

Retention and disposal of personal information

14.(1) Where a public authority uses personal information for an administrative purpose, it shall retain the information for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual concerned has a reasonable opportunity to obtain access to the information.

(2) Subject to subsection (1) and this Act, the Minister shall prescribe by regulation, guidelines for the retention and disposal of personal information held by a public authority.

Correction of personal information

15. (1) Where a document of a public authority to which access has been given under any enactment, contains personal information of a person and that person claims that the information –

(a) is incomplete, incorrect or misleading; or
(b) not relevant to the purpose for which the document is held,

the public authority may, subject to subsection (2), on the application of that person, amend the information upon being satisfied of the claim.

(2) An application under subsection (1) shall –

(a) be in writing; and
(b) as far as practicable, specify:

(i) the document or official document containing the record of personal information that is claimed to require amendment;
(ii) the information that is claimed to be incomplete, incorrect or misleading;

(iii) whether the information is claimed to be incomplete, incorrect or misleading;
(iv) the applicant's reasons for so claiming; and
(v) the amendment requested by the applicant.

(3) To the extent that it is practicable to do so, the public authority shall, when making any amendment under this section to personal information in a document, ensure that it does not obliterate the text of the document as it existed prior to the amendment.

(4) Where a public authority is not satisfied with the reasons for an application under subsection (1), it may refuse to make any amendment to the information and inform the applicant of its refusal together with its reasons for so doing.

[PART III

PRIVACY COMMISSIONER

Office of Privacy Commissioner

16.(1) For the purposes of this Act, there is hereby established the office of Privacy Commissioner.

(2) The Privacy Commissioner shall be appointed by the [President] upon the recommendation of the Minister, subject to such terms and conditions as may be specified in the instrument of appointment.

Tenure of office

17.(1) A person appointed as Privacy Commissioner shall hold office during good behaviour for a period of five years and shall, at the expiration of such period, be eligible for reappointment.

(2) A person appointed as Privacy Commissioner may resign from office by writing under his or her hand addressed to the [President] and shall in any case vacate office on attaining the age of sixty-five years.

(3) The Privacy Commissioner may be removed from office only for inability to discharge the functions of office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

Disqualification for appointment etc

18.(1) No person shall be qualified for appointment to the office of Privacy Commissioner if that person -

(a) is a Member of Parliament;
(b) is a member of a local authority;
(c) is an undischarged bankrupt; or
(d) has at any time been convicted of any offence involving dishonesty or moral turpitude.

(2) The Privacy Commissioner shall vacate office if any circumstances arise that, if he or she were not Privacy Commissioner, would cause him or her to be disqualified for appointment as such, by virtue of subsection (1) of this section.

Restriction on employment

19. A person appointed as Privacy Commissioner shall be a full-time officer and -

(a) *shall not be employed in any other capacity during any period in which the person holds office as Privacy Commissioner; and*

(b) *shall not, at any time after that person has ceased to hold office as Privacy Commissioner, be eligible for appointment in the public service.*

Filling of vacancy

20.(1) Where -

(a) *a vacancy arises in the office of Privacy Commissioner; or*

(b) *by reason of illness, absence from the country or other sufficient cause, a person appointed as Privacy Commissioner is unable to perform his or her functions under this Act,*

the [President] may, upon the recommendation of the Minister, appoint a suitable person to act in that office or perform those functions, as the case may be.

Functions of Privacy Commissioner

21. The functions of the Privacy Commissioner shall be -

(a) *to monitor compliance by public authorities of the provisions of this Act;*

(b) *to provide advice to public authorities on their obligations under the provisions, and generally on the operation, of this Act;*

(c) *to receive and investigate complaints about alleged violations of the privacy of persons and in respect thereof may make reports to complainants;*

(d) *to inquire generally into any matter, including any enactment or law, or any practice, or procedure, whether governmental or non-governmental, or any technical development, if it appears to the Commissioner that the privacy of the individual is being, or may be, infringed thereby;*

(e) *for the purpose of promoting the protection of individual privacy, to undertake educational programmes on the Commissioner's own behalf or in co-operation with other persons or authorities acting on behalf of the Commissioner;*

(f) *to make public statements in relation to any matter affecting the privacy of the individual or of any class of individuals;*

(g) *to receive and invite representations from members of the public on any matter affecting the privacy of the individual;*

(h) *to consult and co-operate with other persons and bodies concerned with the privacy of the individual;*

(i) *to make suggestions to any person in relation to any matter that concerns the need for, or the desirability of, action by that person in the interests of the privacy of the individual;*

(j) *to undertake research into, and to monitor developments in, data processing and computer technology to ensure that any adverse effects of such developments on the privacy of individuals are minimised, and to report to the Minister the results of such research and monitoring;*

(k) *to examine any proposed legislation (including subordinate legislation or proposed policy of the Government that the Commissioner considers may affect the privacy of individuals, and to report to the Minister the results of that examination;*

(l) *to report (with or without request) to the Minister from time to time on any matter affecting the privacy of the individual, including the need for, or desirability of, taking legislative, administrative, or other action to give protection or better protection to the privacy of the individual;*

(m) to report to the Minster from time to time on the desirability of the acceptance, by [name of country] of any international instrument relating to the privacy of the individual;

(n) to gather such information as in the Commissioner's opinion will assist the Commissioner in discharging the duties and performing the functions of the Commissioner under this Act;

(o) to do anything incidental or conducive to the performance of any of the preceding functions; and

(p) to exercise and perform such other functions, powers, and duties as are conferred or imposed on the Commissioner by or under this Act or any other enactment.

Staff and funds

22.(1) There shall be appointed such officers and employees as may be necessary to enable the Privacy Commissioner to discharge the duties and perform the functions of such Commissioner under this Act.

(2) Parliament shall appropriate annually, for the use of the Privacy Commissioner, such sums of money as may be necessary for the proper exercise, performance and discharge, by the Commissioner, of his or her powers, duties and functions under this Act.]

PART IV

INVESTIGATION OF COMPLAINTS

Receipt and investigation of complaints

23.(1) Subject to this Act, the [*Commissioner*] shall receive and investigate a complaint from any person in respect of any matter relating to -

(a) the collection, retention or disposal of personal information by a public authority; or

(b) the use or disclosure of personal information held by a public authority;

(2) Nothing in this Act precludes the [*Commissioner*] from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorised by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorised.

(3) Where the [*Commissioner*] is satisfied that there are reasonable grounds to investigate a matter under this Act, the [*Commissioner*] may initiate a complaint in respect thereof.

Mode of complaint

24.(1) A complaint under this Act shall be made to the [*Commissioner*] in writing unless the [*Commissioner*] authorises otherwise.

(2) The [*Commissioner*] shall give such reasonable assistance as is necessary in the circumstances to enable any person who wishes to make a complaint to the [*Commissioner*], to put the complaint in writing.

Notice of investigation

25. Before commencing an investigation of a complaint under this Act, the [*Commissioner*] shall notify the chief executive officer of the public authority concerned of the intention to carry out the investigation and shall inform the chief executive officer of the substance of the complaint.

Regulation of procedure

26. Subject to this Act, the [*Commissioner*] may determine the procedure to be followed in the discharge of any duty or the performance of any function of the [*Commissioner*] under this Act.

Investigations in private

27.(1) Every investigation of a complaint under this Act by the [*Commissioner*] shall be conducted in private.

(2) In the course of an investigation of a complaint under this Act by the [*Commissioner*], the person who made the complaint and the chief executive officer of the public authority concerned shall be given an opportunity to make representations to the [*Commissioner*], but no one is entitled as of right to be present during, to have access to, or to comment on, representations made to the [*Commissioner*] by any other person.

Powers of [*Privacy Commissioner*] in carrying out investigations

28.(1) The [*Commissioner*] has, in relation to carrying out of the investigation of any complaint under this Act, power -

(a) to summon and enforce the appearance of persons before the [*Commissioner*] and compel them to give oral or written evidence on oath and to produce such documents and things as the [*Commissioner*] deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
(b) to administer oaths;
(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the [*Commissioner*] sees fit, whether or not the evidence or information is or would be admissible in a court of law;
(d) to enter any premises occupied by any public authority on satisfying any security requirements of the authority relating to the premises;
(e) to converse in private with any person in any premises entered pursuant to paragraph(d) and otherwise carry out therein such inquiries within the power of the [*Commissioner*] under this Act as the [*Commissioner*] sees fit; and
(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph(d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the [*Commissioner*] may, during the investigation of any complaint under this Act, examine any information recorded in any form held by a public authority and no information that the [*Commissioner*] may examine under this subsection may be withheld from the [*Commissioner*] on any grounds.

(3) Any document or things produced pursuant to this section by any person or public authority shall be returned by the [*Commissioner*] within ten days after a request is made to the [*Commissioner*] by that person or authority, but nothing in this subsection precludes the [*Commissioner*] from again requiring its production in accordance with this section.

Findings and recommendations of [*Privacy Commissioner*]

29.(1) If, on investigating a complaint under this Act in recommendations in respect of personal information, the [*Commissioner*] finds that the complaint is well-founded, the [*Commissioner*] shall provide the chief executive officer of the public authority that has control of the personal information with a report containing -

(a) the findings of the investigation and any recommendations that the [*Commissioner*] considers appropriate; and
(b) where appropriate, a request that, within a time specified therein, notice be given to the [*Commissioner*] of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

(2) The [*Commissioner*] shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where a notice has been requested under paragraph (1)(b), no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the [*Commissioner*].

(3) Where a notice has been requested under paragraph (1)(b) but no such notice is received by the [*Commissioner*] within the time specified therefor or the action described in the notice is, in the opinion of the [*Commissioner*], inadequate or inappropriate or will not be taken in a reasonable time, the [*Commissioner*] shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(4) Where, following the investigation of a complaint, the [*Commissioner*] has made recommendations to a public authority under subsection (1), and the decision of the public authority is –

(a) not to implement the recommendations; or
(b) to implement the recommendations, but, in the opinion of the [*Commissioner*], not within a reasonable time or in a manner that is inadequate or inappropriate,

the complainant is entitled to seek judicial review of the decision of the public authority.

Review of compliance with certain provisions

30.(1) The [*Commissioner*] may, from time to time at the discretion of the [*Commissioner*], carry out an investigation in respect of personal information under the control of public authority to ensure compliance with sections 7 to 14 of this Act.

(2) Sections 25 to 28 apply, where appropriate and with such modifications as the circumstances require, in respect of investigations carried out under subsection (1).

(3) If, following an investigation under subsection (1), the [*Commissioner*] considers that a public authority has not complied with section 7 to 14 of this Act, the [*Commissioner*] shall provide the chief executive officer of the authority with a report containing the findings of the investigation and any recommendations that the [*Commissioner*] considers appropriate.

(4) Any report made by the [*Commissioner*] under subsection (3) may be included in a report made to Parliament pursuant to this Act.

Report to Parliament

31. The [*Commissioner*] shall, as soon as practicable after the thirty-first of December of each year, prepare a report on the activities of the office during that year and cause a copy of the report to be laid before Parliament.

Security requirements

32. The [*Commissioner*] and every person acting on behalf or under the direction of the [*Commissioner*] who receives or obtains information relating to any investigation under this Act or any other Act of Parliament shall, with respect to the use of that information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of that information.

Confidentiality

33. Subject to this Act, the [*Commissioner*] and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in carrying out duties and performing functions under this Act.

Protection of [*Commissioner*] etc from criminal or civil proceedings

34.(1) Notwithstanding the provisions of section 37, no criminal or civil proceedings lie against the [*Commissioner*], or against any person acting on behalf or under the direction of the [*Commissioner*], for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise, discharge, or performance of any power, duty or function of the [*Commissioner*] under this Act.

(2) For the purposes of any law relating to libel or slander,

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation carried out by or on behalf of the [*Commissioner*] under this Act is privileged; and

(b) any report made in good faith by the [*Commissioner*] under this Act is privileged.

Obstruction

35.(1) No person shall obstruct the [*Commissioner*] or any person acting on behalf or under the direction of the [*Commissioner*] in the discharge and performance the [*Commissioner's*] duties and functions under this Act.

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding *[.....]*.

PART V

MISCELLANEOUS

Delegation by chief executive officer of public authority

36. The chief executive officer of a public authority may, subject to section 38(2)(b), by order, designate one or more officers or employees of that authority to exercise, discharge or perform any of the power, duties or functions of chief executive officer under this Act that are specified in the order.

Proceedings where disclosure was in good faith

37. In any civil or criminal proceedings against a public authority for the disclosure of any personal information pursuant to this Act, or for any consequences that flow from that disclosure, it shall be an absolute answer that such disclosure was made in good faith.

Regulations

38.(1) The Minister may make regulations for giving effect to the purpose of this Act and for prescribing anything required or authorised by this Act to be prescribed.

(2) Notwithstanding the generality of subsection (1), regulations made under this section may prescribe -

(a) guidelines for the disposal of personal information held by a public authority;
(b) officers who may make decisions on behalf of a public authority.

(3) All regulations made under this Act shall be laid before Parliament as soon as may be after the making thereof and shall be subject to [negative/affirmative] resolution.

PRIVACY BILL

AMENDMENTS PROPOSED FOR CONSIDERATION OF MINISTERS BY SENIOR OFFICIALS

Senior Officials recommend that Ministers endorse the Model Bill contained in paper LMM(02)7 with the following amendments:

Subparagraph 8(3)(d)(v) be replaced with the following: -

"(v) in the interests of national security,[national] defence or international relations"

Subparagraph 10(f)(v) be replaced with the following: -

"(v) in the interests of national security,[national] defence or international relations"

Subparagraph 11(1)(f)(vi) be replaced with the following: -

"(vi) in the interests of national security,[national] defence or international relations"

In clause 14(1), delete "if necessary" at the end of the subsection.

STRATEGIES FOR ENHANCING DEMOCRACY BY ELIMINATING LEGAL BARRIERS TO DEVELOPMENT

DRAFT MODEL LAW ON THE PROTECTION OF PERSONAL INFORMATION

INTRODUCTION

1. Senior Officials of Commonwealth law ministries, at their meeting in London in November 1991, in discussing principles of privacy, expressed the view that global developments rendered it highly desirable that member countries enacting privacy legislation relating to personal information held by the public sector should also enact legislation to protect personal information held by the private sector.

2. They also expressed concern for the possible economic implications of the 1995 European Union (EU) Directive on the protection of privacy in member countries, and the need to develop national legislation to address the issue. They requested the Secretariat to study the national laws of some Commonwealth countries such as Canada and United Kingdom and also look at other international instruments such as the OECD Guidelines on the Protection of Privacy and Transborder Flow of Personal Data, when developing the model legislation.

3. The Secretariat is of the view that the EU Directive deals primarily with the automatic processing of data. On the other hand, the OECD Guidelines (which were summarised in the paper considered by Senior Officials in 2001 – SOLM(01)17) apply to personal data involving the privacy of individuals and individual liberties irrespective of the methods and machinery used in their handling. The basic principles of protection proposed by the Directive and the Guidelines are, at the level of detail, not identical and the terminology employed differs in some respects. Thus, whilst it may be common practice in continental Europe to refer to "data protection laws", in English-speaking countries they are more usually known as "privacy protection laws".

MODEL PROTECTION OF PERSONAL INFORMATION BILL

4. The model Bill developed by the Secretariat is annexed to this paper. It is modelled largely on the Canadian legislation, although account was also taken of the United Kingdom legislation (which is based on the EU Directive and therefore places emphasis on different elements of protection) and the OECD Guidelines. Taking into consideration the application of this legislation in developing Commonwealth countries, and also the level of advancement of technology in many of these countries, the Bill seeks to make provision for the recognition of the privacy of individuals by protecting personal information or data processed by private sector organisations.

5. The model Bill gives effect to some core principles of this type of protection: setting limits to the collection of personal information or data; restrictions on the usage of personal information or data to conform with openly specified purposes; giving an individual the right to access personal information relating to that individual and the right to have it corrected, if necessary; and the identification of the parties who are responsible for compliance with the relevant privacy protection principles.

6. Conscious that some countries may have an inadequate resource base to set up an independent body or Authority to deal with complaints under this legislation, provision has been made for the Privacy Commissioner appointed under the Privacy Act (dealing with the protection of personal information in the public sector) to also deal with complaints under this Bill. Recognising that some countries may not even have adequate resources to create the office of Privacy Commissioner, references to the Commissioner in provisions have been square bracketed and would need to be replaced by references to an appropriate official, for example, an ombudsman.

ACTION BY LAW MINISTERS

7. The draft model Bill annexed to this paper for consideration by Law Ministers who may feel it appropriate to recommend it to member countries for adoption (or adaptation to national circumstances) as a Commonwealth model of good practice.

DRAFT PROTECTION OF PERSONAL INFORMATION ACT *[.....]*

Arrangement of Sections

PART I

PRELIMINARY

Section

PART II

PROCESSING OF PERSONAL INFORMATION

PART III

DUTIES OF ORGANISATIONS WITH RESPECT TO RECORDS OF PERSONAL INFORMATION

PART IV

ACCESS TO PERSONAL INFORMATION

PART V

INVESTIGATION OF COMPLAINTS

BILL

for

AN ACT to make provision for the recognition of the privacy of individuals by protecting personal information processed by private organisations, and for connected matters.

BE IT ENACTED by the Parliament of *[name of country]* as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the Protection of Personal Information Act, *[year of enactment]*.

Commencement

2. This Act shall come into operation on a day to be appointed by the Minister, by Order published in the *Gazette*.

Object of Act

3. The object of this Act is to regulate the processing of personal information by private organisations in a manner that recognises the right of privacy of individuals with respect to their personal information and the need of those organisations to process personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Interpretation

4. In this Act -

"agent", in relation to an organisation, means a person, whether or not the person is employed by the organisation and whether or not the person is being remunerated, when the person acts for or on behalf of the organisation in performing functions with respect to personal information;

"collect", in relation to actions of an organisation that has custody or control of personal information means to gather, acquire or obtain the information by any means from any source outside the organisation or its agents, and "collection" has a corresponding meaning;

"correct", in relation to personal information, means to alter that information by way of correction, deletion, or addition; and "correction" has a corresponding meaning;

"data" means information which -

(a) is recorded with the intention that it should be processed; or
(b) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;

"de-identify", in relation to personal information of an individual, means to remove any information that –

(a) identifies the individual;
(b) can be manipulated by a reasonably foreseeable method to identify the individual; or
(c) can be linked by a reasonably foreseeable method to other information that identifies the individual or that can be used or manipulated by a reasonably foreseeable method to identify the individual;

"disclose", in relation to personal information in the custody or under the control of an organisation, means to make the information available to an organisation that is not an agent of the disclosing organisation, and "disclosure" has a corresponding meaning;

"individual" means, in relation to personal information, the individual, whether living or deceased, with respect to whom the information is or was collected, used or disclosed;

"head" in relation to an organisation means the person responsible for the overall management of the organisation including its policies and practices;

"information practices" in relation to an organisation, means the policy of the organisation for actions in relation to personal information, including -

(a) when, how and the purposes for which the organisation is to collect, use, modify, disclose, retain or dispose of personal information;
(b) the administrative, technical and physical safeguards and practices that the organisation maintains with respect to the information;

"investigative body" means a prescribed person or body that is legally authorised in *[name of country]* to carry out any investigation relating to the enforcement of law;

"Minister" means the Minister who has been assigned responsibility for *[information/public administration]* under the Constitution;

"organisation" includes a body corporate, an individual, a partnership or unincorporated association;

"personal information" means information or data about an identifiable individual whether or not recorded in any form, including, without restricting the generality of the foregoing –

(a) information relating to the race, national or ethnic origin, religion, age or marital status of the individual;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;
(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
(f) correspondence sent by the individual that is explicitly or implicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;
(g) the views or opinions of any other person about the individual;
(h) information that can be manipulated by a reasonably foreseeable method to identify the individual; or
(i) information that can be linked by a reasonably foreseeable method to other information that identifies the individual or that can be manipulated by a reasonably foreseeable method to identify the individual;

"prescribed" means prescribed by regulation made under this Act;

"process", in relation to information or data, means obtain, record or hold the information or data or carry out any operation or set of operations on the information or data, including -

(a) organisation, adaptation or alteration of the information or data;
(b) retrieval, consultation or use of the information or data;
(c) disclosure of the information or data by transmission, dissemination or otherwise making available; or
(d) alignment, combination, blocking, erasure or destruction of the information or data;

and "processed" "processes" and "processing" shall be construed accordingly;

"relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible;

"record" means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record;

"use", in relation to actions of an organisation that has custody or control of personal information or data, means to handle or deal with the information or data, including to transfer the information or data, to an agent of the organisation, but does not include to disclose the information or data;

"Privacy Commissioner" means the Privacy Commissioner appointed under section 16 of the Privacy Act, *[year of enactment]*;

Application of Act

5.(1) This Act shall apply to every private organisation in respect of personal information that –

(a) the organisation processes in the normal course of its business or for professional or commercial purposes;
(b) is about an employee of the organisation and that the organisation processes in connection with its business.

(2) This Act shall not apply to –

(a) any public authority to which the Privacy Act *[year of enactment]* applies;
(b) any individual in respect of personal information that the individual processes for personal or domestic purposes and does not process for any other purpose;
(c) any organisation in respect of personal information that the organisation processes for journalistic, artistic or literary purposes and does not process for any other purpose.

Saving of certain other enactments

6. This Act shall not affect the operation of any enactment that makes provision with respect to the processing of personal information and is capable of operating concurrently with this Act.

PART II

PROCESSING OF PERSONAL INFORMATION

Appropriate purpose

7. An organisation may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.

Requirement of knowledge and consent

8.(1) Subject to sections 11, 12 and 13, an organisation shall not collect, use or disclose personal information about any individual without the knowledge and consent of that individual.

(2) An individual may, with reasonable notice in writing, withdraw the consent referred to in subsection (1) at any time, subject to legal and contractual restrictions. The organisation shall inform the individual of the implication of such withdrawal.

Collection of personal information

9.(1) An organisation shall identify the purpose for which it collects personal information at or before the time such information is collected.

(2) An organisation shall document the purposes for which personal information is collected in order to comply with section 21(5)(d).

(3) An organisation shall not collect personal information unless –

(a) the information is collected for a lawful purpose directly related to a function or activity of the organisation; and
(b) the collection of the information is necessary for, or directly related to that purpose.

(4) An organisation shall not collect personal information –

(a) by unlawful means; or
(b) by means that, in the circumstances of the case –
  (i) are unfair; or
  (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Source of personal information

10.(1) An organisation shall collect personal information directly from the individua concerned, unless –

(a) the individual consents to having the organisation collect th information from the person who has custody or control of it;
(b) the individual consents to having the organisation that has custody o control of the information disclose it;
(c) the person who has custody or control of the information is authorised a law to act on behalf of the individual and consents to the disclosure c the information to the organisation;
(d) this Act authorises the organisation to collect the information; or
(e) the organisation is authorised by another Act or at law to collect th information in a manner other than directly from the individual.

(2) At or before the time, or if that is not practicable, as soon as practicable afte an organisation collects personal information from an individual under subsectio (1), the organisation shall take such steps as are, in the circumstances, reasonable t ensure that the individual concerned is aware of –

(a) the purpose for which the information is being collected;
(b) the fact that the collection of the information is authorised or require by or under law, if such collection is so authorised or required; and
(c) the intended recipients of the information.

Collection without knowledge or consent

11. An organisation may collect personal information without the knowledge o consent of the individual, where –

(a) the collection is clearly in the interests of the individual and consen cannot be obtained in a timely manner;
(b) it is reasonable to expect that the collection with the knowledge an consent of the individual will prejudice the purpose of the collection o compromise the availability or accuracy of the information;
(c) the collection is reasonable for purposes relating to the investigation c the breach of the law or an agreement;
(d) the collection is solely for journalistic, artistic or literary purposes; or
(e) the information is publicly available information.

Limits on use of personal information

12.(1) Where an organisation holds personal information that was collected i connection with a particular purpose, it shall not use that information for any othe purpose unless –

(a) the individual concerned authorises the use of the information for tha other purpose;
(b) use of the information for that other purpose is authorised or required b or under law;

(c) the purpose for which the information is used is directly related to th purpose for which the information was collected;

(d) the information is used -
  (i) in a form in which the individual concerned is not identified; or
  (ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned;

(e) the organisation believes on reasonable grounds that use of th information for that other purpose is necessary to prevent or lessen serious and imminent threat to the life or health of the individua concerned or other person, or to public health or safety; or

(f) use of the information for that other purpose is necessary -
  (i) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law; or
  (ii) for the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

(2) Where an organisation uses personal information for a new purpose, it shall document that purpose in order to comply with section 21(5)(d).

Limits on disclosure of personal information

13.(1) Where an organisation holds personal information, it shall not disclose the information to another person, body or agency (other than the individual concerned), unless –

(a) the individual concerned has expressly or impliedly consented to the disclosure;

(b) the disclosure of the information is required or authorised by or under law;

(c) the disclosure of the information is one of the purposes in connection with which the information was collected, or is directly connected to that purpose;

(d) the individual concerned is reasonably likely to have been aware or made aware under section 10(2)(c) that information of that kind is usually passed on to that person, body or agency;

(e) the information is to be disclosed -
  (i) in a form in which the individual concerned is not identified; or
  (ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(f) the organisation believes on reasonable grounds that disclosure of the information is necessary –
  (i) to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or other person, or to public health or safety;
  (ii) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law; or
  (iii) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

(2) Any person, body or agency to whom personal information is disclosed under subsection (1) shall not use or disclose the information for a purpose other than the purpose for which the information was given to that person, body or agency.

Condition for use or disclosure of personal information

14. An organisation shall only use or disclose personal information under section 12 or section 13, where such use or disclosure would not amount to an unreasonable invasion of privacy of the individual concerned, taking into account the specific nature of the personal information and the specific purpose for which it is to be so used or disclosed.

Use of personal information outside *[name of country]*

15.(1) An organisation shall not use, outside *[name of country]* personal information collected in *[name of country]* unless the organisation -

(a) would be permitted under this Act to make the same use of that information in *[name of country]*; and
(b) takes appropriate steps to preserve the confidentiality of the information and to protect the privacy of individuals.

(2) Nothing in this section affects the use of personal information that is required or authorised to be made under another Act.

Disclosure of personal information outside *[name of country]*

16.(1) An organisation shall not disclose personal information collected in *[name of country]* to an organisation outside *[name of country]* unless –

(a) the organisation receiving the information performs functions comparable to the functions performed by a person to whom this Act would permit disclosure by the organisation disclosing the information in *[name of country]*; and
(b) the organisation disclosing the information believes on reasonable grounds that the organisation receiving the information will take appropriate steps to preserve the confidentiality of the information.

(2) Nothing in this section affects a disclosure of personal information that is required or authorised to be made under another Act.

PART III

DUTIES OF ORGANISATIONS WITH RESPECT TO RECORDS OF PERSONAL INFORMATION

Accuracy of information

17.(1) An organisation that collects, uses or discloses personal information about an individual shall –

(a) take all reasonable steps to ensure that whatever record it makes of the information is as accurate, complete and up-to-date as is necessary for the purposes for which it collects, uses or discloses the information, as the case may be;

(b) take all reasonable steps to minimise the possibility that an organisation will use inaccurate personal information to make a decision about the individual.

(2) The organisation shall not update a record of personal information about an individual unless –

(a) doing so is necessary to fulfil the purpose for which the organisation collected the information;
(b) the individual consents to the updating; or
(c) this Act or another law permits the updating.

Security of information

18.(1) An organisation shall take reasonable steps to ensure that personal information in its custody or control is protected against unauthorised use or disclosure and to ensure that the records containing the information are protected against unauthorised copying, modification or destruction.

(2) An organisation is responsible for personal information in its custody or control, including information that has been transferred to a third-party for processing. The organisation shall use contractual or other means to provide a comparable level of protection while the information is being processed by the third party.

(3) The question of what protection constitutes compliance with subsection (1) shall be determined in light of all the circumstances, including the sensitivity of the information, the amount of information and the format in which it is stored.

(4) Upon request, the organisation shall make available to any person a general description of the safeguards that it uses to protect personal information and to fulfil its obligations under subsection (1).

Note of uses and disclosures without consent

19.(1) An organisation shall make a note of all uses and disclosures that it makes of personal information about an individual without the individual's consent except if the individual would not be entitled to access to the information under section 22(1) or a record of the information under section 25(1).

(2) The organisation shall keep the note as part of the records of personal information about the individual that it has in its custody or under its control or in a form that is linked to those records.

Retention of records

20.(1) Subject to subsection (2), an organisation shall not retain a record of personal information after the purpose for which the organisation collected the information has been fulfilled unless –

(a) another law requires the organisation to retain the record;
(b) the organisation reasonably requires the record for purposes related to its operation; or
(c) the regulations authorise the organisation to retain it.

(2) An organisation that has used a record of personal information about an individual to make a decision about the individual shall retain the record for such period of time as may be prescribed after making the decision, to allow the individual a reasonable opportunity to request access to the information.

(3) An organisation shall destroy or delete a record of personal information or de-identify it as soon as it is no longer authorised to retain the record under subsection (1).

Information practices

21.(1) An organisation that has custody or control of personal information shall have in place information practices that comply with the requirements of this Act and the regulations made thereunder.

(2) The organisation shall act in conformity with its information practices unless otherwise permitted by law.

(3) The organisation shall designate, as a contact person, an individual or individuals who are resident in *[name of country]* and who are employed by or in the service of the organisation or an agent of the organisation, to –

(a) facilitate the organisation's compliance with this Act;
(b) ensure that all persons who are employed by or in the service of the organisation are appropriately informed of their duties under this Act while employed by or in the service of the organisation;
(c) respond to inquires from the public about the organisation's information practices.

(4) An organisation shall make readily available to any person, in a form that is generally understandable, specific information about its policies and practices relating to the management of personal information.

(5) The information made available under subsection (4) shall include –

(a) the name, address and other contact details of the organisation;
(b) the name or title of the person or persons accountable for the organisation's policies and practices;
(c) the means of gaining access to personal information held by the organisation;
(d) a description of the type of personal information held by the organisation, including a general account of its use;
(e) what personal information is made available to related organisations;
(f) a copy of any brochures or other information that explain the organisations policies and practices or codes; and
(g) the name or title of the person or persons designated under subsection (3), to whom any inquiry in relation to this Act can be forwarded.

PART IV

ACCESS TO PERSONAL INFORMATION

Right of access to personal information

22.(1) Subject to this Part, an individual is entitled, in accordance with this Part, to access to personal information about the individual that is in the custody or under the control of an organisation, including information on its use and disclosure, unless –

(a) the information relates to having an investigative body enforce any law or by-law, carry out an investigation relating to the enforcement of that law or by-law or gather information or intelligence for the purpose of enforcing that law or by-law;
(b) the organisation is prohibited under subsection (6) from granting the individual access to the information;
(c) the organisation has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of any law that has been, is being or is about to be committed;
(d) the information is subject to legal privilege;
(e) the information is collected or put together for the purpose of determining whether to commence a proceeding or for the purpose of conducting a proceeding or enforcing a judgment, order or award made in a proceeding;
(f) granting the access could reasonably be expected to threaten the life or security of another individual;
(g) granting the access would reveal confidential organisational information that could reasonably be expected to harm the organisation;
(h) granting the access would be likely to reveal personal information of another individual who does not consent to granting the access and it is not possible to sever the requested information from the personal information of the other individual.

(2) If an organisation receives a request from an individual under section 23 for access to personal information that the organisation has previously disclosed to the government, an agent of that government or to an investigative body, the organisation shall, without delay, give written notice to the person or body who received disclosure of the information stating that the individual has made the request.

(3) Within thirty days of receiving the notice, the person or body who receives the notice shall notify the organisation whether it objects to having the organisation grant the individual's request for access.

(4) An investigative body who received disclosure of the information may object to having the organisation grant the individual's request for access only if it is of the opinion that granting the request could reasonably be expected to be injurious to the enforcement of any law or the gathering of intelligence for the purpose of enforcing that law.

(5) The organisation shall not, under section 23(3), respond to the individual's request for access until the earlier of –

(a) the day on which it receives notification of an objection made under subsection (4); or
(b) thirty days from the time of giving the notice described in subsection (3).

(6) If a person or body, objects to having the organisation grant the individual's request for access under subsection (5), the organisation shall not grant the individual access to the requested personal information.

Procedure for access

23.(1) To exercise a right to access to personal information under subsection 22(1), including information on its use and disclosure, an individual shall make a written request for access to the organisation that has custody or control of the information.

(2) If the individual requests the organisation for assistance in preparing the request for access, the organisation shall assist the individual.

(3) Subject to subsection (4) and to section 24, as soon as possible in the circumstances but not later than thirty days after receiving the request, the organisation shall –

(a) grant the individual access to the requested personal information in a generally understandable format unless the organisation believes, on reasonable grounds, that the individual is not entitled under this Act to access to the information;
(b) give a written notice to the individual stating that the organisation does not have custody or control of the requested personal information, if that is the case, and specifying the identity of the organisation that has custody or control of the information, if that is known; or
(c) give a written notice to the individual stating that the organisation is refusing the request, in whole or in part, specifying the reason for the refusal and stating that the individual is entitled to make a complaint about the refusal to the *[Privacy Commissioner]*.

(4) Within thirty days after receiving the request, the organisation may extend the time limit set out in subsection (3) for a further period of time of not more than thirty days if –

(a) meeting the time limit would unreasonably interfere with the activities of the organisation; or
(b) the time required to undertake the consultations necessary to reply to the request would make it not reasonably practical to meet the time limit.

(5) If the organisation extends the time limit under subsection (4), the organisation shall give the individual a written notice of the extension before the time limit set out in subsection (3) expires, setting out the length of the extension and the reason for the extension.

(6) An organisation that reasonably believes that a request for access to personal information is frivolous or vexatious or made in bad faith may refuse to grant the individual access to the requested information.

(7) An organisation that does not grant an individual access to personal information under this section because it believes, on reasonable grounds, that the individual is not entitled under this Act to access to the information may state in the notice that it is required to give under subsection (3)(c) that it refuses to confirm or deny that the information exists.

(8) If the organisation does not reply to the request within the time limit or before the extension, if any, expires, the organisation shall be deemed to have refused the individual's request for access.

(9) If the organisation refuses or is deemed to have refused the request, in whole or in part, the individual is entitled to make a complaint about the refusal to the *[Privacy Commissioner]* under Part VI.

(10) An organisation shall not grant an individual access to personal information under this section without first taking reasonable steps to be satisfied as to the individual's identity.

Fees for access

24. (1) As a condition of granting the access to personal information that an individual requests under this section, an organisation may require the individual to pay a reasonable fee determined in accordance with the regulations if –

(a) it informs the individual of the approximate amount of the prescribed fee before granting the access;
(b) within a reasonable time of receiving the information mentioned in clause (a), the individual does not notify the organisation that he or she withdraws the request; and
(c) the organisation has not used the personal information to deny the individual a benefit or to increase any charge that the organisation imposes on the individual in dealing with the individual.

(2) The organisation shall waive the payment of all or part of the fee, where the organisation determines that it is fair and equitable to do so after considering –

(a) whether the payment will cause financial hardship for the applicant; and
(b) all other matters relating to fees that may be prescribed.

Copy of record

25.(1) If an organisation grants an individual access to personal information under this section and if the organisation has made a record of the information, it shall, at the time of granting the access, give the individual a copy of the record or an opportunity to examine the record.

(2) If, after exercising an opportunity to examine the record under subsection (1), the individual requests a copy of part or all of the record, the organisation shall give the individual a copy of those portions of the record that it would be reasonably practical to reproduce, given their length and nature.

Sensory disability

26. (1) An organisation shall give access to personal information in an alternative format to an individual with a sensory disability who has a right of access to personal information under this Part and who requests that it be transmitted on the alternative format if –

(a) a version of the information already exists in that format; or
(b) its conversion into that format is reasonable and necessary in order for the individual to be able to exercise rights under this Part.

(2) In this section, "alternative format" with respect to personal information means a format that allows a person with a sensory disability to read or listen to the personal information.

Duty to sever

27. (1) An organisation shall not give an individual access to personal information if doing so would be likely to reveal personal information about a third party. However, if the information about the third party is severable from the record containing the information about the individual, the organisation shall sever the information about the third party before giving the individual access.

(2) Subsection (1) does not apply if the third party consents to the access or the individual needs the information because of a threat to the individual's life, health or security.

Correction of personal information

28. (1) Where the record of an organisation to which access has been given under this Act contains personal information of a person and that person claims that the information is incomplete, incorrect or misleading, the organisation may, subject to subsection (2), on the application of that person, correct the information upon being satisfied of the claim.

(2) An application under subsection (1) shall –

(a) be in writing; and
(b) as far as practicable, specify –
  (i) the record of personal information that is claimed to require correction;
  (ii) the information that is claimed to be incomplete, incorrect or misleading;
  (iii) whether the information is claimed to be incomplete, incorrect or misleading;
  (iv) the applicant's reasons for so claiming; and
  (v) the correction requested by the applicant.

(3) To the extent that it is practicable to do so, the organisation shall, when making any correction under this section to personal information in a record, ensure that it does not obliterate the text of the record as it existed prior to the correction.

(4) Where an organisation is not satisfied with the reasons for an application under subsection (1), it may refuse to make any correction to the information and inform the applicant of its refusal together with its reasons for so doing.

PART V

INVESTIGATION OF COMPLAINTS

Receipt and investigation of complaints

29. (1) Subject to this Act, the *[Privacy Commissioner]* shall receive and investigate a complaint from any person in respect of any matter relating to –

(a) the collection, retention or disposal of personal information by an organisation;
(b) the use or disclosure of personal information held by an organisation;
(c) the refusal by an organisation to grant access to personal information under this Act; or
(d) the refusal by an organisation of an application to correct the information.

(2) Nothing in this Act precludes the *[Privacy Commissioner]* from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorised by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorised.

(3) Where the *[Privacy Commissioner]* is satisfied that there are reasonable grounds to investigate a matter under this Act, the *[Commissioner]* may initiate a complaint in respect thereof.

Mode of complaint

30.(1) A complaint under this Act shall be made to the *[Privacy Commissioner]* in writing unless the *[Commissioner]* authorises otherwise.

(2) The *[Privacy Commissioner]* shall give such reasonable assistance as is necessary in the circumstances to enable any person who wishes to make a complaint to the *[Commissioner]*, to put the complaint in writing.

Notice of investigation

31. Before commencing an investigation of a complaint under this Act, the *[Privacy Commissioner]* shall notify the head of the organisation concerned of the intention to carry out the investigation and shall inform such head of the substance of the complaint.

Regulation of procedure

32.(1) Subject to this Act, the *[Privacy Commissioner]* may determine the procedure to be followed in the discharge of any duty or the performance of any function of the *[Commissioner]* under this Act.

(2) The functions of the Privacy Commissioner set out in section 21 of the Privacy Act, *[year of enactment]* shall, *mutatis mutandis*, be the functions of the *[Commissioner]* under this Act.*]*

Investigations in private

33.(1) Every investigation of a complaint under this Act by the *[Privacy Commissioner]* shall be conducted in private.

(2) In the course of an investigation of a complaint under this Act by the *[Privacy Commissioner]*, the person who made the complaint and the head of the organisation concerned shall be given an opportunity to make representations to the *[Commissioner]*, but no one is entitled as of right to be present during, to have access to, or to comment on, representations made to the *[Commissioner]* by any other person.

Powers of *[Privacy Commissioner]* in carrying out investigations

34.(1) The *[Privacy Commissioner]* has, in relation to carrying out of the investigation of any complaint under this Act, power -

(a) to summon and enforce the appearance of persons before the *[Commissioner]* and compel them to give oral or written evidence on oath and to produce such documents and things as the *[Commissioner]* deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the *[Commissioner]* sees fit, whether or not the evidence or information is or would be admissible in a court of law;
(d) to enter any premises occupied by an organisation on satisfying any security requirements of the organisation relating to the premises;
(e) to converse in private with any person in any premises entered pursuant to paragraph(d) and otherwise carry out therein such inquiries within the power of the *[Commissioner]* under this Act as the *[Commissioner]* sees fit; and
(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph(d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the *[Privacy Commissioner]* may, during the investigation of any complaint under this Act, examine any information recorded in any form held by an organisation and no information that the *[Commissioner]* may examine under this subsection may be withheld from the *[Commissioner]* on any grounds.

(3) Any document or thing produced pursuant to this section by any person or organisation shall be returned by the *[Privacy Commissioner]* within ten days after a request is made to the *[Commissioner]* by that person or organisation, but nothing in this subsection precludes the *[Commissioner]* from again requiring its production in accordance with this section.

Dispute resolution

35. Where, in the course of an investigation of a complaint under this Act by the *[Privacy Commissioner]*, the *[Commissioner]* is of the view that it may be possible to secure a settlement between any of the parties concerned and, if appropriate, a satisfactory assurance against the repetition of any action that is the subject matter of the complaint or the doing of further actions of a similar kind by the person or organisation concerned, the *[Commissioner]* may, without investigating the complaint further, use his or her best endeavours to secure such a settlement and assurance.

Findings and recommendations of *[Privacy Commissioner]*

36.(1) If, on investigating a complaint under this Act, in recommendations in respect of personal information, the *[Privacy Commissioner]* finds that the complaint is well-founded, the *[Commissioner]* shall provide the head of the organisation that has control of the personal information with a report containing –

(a) the terms of any settlement reached by virtue of section 35; or
(b) the finding of the investigation and any recommendations that the *[Commissioner]* considers appropriate; and
(c) where appropriate, a request that, within a time specified therein, notice be given to the *[Commissioner]* of any action taken or proposed to be taken to implement the terms of settlement or recommendations as the case may be, contained in the report or reasons why no such action has been or is proposed to be taken.

(2) The *[Privacy Commissioner]* shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where a notice has been requested under paragraph (1)(c), no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the *[Commissioner]*.

(3) Where a notice has been requested under paragraph (1)(c) but no such notice is received by the *[Commissioner]* within the time specified therefore or the action described in the notice is, in the opinion of the *[Commissioner]*, inadequate or inappropriate or will not be taken in a reasonable time, the *[Commissioner]* shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(4) Where, following the investigation of a complaint, the *[Privacy Commissioner]* has made recommendations to an organisation under subsection (1), and the decision of the organisation is –

(a) not to implement the recommendations; or
(b) to implement the recommendations, but, in the opinion of the *[Commissioner]*, not within a reasonable time or in a manner that is inadequate or inappropriate,

the complainant is entitled to seek judicial review of the decision of the organisation.

Review of compliance with certain provisions

37.(1) The *[Privacy Commissioner]* may, from time to time at the discretion of the *[Commissioner]*, carry out an investigation in respect of personal information under the control of an organisation to ensure compliance with this Act.

(2) Section 31 to 34 apply, where appropriate and with such modifications as the circumstances require, in respect of investigations carried out under subsection (1).

(3) If, following an investigation under subsection (1), the *[Privacy Commissioner]* considers that an organisation has not complied with the provisions of this Act, the *[Commissioner]* shall provide the head of the organisation with a report containing the findings of the investigation and any recommendations that the *[Commissioner]* considers appropriate.

(4) Any report made by the *[Privacy Commissioner]* under subsection (3) shall be included in a report made to Parliament pursuant to this Act.

Report to Parliament

38. The *[Privacy Commissioner]* shall, as soon as practicable after the thirty-first of December of each year, prepare a report on the activities of the office under this Act during that year and cause a copy of the report to be laid before Parliament.

Security requirements

39. The *[Privacy Commissioner]* and every person acting on behalf or under the direction of the *[Commissioner]* who receives or obtains information relating to any investigation under this Act or any other Act of Parliament shall, with respect to the use of that information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of that information.

Confidentiality

40. Subject to this Act, the *[Privacy Commissioner]* and every person acting on behalf or under the direction of the *[*Commissioner*]* shall not disclose any information that comes to their knowledge in carrying out duties and performing functions under this Act.

Protection of *[Commissioner]* etc from criminal or civil proceedings

41.(1) Notwithstanding the provisions of section 44, no criminal or civil proceedings lie against the *[Privacy Commissioner]*, or against any person acting on behalf or under the direction of the *[Commissioner]*, for anything done, reported or said in good faith in the course of the exercise, discharge or performance or purported exercise, discharge, or performance of any power, duty or function of the *[Commissioner]* under this Act.

(2) For the purposes of any law relating to libel or slander –

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation carried out by or on behalf of the *[Privacy Commissioner]* under this Act is privileged; and
(b) any report made in good faith by the *[Privacy Commissioner]* under this Act is privileged.

Obstruction

42.(1) No person shall obstruct the *[Privacy Commissioner]* or any person acting on behalf or under the direction of the *[Commissioner]* in the discharge and performance the *[Commissioner's]* duties and functions under this Act.

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding .....

PART VI

MISCELLANEOUS

Delegation by head of organisation

43. The head of an organisation may, by order, designate one or more officers or employees of that authority to exercise, discharge or perform any of the power, duties or functions of the head under this Act that are specified in the order.

Regulations

44.(1) The Minister may make regulations for giving effect to the purpose of this Act and for prescribing anything required or authorised by this Act to be prescribed.

(2) Notwithstanding the generality of subsection (1), regulations made under this section may prescribe –

(a) guidelines for the retention of records for the purposes of section 20(1) and (2);
(b) guidelines for the disposal of personal information held by an organisation;
(c) maximum amount of fees payable for access to personal information under this Act; and
(d) guidelines for information practices of an organisation.

(3) All regulations made under this Act shall be laid before Parliament as soon as may be after the making thereof and shall be subject to *[*negative/affirmative*]* resolution.

STRATEGIES FOR ENHANCING DEMOCRACY BY ELIMINATING LEGAL BARRIERS TO DEVELOPMENT

INTRODUCTION

1. The purpose of this paper is to raise for consideration by Ministers various issues upon which they may wish to reflect and share experience so that the collective goal of ensuring that the law and legal infrastructure in member countries can rise to the challenge of facilitating development.

2. While canvassing various legal issues relevant to development, the main focus of this paper is on development and in particular two issues – land and competition. The issue of competition law comes before this meeting at the request of Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions following their meeting in 2000.

3. The Commonwealth Fancourt Declaration on Globalisation and People Centred Development and the UN Millennium Declaration laid the foundation for countries to overcome the frontiers of poverty and underdevelopment and both organisations called on all nations to work to reduce the growing gap between rich and poor, and to enhance international support to democracies fighting poverty.

4. The links between democracy and good governance on the one hand and poverty and development on the other hand are inevitably apparent from the perspective that "*...poverty must be seen as the deprivation of basic capabilities [to choose a life one has reason to value] rather than merely lowness of incomes...*" (*Development as Freedom*, Oxford University Press 1999, p.86 per Amartya Sen) . The basic capabilities envisaged by this concept of poverty, need not be just material but would also include non-material capabilities such as political freedoms (as espoused in the Harare Declaration) and the sense of security that individuals enjoy.

5. These links were recognised in the Coolum Declaration in which Heads of Government called on the Commonwealth Secretary-General to constitute a high-level expert group to focus on how democracies might best be supported in combating poverty and recommend ways in which we could carry forward the Fancourt Declaration.

6. Law Ministers are aware of the inextricable linkages between a wholesome and independent legal system on one hand and the ability of a country to attract and sustain investment on the other. State capacity building is a critical aspect of creating conditions for development and encouragement for inflows of investment. Each organ of state has its individual role to play in promoting economic growth and in fostering investment initiatives. The reality is that many governments lack the capacity to fulfil this role which is sometimes evidenced by inadequate coordination of objectives between the various departments of government. The non-existent or inadequate policy and legal frameworks for growth invariably evidence this deficiency in capacity. It is strongly arguable that Law Ministers must be much more proactive and vigilant in ensuring that the appropriate legislative foundation is in place.

7. While ministers acting collectively in any one country need to develop national strategies to support development and reduce poverty, there are areas which in many, if not most, Commonwealth countries, fall within the responsibilities of law ministers. A perusal of the World Development Reports over the past couple of years makes clear the role of the legal sector and the importance of the justice system in securing sustainable development targets.

8. Law Ministers, over the years, have considered the question of improving access to justice. The World Development Report 2002 notes, in the chapter on the judicial system, that one of the main findings was that –

> *"the simplification of procedural elements is associated with greater judicial efficiency; both costs and delays are reduced. In many developing countries procedural complexity reduces judicial efficiency ...[and] facilitates corruption in the absence of transparency."*

This remains a critical area for work by law ministers and the research by the World Bank should provide compelling reading for those ministers concerned with the efficiency and effectiveness of, particularly, the courts exercising commercial jurisdiction.

9. The World Development Report for 2003 (already issued) deals, in part, with institutions for sustainable development. It says that –

> *"In many areas, government plays a central role in organising dispersed interests: meeting national goals and balancing competing interests. If a government finds itself unbound by rules (e.g. by a constitution or equivalent with the separation of powers it brings) how can it commit itself as a partner? The private sector will be less willing to invest and do business if instability and risks of expropriatory consequence have not been curtailed. Unless institutions succeed in separating the powers of government and providing meaningful checks and balances, communities and the private sector will be less forward looking, and environmental and natural assets will be hurt through inappropriate investment and conservation."*

10. This Report goes on to ask the vital question "Why would a politician or leader not take steps to strengthen the judiciary and protect property rights? Because a leader who takes steps to build stronger institutions would reap benefits from the stronger economy and better environment only in the long run, and this requires a stable setting with broad political support."

The following parts of this paper deal with –

- the relevance of land and its ownership to development;
- competition law;
- corporations law including company law and corporate governance issues.

A. THE RELEVANCE OF LAND AND ITS OWNERSHIP TO DEVELOPMENT

11. A well functioning democracy can empower the poor and be a significant force for development and poverty reduction. Land remains the fundamental source of life, livelihood and income, and the foundation of both environment and productive activities. Facilitating access to land coupled with certainty of ownership, or tenure for its occupation, possession, and use, is therefore central to understanding how instrumental land is to development.

12. In order to raise capital, the rural farmer and sophisticated businessman alike needs land, be it owned or leased or held communally, as collateral for credit. The ability to raise capital opens up a wide array of options for an individual to utilise it in the way s/he wishes to increase her/his capabilities to enjoy the life s/he chooses.

13. Land law not only creates property rights in land and the ability to alienate those rights, by way of sale, lease, or mortgage, but it also sets out regulations that affect those rights, including environmental legislation; laws creating public rights in land; laws forming the institutions that make allocative and other decisions with regard to customary and public land; and laws enacted to facilitate the operation of property rights systems, such as land registration laws.

14. For users of land, the terms and conditions on which the law makes land accessible to them influence their approach to its use and their incentives to cultivate it carefully, or mine it. The terms and conditions reflect basic allocative decisions of the society and impact on the incidence of poverty and prosperity. They set the patterns and conditions for transactions in land in ways that help determine efficiency of land use and influence emerging patterns of land distribution.

15. Most developing countries however, find themselves in the midst of profound transitions in this area. Some countries are still working with colonial era statutes, which are outdated and require review and reform. In the Caribbean, key land issues which have been identified for past and ongoing projects include:

- The poor, indigenous peoples and women often lacking equitable and sufficient access to land;
- Informal communities surrounding cities needing secure land rights;
- The clarification of land rights to improve otherwise sluggish land markets, limited access to capital, and stagnant economies;
- The need for modern documentation technology when updating inadequate property record systems;
- Improvement on management of state lands so that environmental degradation can be curbed;
- Community of management of natural resources to ensure community access to those resources and provide models for sustainable resource management.

16. The task of providing an adequate legal environment for the effective and productive use of land and more importantly its use for collateral, is complicated and sometimes frustrated in many countries by problems in one or more of the following areas:-

- **Systems of land title and registration in use in countries** marked by the absence of any or any effective system of land titling and registration to make owners easily identifiable and to speed up the process of formalising security of tenure: e.g in St Vincent and the Grenadines, problems within an antiquated registration system were found to pose a major constraint to landholders' access to registration and tenure security;
- **Leasehold interests** where there is a lack of enabling legislation which permits the extension of tenure for leasehold interests in lands which have been improved for commercial and/or industrial purposes; (e.g. the case of sugarcane farmers in Fiji) or where the tenure of leasehold interest expires before the term of a mortgage does (a problem that often arises in jurisdictions like Australia) or where there are problems of management of leaseholds on state lands and need for greater tenure security (e.g Antigua and St Kitts)
- **The means of dealing with traditional ownership of land** where parallel and often overlapping formal and informal or traditional ownership systems of land rules exist. The informal systems may be deeply grounded culturally, as with customary land tenure systems. In some countries, e.g. Samoa, alienation of customary land by sale or mortgage is prohibited under the Constitution unless authorised by statute. In others, there are relatively recent initiatives in self-governance by communities when the State has failed to provide effective rules governing land use. Whilst these systems may have well defined ambits in law, there may be in fact overlaps between them which often represent struggles for power over resources.

- **Equitable succession laws** where even although they exist, the social norms prevent or hinder the observance of such laws (e.g. India)

- **Women's property rights** where there is need to legislate and implement laws which allow or recognise women's rights to access, use and own land; (e.g. Africa)

- **Land ownership and environmental sustainability** to ensure that economic growth is environmentally sustainable and that the quality of poor people's environments is maintained. Land and resource use must be sustainable if it is to continue to bring economic returns in the long run, and maintain vital environmental services such as watershed and climate regulation. Poor people's direct rights of access to environmental resources on which they depend are also critical. A clearly defined framework of both individual and collective rights and responsibilities in relation to the use and control of land resources is fundamental to sustainability.

Systems of land title and registration in use in countries

17. The titling of land and the prompt registration of titles in a public registry is considered to be the best way to protect ownership rights to land and therefore the best form of tenure security. In private property tenure systems, more commonly known as freehold property or estate in fee simple, land titling and registration signifies the formalisation of ownership rights. Where private property as a tenure form does not prevail however, land titling is of little consequence or advantage because landholders acquire tenure security through a range of local institutional mechanisms (e.g. membership in a household, community or extended family). This explains why titling programmes in some areas either have little impact, unintended effects or quickly become outdated (e.g. title documents are not kept up to date when property is transferred).

18. The most commonly recognised benefit from the titling and registration of land, besides the tenure security acquired by the property owner, is the use of those secure property rights as collateral to solicit credit. Formal lending agencies such as banks, often require not only that property being used as collateral be titled, but that the title be registered. In fact the rationalisation for the cost of titling and registration programmes, is that they put capital into the hands of people with little wealth and a low income, leading to increased investment and productivity by these families. Titling and/or registration of ownership rights to land, increases the productivity of land because:-

- increased tenure security provides incentives to invest time, labour and capital in the land (making improvements) and agricultural production (buying inputs);

- titled land can be used as collateral to secure credit (capital) for investment, thus making credit more abundant; and

- titling facilitates land transfers, resulting in land moving into the hands of more productive farmers and individuals.

19. Tenure security can however be undermined by the absence or inaccuracy of ownership or lease documents. The process of registration may not be efficient so that there are lengthy delays in a purchaser or lessee or licencee acquiring formal title or secure access to a particular land. This can lead to delays in lending institutions approving and processing applications for credit until the security for any advances is in place. Where customary land is concerned, progress of any alienation can be fraught with protracted litigation to determine who the titleholder is to the land.

20. There are renewed demands for land titling from governments and national elites seeking to acquire land for development, linked to an interest in attracting commercial investment and modernising agricultural production in the hope of competing more effectively in globalised markets.

21. Such difficulties can be allayed by: taking firm steps to effect titling activities, e.g the Government of Jamaica, in 1989, undertook the Jamaican Land Titling Project to establish a land management system that would order and secure tenancy in rural farming areas by issuing titles to beneficiaries on Government Land Settlements and in 2001 undertook a pilot programme to prepare a cadastral map for certain parcels of land in the parish of St Catherine and to undertake tenure regularisation of these parcels; providing the legal structure necessary for implementation of a national Land Registration and Titling Programme and a modern land registry as in St Lucia's land legislation of 1984; instituting measures to document legal descriptions or other means of identifying land; training conveyancers or other persons who are tasked with the preparation of ownership or lease documents to minimise mistakes or inaccuracies; introduce systems which ensure the swift processing of title documents for registration; and reviewing procedures in those Courts which deal with customary land issues to streamline lengthy litigation.

Leasehold interests

22. Whereas leasehold interests of freehold land can easily be alienated as collateral, it is still subject to difficulties which need to be addressed. The situation is not simple either when it comes to leasehold interest in customary and communal lands, although a lease is the most convenient way of enabling customary land to be utilised for a commercial purpose. Some common difficulties associated with the practical operation of leases are:-.

- The problem of mortgages or charges on leasehold land which are taken out by lessees but are still outstanding at the time when the lease comes to an end, either by expiry of time or by premature termination by one party or the other. The mortgagee or chargee will normally try to foreclose on the mortgage or charge and take over the development or place someone on the land who can develop it to service the outstanding amount of the loan.

- There may be people who were at the time the lease was granted, holding secondary rights to the land under custom, such as rights of passage or usufruct but were not identified. As a result, the owners of the land who are identified receive rent in respect of the leasehold, while those holding secondary rights to the land may not.

- Discontent in respect of rent payments. This situation arises where the rent is paid only to the chief or heads of families and never finds its way to the hands of all those who are entitled to it.

- The lessees may have cultivated and developed the land to such a scale where skilled or semi skilled labour is required for sustaining cultivation, development, and the operation of heavy equipment and machinery, for which the owner has no expertise in;

- There is the question of compensation for lessees who have made permanent improvements to the land where the landowners are unlikely to have the means to pay compensation.

- The placing of customary land in the hands of a statutory body established under legislation which removes all powers of control and management from the customary landowners. (e.g. the Native Land Trust Board in Fiji set up under the Native Land Trust Act, Cap 134).

- Mortgaging of leasehold interest in customary land is prohibited under the constitution of a country as in many Pacific Island countries unless authorised by statute.

- The absence of lease documents resulting in unauthorised transfers of land by tenants without any documents in their own names, or the failure of tenants to obtain formal credit for short terms loans if the landlord refused to give something in writing to attest to the fact that the tenant is farming a given plot or set of plots. This type of situation is a popular cause for prevailing tensions between tenants and landlords in Guyana. There, the reluctance of landlords to rent out land for longer periods of time leads to non-use of land and squatting and, because of the high turnover of tenants, no one has an interest in caring about and preserving the land.

23. The aforesaid problems may be addressed by giving consideration to -

- whether the State should intervene by law to regulate, support or restrict the way in which decisions are made and actions are taken by owners of customary land as to the management and use of these lands;

- whether a system such as that adopted in Fiji amounts to compulsory acquisition of property by the State or at least a deprivation of property without the safeguards required by the constitutions of many countries;

- whether assistance and in what form can be given to countries where there are backlogs of cases concerning customary land;

- whether enabling legislation could or should be put in place to permit the tenure of leasehold interest to be extended beyond the expiry date where such interest is subject to a mortgage or charge which has not run its full term

- whether action plans be implemented to, inter alia, convert leasehold to freehold and raise rents toward market rates as was done for Guyana in 1995 with the support of the Inter-American Development Bank.

The means of dealing with traditional ownership of land

24. The troubling aspect of dealing with traditional ownership of land is the all pervading sense of affinity to the land: as a source of power and symbol of status within a family, village or community; as a form of identity, security and a source of life and sustenance; and as embodying culture, custom and tradition. Any attempts therefore to introduce measures which impinge on those values are usually incongruous with the accepted social norms. The situation typified by Kenya's experience (as is also in other countries), has been the attempted replacement of customary tenure by formal regimes, through programmes of individual registration and titling. These have generally failed proving culturally and socially inappropriate. Land registers have been difficult to maintain, since customary norms and practices have proved remarkably persistent as an everyday basis for land allocation, transfer and inheritance.

25. There is also an emerging re-assertion and contestation of the role of traditional chiefs, for instance in South Africa, in circumstances where they may be at risk of abusing their considerable powers as authorities over land allocation. In some cases this role is favoured politically by the state.

26. In countries where alienation of customary land is prohibited by way of sale or mortgage under their constitutions, a change of the present laws so as to allow customary land to be mortgaged would obviously necessitate amendments to constitutions. However, it is doubtful whether this could be done, given the nature of customary land tenure. For example, the standard form of mortgage, giving the mortgagee the power to sell the land in the event of the mortgagor's default, strikes at the very essence of customary land tenure. Any referendum for constitutional change along those lines

would almost certainly be defeated. On the other hand, a mortgage specially designed for customary land forbidding the mortgagee to sell the land in the case of default would be valueless as collateral.

27. However, although customary land cannot be used as collateral, a financial institution funding a development would perhaps be satisfied if it could gain control of the land by acquiring a leasehold interest with the ability to grant a sublease, or by acquiring a sublease itself, depending on how the financial arrangements were to be structured.

28. In future developments of customary land, the ability of the lessee to grant a sublease could be vital to funding prospects and it would take only simple amendments to legislation, enabling the alienation of customary land for specific purposes, to put the issue beyond doubt by including a specific power to sublease. The same position would pertain to a purported assignment of lease.

29. Where management of customary land is placed in the hands of a statutory body, it may well be advised to engage in more consultative processes with the landowners. The re-assertion of the role of traditional chiefs, **with** powers **and** authorities over land allocation may be tempered by appropriate mechanisms put in place whereby such decisions are monitored by an independent body.

Equitable Succession Laws

30. It is generally the case as in many African countries, that a woman does not inherit land from her father because if she were to marry, the land would be transferred to her husband's lineage.

31. She would not have any capital to purchase land and does not share title with her husband. Her temporary use rights are not recognised for a reasonable duration through a lease or other formal contract so that she can have more leverage. If she were granted those rights she could then plan her investment, sell or mortgage this land to have some working capital, or exchange, lend, or rent it.

32. Gender equality in laws governing inheritance of property could contribute significantly to a woman's economic equality and autonomy of choice.

Women's Property Rights

33. Women's right to land is a critical factor in social status, economic well being, and empowerment. Land is a basic source of employment, the key to agricultural input, and a major determinant of a farmer's access to other productive resources and services. But the land is also a social asset, crucial for cultural identity, political power, and participation in local decision-making processes. Women's access to natural resources, such as water, fuelwood, fish and forest products, is also crucial for food security and income, particularly as land becomes increasingly scarce and access becomes a growing problem for women and men alike.

34. Although women own only about 2% of all land, the UN Economic and Social Council Commission on the Status of Women states that "land rights discrimination is a violation of human rights" and urges States " to design and revise laws to ensure that women are accorded full and equal rights to own land and other property". Similarly the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states in Article 14 that " State parties shall take all appropriate measures to eliminate discrimination against women in rural areas...and ...shall ensure to such women the right...to have access to...and equal treatment in land and agrarian reform..."

35. The approaches of governments around the world to gender equality in access to land and natural resources are highly variable.

36. A typical rural woman's view to rights to land and natural resources is characterised by local institutional arrangements through which she gains access to a variety of resources. For example, she has rights to use a rice field and a garden plot by virtue of her membership in a household. She has rights to collect water and fuelwood from nearby common lands by virtue of her membership in a community and, by virtue of her status as a woman within a lineage or extended family, she may also have the rights to harvest certain trees crops. Membership in these institutions provides use rights; the way she operates within them, her behaviour, provides the leverage to exercise these rights. The control of these institutions over her access to land is also an important means of coercing her to conform to certain types of behaviour.

37. A woman's secure access to land, alone, is not enough without access to associated support services such as credit, capital, appropriate technologies, access to markets and information.

38. One way to make a meaningful link between land ownership and development is to introduce land reform that combines market, property rights, and reforms in a comprehensive supporting institutional framework to enshrine rights and security of individuals. For the most part so far, approaches are aimed at improving the access of landless and poorer farmers generally to land and natural resources. Very few among these target women specifically, although South Africa, by a process of reform through restitution to redress discriminatory legislation, is a notable exception.

39. Broadening property rights to a human rights issue reveal some of the shortcomings in past approaches and highlights policies previously used for increasing access for the poor, which might also be fruitful for increasing women's rights to land. Secure access to land and natural resources will depend in part on better access for women to associated support services, cash, labour, markets, and information.

40. The case for addressing gender inequalities in land access is extremely strong given the growing feminization of agriculture in Asia. 86 percent of all rural female workers are in agriculture in India but they rarely hold titles to the land they cultivate. A large percentage of rural households in Asia are *de facto* female-headed due to widowhood, marital breakdown or male out-migration. Most self-employed rural women are unwaged workers on male-owned family farms. Although women's equal rights to land have been enshrined in law in most parts of South East Asia, social recognition and legal enforcement of women's rights remain major challenges. Difficulties are particularly acute for women who are divorced, separated or widowed.

41. Rights are defined, not just in law, but also in practice through a diversity of competing legal and moral systems and are strongly influenced by power dynamics at all levels. These informal struggles can undercut the formal instruments of law, for example through court interpretations, which narrow or broaden definitions of right holders. These raise a few issues for further consideration.

42. What mechanisms need to be in place to increase accountability in and encourage/compel the plurality of duty holders, including governments, formal and informal institutions to uphold the universal standards of gender equality in rights to land?

43. What practical means exist to help transform the "international norm" of gender equality in rights into a current customary norm and moral force at each of these levels?

44. In addition to promoting general principles of gender equality in rights to land and natural resources in national Constitutions, what accompanying measures are needed to strengthen women's claims vis-a-vis those duty holders who do not uphold their rights? What supporting institutions are required on the ground to guarantee that these principles have some effect and how should their functions be prioritised?

45. Given that customary systems range from fairly democratic and functional systems to conservative and abusive, what strategies exist for supporting well functioning customary systems while strengthening the channels for change in those that are not?

46. Apart from individual property rights for all women, what other options might be just as empowering or more appropriate in specific situations (i.e. severe land scarcity) such as joint rights or temporary and partial interests (i.e. resource leasing, sharecropping, formalisation of use rights, clarification of content and capacity of property rights)?

Land Ownership And Environmental Sustainability

47. If people have weak, temporary or unclear rights to the land they are using, they have little incentive to invest in it, using cash or labour, for land development or conservation of its natural resources. Confidence, investment and sustainable use are improved if land users know they have security of tenure over the long term.

48. As populations and markets in land and natural resources grow, land tenure systems, whether customary and formal, need to be robust and flexible, to prevent land degradation and the marginalisation of poor people. "Open access" tenure regimes, in which land can be freely accessed by all without social or legal sanctions, have led to the classic "tragedy of the commons" scenario, in which resources are over-exploited and degraded because the users have no incentives to harvest sustainably.

49. Common property or individualised forms of tenure, on the other hand, restrict land use or ownership to defined and recognised users. Environmental problems frequently arise when common property or communal land management systems break down as a result of population growth and land acquisition or of disposal by state or private individuals for other purposes. Often it is the poor, without formally recognised land rights, who are obliged by development processes to subsist on diminishing supplies of land and formerly abundant natural resources.

50. Land use and ownership may need to be regulated through social and legal mechanisms that take account of land suitability for different uses, production systems and types of development. Where land and land rights are traded or development concessions awarded, prices or rental values need to reflect the full environmental and social costs of private use. Land policies, laws and institutions have an important role in helping ensure that land and environmental resources are not degraded, or the costs of poor land use externalised to neighbouring land users or wider society. In urban and peri-urban areas particularly, effective zoning of land for housing, conservation and development can help improve tenure security and environmental quality for the poor and control unbridled speculation. Participatory approaches to land use planning can assist in matching land allocation and management to social needs, and in addressing potential conflicts amongst land users. Participation in planning can strengthen the confidence of people in the development process and in their tenure rights, and help direct investments to areas where they will be of greatest social benefit.

RECOMMENDATIONS ON LAND ISSUES

51. Law Ministers may wish to:

- recognise the strong link between land and development and poverty reduction;
- consider whether there is a need for land reform and/or review of current land reforms in their respective jurisdictions;

- discuss the question whether there is a need to institute an adequate legal environment which reviews and regulates: land titling and registration; the tenure of leasehold interests which have been used as collateral; the means of dealing with traditional ownership of land; assures equitable succession laws with respect to land; promulgation of women's property rights and the relevance of land ownership to environmental sustainability;

- consider the usefulness, relevance and/or applicability to their jurisdictions, of principles governing land which have been proposed for Kenya's new constitution (*Annex A*);

- advise the Secretariat of their views on any programmes which should, as a matter of priority, be the subject of work by the Secretariat and by Senior Officials of Law Ministries.

B. COMPETITION

52. Competition has long been acknowledged as an important force bringing about economic development and growth. There are many potential barriers to competition. In developing countries the main institutional barriers to domestic competition are government regulation on exit and entry of firms. Private institutions also cause barriers to competition. For example, the monopolisation of domestic distribution channels can mean that even when a good can be imported freely, there still may not be competition in the domestic market for that good. Domestic institutions that promote competition include competition laws and authorities. These were introduced by governments to tackle private barriers to product market competition and to ensure that, in sectors characterised by monopolies, prices do not diverge too much from costs. Some of the more prominent examples of private barriers to product market competition are monopolies, cartels and vertical restraints (for example contracts between producers and their distributors that prevent distributors from carrying competitors' products.)[1]

53. The enactment of competition laws in developing and transition countries is a relatively recent phenomenon and in these countries the World Bank assessment is that enforcement is not very active. This, it is said, is due in part to the lack of complementary institutions that would facilitate enforcement, such as courts or well-established information processing systems for the regulator.

54. There are many actions that governments can take to build more effective competition laws and authorities. Competition agencies need the statutory authority to force firms to supply the necessary information. They need legal enforcement powers so that they can make decisions on competition cases without referring the simpler ones to the courts. "Where courts do not work, as in many developing countries, giving competition authorities the power of enforcement is even more crucial."[2]. Governments also need to ensure the independence of competition agencies and, indeed, in most developing countries, these agencies are independent of any ministry.

55. At the Commonwealth Heads of Government Meeting in Durban in 1999, the Commonwealth Secretariat was asked to continue its support on multilateral trade issues to Commonwealth developing countries, especially small states, in building their capacities for negotiating, updating legislation and strengthening domestic trade policy institutions. They also called on the Secretariat to explore ways and means to promote consensus on international trade, which includes competition law.

56. The term competition law is used in different contexts in different countries. It can be defined to include all policies relevant to competition in the market, including trade policies,

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1 World Development Report 2002, Chapter 7

2 ibid

regulatory policies, and policies adopted by governments to address anti-competitive activities of enterprise, whether private or public[3].

57. Anti-competitive practices include:

- practices undertaken by a single firm (when a firm enjoys a dominant position);
- anti-competitive mergers and acquisitions;
- horizontal restraints (i.e. arrangements between competitors to restrain competition, including price fixing, restraint of output, market allocation, import cartels, export cartels, international cartels, conscious parallelism (competing suppliers generally set the same prices, but without an explicit agreement) and collusive tendering (bid rigging etc.); and
- vertical restraints (i.e. anti-competitive arrangements between firms along the production-distribution chain, including exclusive dealing, reciprocal exclusivity, refusal to deal, discriminatory pricing, territorial restraint, (a supplier sells to distributors only on condition that the distributor does not market the product outside a specified territory), transfer pricing that may involve over-invoicing or under-invoicing of intermediate inputs between foreign affiliates. Under–invoicing can be used to facilitate predatory pricing etc. These practices have adverse effects on market access. Concerns have arisen within circumstances where vertical restraints prevent foreign firms from having access to distribution networks that are controlled by domestic suppliers[4]).

58. Most competition laws prohibit the above mentioned anti-competitive business practices. In India, for example, Whirlpool had launched an advertising campaign that offered mostly inexpensive, but also a few valuable gifts (such as a car and an apartment) to buyers of its refrigerators. Following a complaint by a competitor that this scheme would tempt people to buy Whirlpool products in the hope of winning a prize, the Monopolies and Restrictive Trade Practices Commission of India declared the scheme illegal in February 1997[5].

59. Competition law applies to all firms operating in a national territory and supplying a particular market, whether through domestic sales, imports, foreign affiliates or non-equity forms of foreign direct investment. They do not, in principle, discriminate between national and foreign firms or between foreign firms from different national or regional origins when it comes to competitive analysis. However, many competition laws make reference to such objectives as controlling the concentration of economic power, promoting the competitiveness of domestic industries, encouraging innovation, and supporting small and medium-size enterprises[6].

60. In summary, competition law monitors the competitive behaviour of domestic and foreign firms with a view to protecting all firms operating in a territory, facilitating transparency and improving the investment atmosphere. It is further seen as:

- protecting consumers from the undue exercise of market power;
- protecting economic efficiency, in both a static and dynamic sense;
- promoting trade and integration within an economic union or free trade area;
- facilitating economic liberalization, including privatization, deregulation and the reduction of external trade barriers;

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3 *Business Guide to the World Trade System*, UNCTAD/WTO and Commonwealth Secretariat, 1999, p. 286.

4 Supra note 1, p. 191.

5 Supra note 1, p. 154.

6 Supra note 1, p. 190.

- preserving and promoting the sound development of a market economy;
- promoting democratic values, such as economic pluralism and the dispersion of socio-economic power;
- ensuring fairness and equity in marketplace transactions;
- minimizing the need for more intrusive forms of regulation or political interference in a free market economy; and
- protecting opportunities for small and medium-sized businesses[7].

61. At the international level, the WTO Agreement also deals with competition issues. The General Agreement on Trade in Services (GATS), for example, recognizes that anti-competitive business practices may restrain and thereby restrict trade, and provides for consultations aimed at eliminating anti-competitive business practices (Article IX). It also calls on each member to ensure that any monopoly supplier of a service in its territory does not, in supply of the monopoly services in the relevant market, act in a manner inconsistent with members obligations under non-discrimination principles (Article VIII).

62. Similarly, the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) took into account concerns, especially by developing countries, about anti-competitive practices involving the use of intellectual property rights[8]. Article 8(2) recognizes that "appropriate measures ..... may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". Article 40, in particular, deals with the control of anti-competitive practices in contractual licenses, and provides for consultations between member states and the supply of publicly available non-confidential information to the requesting member state. This area of the law is of particular relevance to the developing countries, whose bulk of technology transfer contracts is likely to involve foreign companies, and any enforcement action against alleged anti-competitive practices in these cases may require access to information outside their jurisdictions.

63. The Set of Multilaterally Agreed Equitable Principles and Rules for Council of Restrictive Business Practices, adopted in 1980 by the United Nations Conference on Trade and Development (UNCTAD), sets out as an important objective to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries. It also seeks to attain greater efficiency in international trade and development, inter alia through promoting of competition, control of concentration of economic power and encouragement of innovation. It aims to protect and promote social welfare in general and, in particular the interest of consumers. It calls upon governments to adopt, improve and effectively enforce appropriate competition legislation and implementation of juridical and administrative procedures[9].

64. In the framework of the OECD, international cooperation in the field of competition policy has taken place since 1967 under successive versions of a Council Recommendation Concerning Cooperation Between Member Countries on Anti-competitive Practices Affecting International Trade. It calls on member governments to make best efforts in the following aspects:

- timely notification of the initiation of investigations to member countries whose interests may be affected;
- coordination of actions when two or more member countries proceed against the same anti-competitive practice;

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7 Supra note 1.

8 Supra note 1, p. 45.

9 Supra note 1, p. 225.

- cooperation in developing or applying mutually satisfactory and beneficial remedies for dealing with anti-competitive practices, and, to that effect, supply each other with relevant information;
- consultation when a country considers that an investigation by another country may affect its important interests, or when enterprises situated in another member country have engaged in anti-competitive practices that substantially adversely affect its interests, and giving sympathetic consideration to the views expressed by the affected country; and in this context;
- commitment to take whatever remedial action is considered appropriate.

65. It also recommends a set of detailed guiding principles for the implementation of notifications, exchanges of information, cooperation in investigations and proceedings, consultations and conciliation of anti-competitive practices affecting international trade[10].

66. In terms of cooperation, many countries have concluded bilateral agreements, for example the United States and the European Union in 1991. This agreement provides for notification by either party of enforcement activities affecting important interests of the other party and for the exchange of information, both of a general nature relating to competition policy in each country and relating to specific anti-competitive conduct. The agreement contains provisions for cooperation and coordination of enforcement activities in situations where both parties have an interest in pursuing enforcement activities with regard to the situation. In order for them to avoid conflicts over enforcement activities, the agreement requires each party to take into account the important interests of each party in its enforcement activities, particularly with respect to decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation, the nature of the remedies or penalties sought, and sets forth a number of principles which the parties have to take into account in seeking to minimize the adverse effects on the other party of their enforcement activities[11].

67. There is also a cooperation and coordination agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission, implemented in 1994. This agreement provides for the notification of enforcement activities that may affect important interests of the other party. It also facilitates the exchange of information of a general nature, as well as coordination of enforcement activities and exchanges of information about specific enforcement matters, including obtaining information and documents on behalf of the other party[12].

68. Mutual legal assistance in criminal matters arrangements and laws can also be used, in appropriate cases, to further co-operation between countries.

69. Although the broad trade issues undoubtedly fall within the ministerial responsibility of a minister other than the Attorney-General or Law Minister, and competition law responsibility is a moveable feast, it is clear that there are significant legal issues to be resolved at least in partnership. Certainly when it comes to contemplating appropriate compulsory powers to be conferred on competition authorities, and the potential impact of competition laws on the courts, the input of the Law Minister is essential. In all of these areas, the affording of natural justice to the parties and the maintenance of the fundamentals of the rule of law is an imperative.

70. The Secretariat has prepared, for consideration of Ministers, a draft model law on competition which could be of assistance to member countries looking to deal with this issue. It draws on the laws of Commonwealth countries and on work done in international fora. The model

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10 Supra note 1, p. 223.

11 *WTO Annual Report, Special Study on Trade and Competition Policy*, Geneva, 1997, p. 53.

12 Ibid., p. 54.

law can be considered at the conclusion of the general discussion on the law and development agenda item.

COMMERCIAL LAWS

71. Effective statutory provision in the areas of company and competition law, as well as legislation to complement effective corporate governance will yield positive results. The bottom line is that the creation of a financial environment without the appropriate legal support cannot uphold itself. Law Ministers are therefore challenged to cause the enactment of the legal foundation appropriate to their countries' growth and development through investment.

72. Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions considered the issue of "Corporations and the Law" at their 2000 meeting. They considered a number of issues in the knowledge that company law is a subject receiving attention on a number of fronts at the current time. This paper deals with some, but by no means all, of the issues which are the subject of increasing transnational concern in the field of company law. Of particular and widespread concern seem to be the subjects of:

- the duties of directors;
- the effect of recent national and international anti-corruption strategies;
- the increasing introduction of corporate criminal liability;
- disqualification of directors; and
- shareholders' remedies

each of which has been the focus of court decisions, treaty development and learned writing.

73. Some small Commonwealth jurisdictions have considered the question whether their existing company law meets the modern day needs of their communities and have reached the conclusion that the traditional UK legislation, and that based on it, is no longer adequate. Indeed, the UK itself is reviewing its company law.

74. An example of a recognition of the importance of sound economic and corporate governance policies is found in the NEPAD prioritisation of eight codes and standards which it believes will achieve the desired levels of good economic and corporate governance. Many of these subjects fall without the responsibility of law ministers but the question of corporate governance (which is one of the NEPAD priority subjects) is squarely one for consideration in the context of developing a sound legal commercial environment.

Company Law

75. In most jurisdictions the fiduciary and general duties of directors are found both in the common law and in statute law. In addition to legal control, self-regulation (for example by corporate governance codes, listing rules and accounting standards) plays a major part in modern company law.[13]

76. Governments have the option to take no action and allow the courts to clarify this area of the law. However, the courts have failed to provide clear guidance to directors on the level of skill and care expected of them, particularly in relation to the responsibilities and liability of executive and non-executive directors. A statutory clarification of directors' duties ought to lead to improved corporate governance practices and market confidence. Clarification of directors duties should also

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[13] Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties. Law Commission, UK, September 1999, Law Com No 261

lead to a reduction in agency costs by addressing the uncertainty of directors in decision making and thereby enabling them to take calculated business risks to maximise company profits. Allowing directors to delegate and rely on judgments of employees of the company or other experts gives recognition to the complexity of management of large corporations and removes impediments to decision making and the efficient management of a corporation's business.

77. The question of the statutory definition of a director's duty of skill and care is also topical. There are various ways of classifying directors' duties of care. The middle road, and that now recommended by the UK Law Commission[14], is a dual subjective/objective test where the director owes a duty to his company to exercise the care, diligence and skill that would be exercised by a reasonable person in the same circumstances, having both the knowledge and experience that may reasonably be expected of a person in the same position as the director and the director's knowledge and experience. The dual approach has the advantage that it allows account to be taken of the responsibilities of directors of different types and in different situations.

78. Law Ministers may wish to recognise publicly that there is merit in statutorily defining director's duties because such elucidation can lead to improved "corporate governance" practices (discussed below), market confidence and ultimate certainty in the investment climate of a member state.

79. Changes in public opinion on white collar crime and a perceived increase in the incidence of corporate crime have led to more concentrated efforts at enforcing corporate obligations by bringing criminal prosecutions. Corporations have been prosecuted for anti-competitive conduct, environmental crimes, conspiracy, fraud, bribery, tax crimes and customs offences. In addition, effective anti-money laundering laws impose corporate criminal liability. The prospect that criminal behaviour of a corporate agent will be attributed to the corporation should motivate corporate officers and directors to deter criminal activity within the company. Corporate criminal liability is vicarious with corporations generally being able to be held liable for intent-based as well as strict liability offences and both crimes of commission and crimes of omission.

80. Any legislation promulgated for the purpose of disqualification of directors should be aimed at the protection of society from persons who are deemed unsuitable and additionally to indicate to the potential investor that there are legal remedies available. As was discussed at the meeting of Small Commonwealth Jurisdictions, Law Ministers may find it useful to enact the appropriate legislation so as to provide adequate protection for potential investors and to ensure that the corporate sector of their economies is not under threat from persons who abuse the fiduciary position in which they are placed.

81. The issue of shareholders remedies was again discussed in considerable detail at the Jersey meeting. There it was revealed that the limiting common law rule in *Foss v. Harbottle* - under which only the company itself, acting in accordance with the will of the majority of its members, may bring proceedings – can operate to unduly limit the remedies that are available to shareholders. Legislation can effectively abolish the common law derivative rights under the exceptions to the proper plaintiff rule in *Foss v. Harbottle*. The common law personal action exception to the rule has remained however, since under this action, a member is not bringing or intervening in proceedings on behalf of a company. The United Kingdom Law Commission has viewed that the rule in *Foss v. Harbottle* is unduly complicated and needs to be replace by statutory derivative action.

82. Law Ministers may wish to consider the desirability of reviewing the laws of their countries to the extent that the rule in *Foss v. Harbottle* is sufficiently mischievous to present a climate of insecurity for shareholders and ultimately investors.

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[14] ibid.

Corporate Governance

83. There are also parallel global developments in the area of company administration as evidenced by the May 1999 OECD approved Principles of Corporate Governance covering the rights of shareholders, the role of shareholders in corporate governance, disclosure and transparency and responsibilities of the board. These Principles (*Annex B*) emphasise, *inter alia*, the role of the board in monitoring and managing potential conflicts of interest of management, board members and shareholders including misuse of corporate assets and abuse in related party transactions. The development of corporate governance models is important and fits well with governmental concerns to simplify their corporation laws. Successful development of and acceptance of corporate governance models ought to increase the economic effectiveness of companies and result in better corporate citizenship. If these goals are reached corporation laws will be able to be facilitative rather than prescriptive.

84. The term "corporate governance" evokes many concepts within an economic system, *viz:*

- the promotion of corporate fairness, transparency and accountability;
- a system by which business corporations are directed and controlled thereby detailing the various rights and responsibilities of the participants in a corporation[15]; and
- the relationship of a company to its shareholders on one hand, and on the other, to society as a whole whereby the government, associations of employers and workers and corporations are designated " social partners".[16]

85. Within the context of the priority mandates of the Commonwealth Secretariat for the elimination of poverty, promotion of sustainable development and the enhancement of the appropriate legislative framework in member states, it is suggested that the multi definitions of corporate governance are relevant. This posture was further underlined in the Coolum Communiqué where the Heads of Government reiterated the importance of good corporate governance and urged foreign investors to act in accordance with national laws, legal requirements and social obligations.

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15 Definition adopted by OECD

16 See for example the Charter of Civil Society for the Caribbean Community - Article 1

Land Principles for the New Constitution

1. All land belongs to the people of Kenya.
2. The people will hold such land in accordance with systems of tenure defined by legislation.
3. Non-citizens of Kenya would be prohibited from acquiring land except on the basis of leasehold tenure.
4. Land in Kenya shall be classified as public, private or commons.
5. Public land shall be clearly delineated and held in trust for the people in Kenya in terms of legislation defining the nature and extent of such trust.
6. Private land may be acquired and held by individuals or other jural persons in accordance with systems of tenure defined legislation.
7. The commons shall be clearly delineated and vested in communities or agents thereof in accordance with systems of tenure defined by legislation.
8. Property rights lawfully acquired shall be protected and may be freely by alienated without discrimination as to gender subject only to such restriction as are inherent in the tenure systems creating them.
9. All land however acquired or held are subject to the inherent power of the state to acquire or regulate such land in the public interest or for the public benefit.
10. There shall be established a Land Commission whose functions will include -
    - Holding title to public land
    - Periodic review of land policy and law
    - Developing principles for the sustainable use and management of land
    - Exercising residual land administration functions.
11. Parliament shall make law within two years of its first sitting under this constitution providing for: -
    - The incorporation of the above principles
    - Mechanisms for resolving land disputes under different tenure categories
    - An expeditious and cost-effective system of land alienation (transfers and transmissions)
    - Equitable distribution of land including the resolution of problems of landlessness, or spontaneous settlements in urban areas.
    - The investigation and resolution of historical claims especially within the Coast, Rift Valley and North Eastern Provinces and other areas.
    - The introduction of tax on idle and underutilized of land, and
    - The coordination and simplification of land laws.

Report of the Constitution of Kenya Review Commission, 18 September, 2002

OECD PRINCIPLES OF CORPORATE GOVERNANCE
(Extracts)

1. The Principles contained in this document build upon experiences from national initiatives in Member countries and previous work carried out within the OECD, including that of the OECD Business Sector Advisory Group on Corporate Governance. During their preparation, a number of OECD committees also were involved: the Committee on Financial Markets, the Committee on International Investment and Multinational Enterprises, the Industry Committee, and the Environment Policy Committee.

Preamble

2. The Principles are intended to assist Member and non-Member governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance. The Principles focus on publicly traded companies. However, to the extent they are deemed applicable, they might also be a useful tool to improve corporate governance in non-traded companies, for example, privately held and state-owned enterprises. The Principles represent a common basis that OECD Member countries consider essential for the development of good governance practice. They are intended to be concise, understandable and accessible to the international community. They are not intended to substitute for private sector initiatives to develop more detailed "best practice" in governance.

3. Increasingly, the OECD and its Member governments have recognised the synergy between macroeconomic and structural policies. One key element in improving economic efficiency is corporate governance, which involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and shareholders and should facilitate effective monitoring, thereby encouraging firms to use resources more efficiently.

4. Corporate governance is only part of the larger economic context in which firms operate, which includes, for example, macroeconomic policies and the degree of competition in product and factor markets. The corporate governance framework also depends on the legal, regulatory, and institutional environment. In addition, factors such as business ethics and corporate awareness of the environmental and societal interests of the communities in which it operates can also have an impact on the reputation and the long-term success of a company.

5. While a multiplicity of factors affect the governance and decision-making processes of firms, and are important to their long-term success, the Principles focus on governance problems that result from the separation of ownership and control. Some of the other issues relevant to a company's decision-making processes, such as environmental or ethical concerns, are taken into account but are treated more explicitly in a number of other OECD instruments (including the Guidelines for Multinational Enterprises and the Convention and Recommendation on Bribery) and the instruments of other international organisations.

6. The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible and well understood across borders. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, may reduce the cost of capital, and ultimately induce more stable sources of financing.

7. Corporate governance is affected by the relationships among participants in the governance system. Controlling shareholders, which may be individuals, family holdings, bloc alliances, or other corporations acting through a holding company or cross shareholdings, can significantly influence corporate behaviour. As owners of equity, institutional investors are increasingly demanding a voice in corporate governance in some markets. Individual shareholders usually do not seek to exercise governance rights but may be highly concerned about obtaining fair treatment from controlling shareholders and management. Creditors play an important role in some governance systems and have the potential to serve as external monitors over corporate performance. Employees and other stakeholders play an important role in contributing to the long-term success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance. The role of each of these participants and their interactions vary widely among OECD countries and among non-Members as well. These relationships are subject, in part, to law and regulation and, in part, to voluntary adaptation and market forces.

8. There is no single model of good corporate governance. At the same time, work carried out in Member countries and within the OECD has identified some common elements that underlie good corporate governance. The Principles build on these common elements and are formulated to embrace the different models that exist. For example, they do not advocate any particular board structure and the term "board" as used in this document is meant to embrace the different national models of board structures found in OECD countries. In the typical two tier system, found in some countries, "board" as used in the Principles refers to the "supervisory board" while "key executives" refers to the "management board". In systems where the unitary board is overseen by an internal auditor's board, the term "board" includes both.

9. The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Their purpose is to serve as a reference point. They can be used by policy makers, as they examine and develop their legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.

10. The Principles are evolutionary in nature and should be reviewed in light of significant changes in circumstances. To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities. Similarly, governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders. It is up to governments and market participants to decide how to apply these Principles in developing their own frameworks for corporate governance, taking into account the costs and benefits of regulation.

11. The following document is divided into two parts. The Principles presented in the first part of the document cover five areas: I) The rights of shareholders; II) The equitable treatment of shareholders; III) The role of stakeholders; IV) Disclosure and transparency; and V) The responsibilities of the board. Each of the sections is headed by a single Principle that appears in bold

italics and is followed by a number of supporting recommendations. In the second part of the document, the Principles are supplemented by annotations that contain commentary on the Principles and are intended to help readers understand their rationale. The annotations may also contain descriptions of dominant trends and offer alternatives and examples that may be useful in making the Principles operational.

I. THE RIGHTS OF SHAREHOLDERS

The corporate governance framework should protect shareholders' rights.

A. Basic shareholder rights include the right to: 1) secure methods of ownership registration; 2) convey or transfer shares; 3) obtain relevant information on the corporation on a timely and regular basis; 4) participate and vote in general shareholder meetings; 5) elect members of the board; and 6) share in the profits of the corporation.

B. Shareholders have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as: 1) amendments to the statutes, or articles of incorporation or similar governing documents of the company; 2) the authorisation of additional shares; and 3) extraordinary transactions that in effect result in the sale of the company.

C. Shareholders should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings:

i. Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.
ii. Opportunity should be provided for shareholders to ask questions of the board and to place items on the agenda at general meetings, subject to reasonable limitations.
iii. Shareholders should be able to vote in person or in absentia, and equal effect should be given to votes whether cast in person or in absentia.

D. Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed.

E. Markets for corporate control should be allowed to function in an efficient and transparent manner.

i. The rules and procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.
ii. Anti-take-over devices should not be used to shield management from accountability.

F. Shareholders, including institutional investors, should consider the costs and benefits of exercising their voting rights.

II. THE EQUITABLE TREATMENT OF SHAREHOLDERS

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

A. All shareholders of the same class should be treated equally.

i. Within any class, all shareholders should have the same voting rights. All investors should be able to obtain information about the voting rights attached to all classes of shares before they purchase. Any changes in voting rights should be subject to shareholder vote.
ii. Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.
iii. Processes and procedures for general shareholder meetings should allow for equitable treatment of all shareholders. Company procedures should not make it unduly difficult or expensive to cast votes.

B. Insider trading and abusive self-dealing should be prohibited.

C. Members of the board and managers should be required to disclose any material interests in transactions or matters affecting the corporation.

III. THE ROLE OF STAKEHOLDERS IN CORPORATE GOVERNANCE

The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

A. The corporate governance framework should assure that the rights of stakeholders that are protected by law are respected.

B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights.

C. The corporate governance framework should permit performance-enhancing mechanisms for stakeholder participation.

D. Where stakeholders participate in the corporate governance process, they should have access to relevant information.

IV. DISCLOSURE AND TRANSPARENCY

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

A. Disclosure should include, but not be limited to, material information on:

i. The financial and operating results of the company.
ii. Company objectives.
iii. Major share ownership and voting rights.
iv. Members of the board and key executives, and their remuneration.
v. Material foreseeable risk factors.
vi. Material issues regarding employees and other stakeholders.
vii. Governance structures and policies.

B. Information should be prepared, audited, and disclosed in accordance with high quality standards of accounting, financial and non-financial disclosure, and audit.

C. An annual audit should be conducted by an independent auditor in order to provide an external and objective assurance on the way in which financial statements have been prepared and presented.

D. Channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users.

V. THE RESPONSIBILITIES OF THE BOARD

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

C. The board should ensure compliance with applicable law and take into account the interests of stakeholders.

D. The board should fulfil certain key functions, including:

i. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.
ii. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
iii. Reviewing key executive and board remuneration, and ensuring a formal and transparent board nomination process.
iv. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.
v. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for monitoring risk, financial control, and compliance with the law.
vi. Monitoring the effectiveness of the governance practices under which it operates and making changes as needed.
vii. Overseeing the process of disclosure and communications.

E. The board should be able to exercise objective judgment on corporate affairs iindependently, in particular, from management:

i. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are financial reporting, nomination and executive and board remuneration.

ii. Board members should devote sufficient time to their responsibilities.

F. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.

LAW AND TECHNOLOGY

COMMONWEALTH DRAFT MODEL LAW ON COMPETITION

INTRODUCTION

1. The subject of competition laws is covered generally in paper **LMM(02)9** (section B). Meeting in Jersey in 2002, Law Ministers and Attorneys General from Commonwealth Small Jurisdictions acknowledged the importance of this subject and agreed to have it referred to the next Law Ministers meeting for discussion.

2. A model law (annexed to this paper) has been prepared for the assistance of those Commonwealth countries considering enactment of such legislation. In developing this law, the consultant considered, in particular, the existing laws of south Africa and Zambia and had regard to the rules and regulations on competition that have been developed by, first, the United Nations Commission on Trade and Development (UNCTAD), and second, the Organisation for Economic Co-operation and Development (OECD). The provisions governing competition in the European Union were also taken into account.

THE MODEL LAW

3. The provisions of the model are described briefly below –

- Clause 1 is the short title to the Act.
- Clause 2 is the interpretation section defining the words and expressions used in the Act.
- Clause 3 sets out the scope and application of the Act.
- Clause 4 prohibits anti-competitive agreements, practices and decisions between parties in a horizontal relationship.
- Clause 5 prohibits anti-competitive agreements between parties in a vertical relationship.
- Clause 6 empowers the Authority (as established under Clause 10) to exempt particular anti-competitive agreements and practices or categories of anti-competitive agreements or practices from the prohibitions imposed by Clauses 4 and 5.
- Clause 7 prohibits a party with a dominant position of market power from abusing that power.
- Clause 8:-
  (i) Provides for the notification to the Authority, of any merger or amalgamation which would result in a concentration over the prescribed limit;
  (ii) Empowers the Authority to prohibit a concentration over the prescribed limit if the concentration is likely to limit competition; and
  (iii) Empowers the Authority to exempt an enterprise from such prohibition if the concentration would result in a technological, efficiency or other pro-competitive gain or is the only way to rescue a failing enterprise.

- Clause 9 empowers the Authority to employ experts to investigate concentrations and proposed concentrations.

- Clause 10 establishes the Competition Authority and provides for the appointment of its chairman and members by the Minister of Trade.

- Clause 11 provides for the independence of the Authority.

- Clause 12 sets out the functions of the Authority.

- Clause 13 sets out the powers of the Authority.

- Clause 14 empowers the Authority to issue guidelines indicating the manner in which it will enforce the provisions of the Act.

- Clause 15 empowers the Authority to appoint the staff necessary for the discharge of its functions under the Act.

- Clause 16 sets out the manner in which complaints about prohibited practices (as defined in the Act) are to be made to the Authority.

- Clause 17 empowers the Authority, for the purposes of an investigation under the Act, to summon any person to appear before it for examination or for production of any document or article in the possession of that person.

- Clause 18 empowers a Judge of the High Court to issue, on an application made by an officer of the Authority, to issue a search warrant for the search of any premises for any document or article relevant to an investigation conducted by the Authority, and suspected to be on those premises.

- Clause 19 empowers a court exercising civil jurisdiction to grant, on the application of the Authority, an injunction restraining an alleged prohibited practice until the completion of an investigation into that prohibited practice by the Authority.

- Clause 20 empowers the Authority to make orders requiring an enterprise to desist from a prohibited practice, and where necessary, to require the enterprise to carry out further action for elimination and prevention of any harmful practice.

- Clause 21 prohibits a member or officer of the Authority or any expert or Inspector employed by the Authority from disclosing any information which may come to his or her knowledge in the performance and discharge of his or her duties and functions under this Act.

- Clause 22 sets out the offences under the Act.

- Clause 23:-
  (1) enables a person who suffers loss or damage as a result of a prohibited practice or because of a violation of an order made by the Authority, to institute a civil action for damages for such loss or damage;
  (2) enables a person who apprehends loss or damage from an alleged prohibited practice to make an application to a civil court for an injunction restraining that prohibited practice;

(3) allows for an injunction to be applied if the Court is satisfied that there is evidence of a prohibited practice or act and that a person or a group of persons is likely to suffer serious or irreparable damage should the prohibited act be not restrained.

(4) authorises one person in that group to sue for damages for such loss or damage or to apply for an injunction restraining such prohibited practice, on behalf of the whole group;

(5) empowers a court to award treble damages in cases of loss or damage caused as a result of a prohibited practice involving price fixing.

(6) mandates the Authority, on the plaintiff's request, to make available any documentation or information which the Authority has and which may be of assistance to the plaintiff in establishing the loss of damage to the plaintiff or his/her group. Information or documents shall not be given pursuant to the disclosure provisions of Clause 21.

- Clause 24 empowers the Authority to give advance rulings as regards the eligibility of an enterprise for exemption from the prohibitions imposed by clauses 4 and 5.

- Clause 25 enables a person to apply for judicial review of a decision of the Authority within 60 days of that decision being communicated to that person.

- Clause 26 empowers the Authority to make regulations for the purposes of the Act.

- The Schedule provides for the qualifications for appointment as a member of the Authority, resignation and removal from office, of members of the Authority, term of office of members of the Authority, the Chairman of the Authority, meetings of the Authority and remuneration payable to members of the Authority.

ACTION BY MINISTERS

4. Ministers may wish to acknowledge the usefulness of the model as a guide to countries seeking assistance with the either the preparation or modernisation of a law on competition.

MODEL COMPETITION ACT

AN ACT to control and eliminate anti-competitive agreements and arrangements between enterprises or through mergers and acquisitions or by the abuse of dominant position of market power, which limit access to markets or otherwise prevent or lessen competition to establish a Competition Authority; and for connected matters.

BE IT ENACTED by the Parliament *[name of legislature]* of .....*[name of country]* as follows:

Short Title

1. This Act may be cited as the Competition Act, *[year of enactment]*.

Interpretation

2. In this Act, unless the context otherwise requires -

"authority" means the Competition Authority established under section 10;

"concerted practice" means co-operative or collaborative conduct between enterprises, achieved through direct or indirect contact, in substitution for their independent action;

"dominant position of market power" means a situation where an enterprise, either by itself or acting with a few other enterprises, is in a position to control the relevant market in ..... *[name of country]* or any part of it, for a particular good or service or group of goods or services;

"enterprise" includes a firm, partnership, corporation, company, association or natural or legal person, irrespective of whether formed or controlled by private persons or by the State, and which engages directly or indirectly in economic activity;

"essential facility" means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers;

"excessive price" means a price for a good or service which -

(a) bears no reasonable relation to the economic value of that good or service; and
(b) is higher than the value referred to in paragraph (a).

"exclusionary act" means an act that impedes or prevents an enterprise from entering into, or expanding within, a market;

"horizontal relationship" means a relationship between competitors;

"market power" means the power of an enterprise to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;

"prescribed" means prescribed by regulations made under this Act;

"prohibited practice" means an agreement, arrangement, practice, action or concentration prohibited by section 4 or 5 or 7 or 8;

"relevant market" means a market in ..... *[name of country]* for any goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them;

"vertical relationship" means the relationship between an enterprise and its suppliers, its customers or both.

Scope of the Act

3.(1) This Act applies to all economic activity within, or having effect within,.....*[name of country]*.

(2) This Act does not derogate from the direct enjoyment of the privileges and protections conferred by other laws protecting intellectual property, including inventions, industrial models, trade marks and copyrights. It applies however, to the use of such property in such a manner as to cause the anti-competitive effects prohibited herein.

(3) This Act does not apply to concerted conduct designed to achieve a non commercial socio-economic objective or similar purpose.

(4) Insofar as this Act applies to an industry or a sector of industry that is subject to the regulation and control of a another regulatory authority, the exercise of the powers of that other regulatory authority shall not be construed as derogating from the exercise of powers by the Authority established to administer this Act.

Prohibition of restrictive agreements, arrangements or concerted practices between rival or potentially rival enterprises.

4.(1) An agreement between, or concerted practice by, enterprises, or a decision by an association of enterprises, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing or lessening competition in a relevant market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from the agreement, practice or decision outweighs that effect; or

(b) it involves any of the following restrictive practices –
  (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
  (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services, or
  (iii) collusive tendering; or
  (iv) concerted refusals to purchase or concerted refusals to supply.

(2) An agreement to engage in a restrictive practice referred to in subsection (1) (b)of this section is presumed to exist between two or more enterprises in a horizontal relationship if -

(a) any one of those enterprises owns a significant interest in the other, or they have at least one director or substantial shareholder in common, and
(b) any combination of those enterprises engages in that restrictive practice.

(3) A presumption referred to in subsection (2) of this section may be rebutted if the enterprise, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) of this section was a normal commercial response to conditions prevailing in that market.

(4) For the purposes of subsections (2) and (3) of this section, "director " means –

(a) a director of a company as defined by the law relating to the incorporation of companies;
(b) a trustee of a trust; or
(c) a person holding an equivalent position in an enterprise.

(5) The provisions of subsection (1) of this section do not apply to an agreement between, or concerted practice engaged in by-

(a) a company, its wholly owned subsidiary, a wholly owned subsidiary of that subsidiary or any combination of them; or
(b) the constituent enterprises within a single economic entity similar in structure to those referred to in paragraph (a) of this sub-section.

Prohibition of restrictive practices by parties in vertical relationship

5.(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a relevant market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect.

(2) An agreement referred to in subsection (1) shall be deemed not to substantially prevent or lessen competition in a relevant market unless –

(a) at least one of the parties to the agreement holds a dominant position in that market; or
(b) the lessening of competition results from the fact that similar agreements are widespread in a market affected by the agreement.

Authorization of prohibited agreements

6.(1) The Authority may –

(a) of its own motion ,authorize a category of agreements or practices, prohibited by section 4 or 5; or
(b) on an application made by an enterprise for the exemption of an agreement or practice, or a category of agreements or practices, from the prohibition imposed by section 4 or section 5, authorize such agreement or practice or category of agreements or practices,

if it is satisfied that such agreement or practice or category of agreements and practices as a whole will produce a net public benefit because the agreement or practice or category of agreements or practices –

(i) contributes to –
  (A) improving production or distribution; or
  (B) promoting technical or economic progress;
  while allowing consumers a fair share of the resulting benefit but –
(ii) does not –
  (A) impose on the enterprises concerned restrictions which are not indispensable to the attainment of those objectives; or
  (B) afford the enterprises concerned the possibility of eliminating competition in respect of a substantial part of the goods in question.

(2) An authorization under subsection(1) of this section shall be for such period, and may be subject to such conditions, as may determined by the Authority.

Abuse of dominant position of market power

7.(1) An enterprise shall be deemed to have dominant position of market power if –

(a) it has a share of at least 45 per centum of the market;
(b) it has a share of 35 per centum or over but less than 45 per centum of the market, unless it can show that if does not have market power; or
(c) it has a share of less than 35 per centum of the market but has market power.

(2) The abuse of dominant position of market power by an enterprise is prohibited .

(3) An action of an enterprise having dominant position of market power which results in, or is likely to result in, a lessening of competition in that market is an abuse of that dominant position.

(4) The following actions of an enterprise having dominant position of market power shall be deemed to constitute abuses of that dominant position –

(a) predatory behaviour towards competitors, such as using below – cost pricing to eliminate competitors, or to prevent competitors from entering the market;
(b) refusing to give a competitor access to an essential facility when it is economically feasible to do so;
(c) limiting production, markets or technical development to the prejudice of consumers;
(d) directly or indirectly imposing unfair trading conditions;
(e) applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage;

(f) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; or

(g) refusing to supply scarce goods or provide services to a competitor when supplying those goods or providing those services is economically feasible.

(5) The provisions of this section shall be deemed not to prohibit actions by an enterprise that create –

(a) obstacles to the entry of new enterprises; or

(b) reduce the competitiveness of existing enterprises in,

the market, if those actions are the result of increasing the efficiency of that enterprise or have the effect of passing the benefits of greater efficiency to consumers.

(6) If the Minister of Trade (hereinafter referred to as "the Minister") is satisfied that there are exceptional and compelling reasons of public policy why the prohibition contained in subsections (2) and (3) of this section ought not to apply in particular circumstances to actions not falling within subsection (4) of this section, he or she may, after a public consultation and advice from the Authority, by Order published in the Gazette, provide for it not to apply to such actions in such circumstances as may be specified in the Order. Such an Order may provide further that the prohibition is to be deemed never to have applied in relation to actions specified in the Order.

(7) When an enterprise has abused its dominant position of market power and no other remedy under this Act or under any other applicable law would be likely to rectify the resulting position or prevent recurrence of the abuse, the Authority may re-organize or divide the enterprise provided there is a reasonable likelihood that the entity or entities resulting from the reorganization or division would be economically viable and provided that the power to reorganize or divide conferred by this section is exercised in a manner designed to minimize any increases in the cost of providing the good or service in question.

Notification, investigations and prohibition of mergers of concentrated markets.

8.(1) A concentration shall be deemed to arise when –

(a) two or more previously independent enterprises merge, amalgamate or combine the whole or a part of their businesses; or

(b) one or more natural or legal persons already controlling at least one enterprise acquire, whether by purchase of securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other enterprises.

(2) For the purposes of this section, "control " means the ability to materially influence an enterprise, in particular through –

(a) ownership of, or the right to use the whole or part of the assets of, the enterprise; or
(b) rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of the enterprise.

(3) When an agreement or public bid will result in a concentration larger than the minimum size prescribed by regulations made under subsection (7) of this section, the parties to the agreement or bid are prohibited from consummating such concentration until.....days after providing notification of the proposed concentration to the Authority, in such form and containing such information as is specified in regulations made under subsection (7) of this section.

(4) Before the expiration of the period referred to in subsection (3) of this section, the Authority may issue a written request to the parties concerned for further information. The issuance of such a request shall have the effect of extending the period within which the concentration may not be consummated for an additional [.....] days beginning on the day after substantially all of the requested information is furnished to the Authority.

(5) Parties to an agreement or public bid not required to give notification under in subsection (3) of this section may voluntarily notify the Authority and, if they do so, shall be subject to the same procedures, restrictions, and rights as are applicable in cases of compulsory notification.

(6) If, before consummation of a concentration, the Authority determines that such concentration is prohibited by subsection (8) of this section and does not qualify for exemption under subsection (9) of this section, the Authority may -

(a) prohibit consummation of the concentration;
(b) prohibit consummation of the concentration unless and until it is modified by changes specified by the Authority; or
(c) prohibit consummation of the concentration unless and until the relevant party or parties enter into legally enforceable agreements specified by the Authority.

(7) The Authority may from time to time make regulations prescribing –

(a) the minimum size or sizes of the concentrations in respect of which notification is required to be given under subsection (3) of this section;
(b) the information that must be furnished in respect of such concentrations;
(c) the types of concentration excepted or exempted from the requirement of giving notification under subsection (3) of this section; or
(d) other rules relating to the notification procedures referred to in subsections (3), (4) and (5) of this section.

(8) Concentrations that will probably lead to a significant lessening of competition are prohibited.

(9)(a) Concentrations prohibited by subsection (8) of this section may be exempted from the prohibition by the Authority if the parties establish that either –

(i) the concentration has brought about, or is likely to result in any technological or efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result, or is likely to result, from the concentration, and would not likely to be obtained if the concentration is prevented; or

(ii) one of the parties to the concentration is faced with actual or imminent financial failure, and the concentration represents the least anti-competitive among the known alternative uses for the failing enterprise's assets.

(b)The burden of proof under subsection (a) lies with the party seeking the exemption.

(c) A party seeking to rely on the exemption specified in paragraph (a)(i) of this subsection must demonstrate that if the concentration were not consummated it is not likely that the relevant technological, efficiency or other pro-competitive gains would be realized by means that would limit competition to a lesser degree than the concentration.

(d) A party seeking to rely on the exemption specified in paragraph (a)(ii) of this subsection must –

(i) demonstrate that reasonable steps have been taken within the recent past to identify alternative purchasers for the failing enterprise's assets; and

(ii) fully describe the results of that search.

(10) The Authority may determine, within three years after consummation of a concentration, that either a concentration which has not been notified under subsection(3) of this section or a notified concentration with respect to which the provisions of subsections (3) to (5) of this section have not been fully complied with, has led or will probably lead to a significant lessening of competition and does not qualify for either of the two exemptions set out in subsection (9) of this section. If it so determines, the Authority may –

(a) undo the concentration by dissolving it into its constituent elements;

(b) require other modifications of the concentration, including sale of a portion of its operations or assets; or

(c) require the surviving enterprise or enterprises to enter into legally enforceable agreements specified by the Authority and designed to prevent or lessen the anti-competitive effects of the concentration.

(11) Notifiable concentrations that the Authority determines are prohibited by subsection (8) of this section and do not qualify for exemption under subsection (9) of this section may nevertheless be authorised by a published decision of the Government of .....(name of country) for overriding reasons of public policy involving a unique and significant contribution to the general welfare of the citizens of ....(name of country).

Concentration investigations

9.(1) In investigating a concentration or a proposed concentration, the Authority may direct an expert or experts to investigate the concentration or proposed concentration.

(2) Any person, whether or not a party to, or participant in, a concentration investigation may voluntarily file with the Authority, any document, affidavit, statement or other relevant information in respect of the concentration or proposed concentration.

Competition Authority

10.(1) There shall be an authority to be called the Competition Authority.

(2) The Authority shall, by the name assigned to it by subsection (1), be a body corporate with perpetual succession and a common seal, and may sue and be sued in such name.

(3) The Authority shall consist of three members appointed by the Minister, one of whom shall be appointed as the Chairman of the Authority.

(4) The provisions of the Schedule to this Act shall apply to qualifications for appointment as a member of the Authority, resignation and removal from office, of members of the Authority, term of office of members of the Authority, the Chairman of the Authority, meetings of the Authority, remuneration payable to members of the Authority and protection of action of members of the Authority.

Independence of the Authority

11.(1) The Authority is independent and subject only to the law and the Constitution.

(2) The Authority shall be impartial and shall exercise, perform and discharge, its powers, duties and functions, under this Act, without fear, prejudice or favour.

(3) Parliament (name of legislature) shall appropriate annually, for the use of the Authority, such sums of money as may be necessary for the proper exercise, performance and discharge, by the Authority, of its powers, duties and functions under this Act.

Functions of the Authority

12. The functions of the Authority shall be to-

(a) implement and enforce the provisions of this Act;
(b) encourage and promote competition in all sectors of the economy;
(c) take steps to reduce barriers to entry into any sector of the economy or to engage in any form of economic activity;
(d) take measures to increase public awareness of the provisions of this Act; and
(e) assist in the preparation, amendment or review of legislation on restrictive business practices and competition policy.

Powers of the Authority

13. The Authority shall have the power to-

(a) conduct such investigations as may be necessary for enforcing the provisions of this Act;
(b) require any person to furnish such returns and information as may be necessary for implementing the provisions of this Act;
(c) acquire and hold, property, both movable and immovable, and to sell, lease, mortgage or otherwise dispose of the same;
(d) enter into such contracts as may be necessary for the proper discharge of it's functions;
(e) conduct seminars, workshops and symposia; and
(f) do all such other things as may be necessary or incidental to the proper discharge of its functions.

Guidelines on enforcement of the Act.

14.(1) The Authority may, from time to time and with a view to enabling enterprises to order their affairs in compliance with the provisions of this Act, cause to be published in the Gazette, guidelines indicating the manner in which the Authority will interpret, and give effect to, the provisions of this Act.

(2) Subject to the provisions of section 21 prohibiting the disclosure of information, the Authority shall cause to be published in the Gazette, all decisions and orders made by the Authority, together with the reasons therefore, and all advance rulings given under section 24.

(3) Guidelines published under this section shall not be binding on the Authority.

Staff of the Authority

15.(1) The Authority shall have the power to –

(a) appoint such officers as may be necessary for the proper discharge of its functions under this Act;
(b) exercise disciplinary control over, and dismiss, the officers so appointed ; and
(c) pay remuneration to such officers, at such rates as may be determined by the Authority out of the funds appropriated for the use of the Authority by Parliament (name of legislature).

(2) For the purposes of conducting an investigation under this Act, the Authority may obtain the services of such experts and Inspectors as may be necessary. The Authority may pay such experts and Inspectors, remuneration at such reasonable rates as may be determined by the Authority.

Complaint procedure

16.(1) Any person may –

(a) submit to the Authority, a complaint against an alleged prohibited practice, in the prescribed form; or
(b) furnish to the Authority, information about an alleged prohibited practice, in any manner or form.

(2) Upon receipt of a complaint under subsection (1)(a) of this section or any information under subsection (1)(b)of this section, the Authority may investigate, or direct an Inspector to investigate, such complaint or the prohibited practice referred to in the information.

Power to summon persons to appear before the Authority.

17.(1) The Authority may, for the purposes of an investigation under this Act, summon any person residing in .....*(name of country)* to appear before the Authority or any Inspector authorized by the Authority, to be examined by the Authority or such Inspector or to produce to the Authority or such Inspector, any document or article in his or her possession.

(2) Any person receiving a summons under subsection (1) shall appear before the Authority or the Inspector specified in the summons, at the time and place specified in the summons, and shall submit himself or herself for examination by the Authority or the Inspector, as the case may be, or produce to the Authority or Inspector, as the case may be, any document or article his or her possession and referred to in the summons.

Powers of entry and search

18.(1) A Judge of the High Court (highest court exercising original criminal jurisdiction) may, on application made by an officer of the Authority, issue a warrant authorizing such officer to enter and search any premises within the jurisdiction of that court, if the Judge is satisfied, on information given on oath or affirmation that –

(a) a prohibited practice has taken place, is taking place, or is to take place, on those premises; or
(b) a document or article connected with an investigation into that prohibited practice is in the possession of, or under the control of, a person on those premises.

(2) An officer authorized by a warrant issued under subsection (1) may enter and search the premises named in the warrant, and shall, immediately upon such entry, hand over a copy of the warrant to the owner or person in charge of those premises.

(3) An officer authorized by a warrant issued under subsection (1) of this section to enter and search any premises may –

(a) enter and search those premises;
(b) search any person on those premises if there are reasonable grounds for believing that that person has in his or her possession, any document or article which has a bearing on the investigation;
(c) examine any book or document which is on in those premises and has a bearing on the investigation, and take extracts from, or make copies of, any such book or document;

(d) operate any computer system on those premises, or require assistance from any person on those premises to operate that computer system, and –

(i) search any data contained in, or available to, that computer system;
(ii) reproduce any record from that data;
(iii) seize any output from that computer for examination or copying; and

(e) remove from those premises for examination, any article which has a bearing on the investigation.

(4) An officer who enters and searches any premises under this section shall conduct the entry and search with strict regard to decency and order, and with respect to each person's dignity, freedom and security.

(5) During a search under subsection (3)(b) of this section, only a female officer may search a female, and only a male officer may search a male.

(6) An officer removing an article from any premises under subsection (3)(e) of this section shall issue a receipt for that article to the owner, or person in charge, of those premises, and shall return the article to those premises, immediately upon completion of the investigation.

Authority may apply for interim injunction

19.(1) Where the Authority receives a complaint about an alleged prohibited practice, the Authority may apply to a civil court of competent jurisdiction (a court exercising original civil jurisdiction) for an injunction restraining the alleged prohibited practice until the completion of an investigation into the complaint by the Authority.

(2) Upon an application made under subsection (1) of this section, the court may, after giving the person named as the respondent to the application, a reasonable opportunity of being heard, grant such injunction if the court is satisfied that –

(a) there is evidence of the alleged prohibited practice ; and
(b) a person or a group of persons may suffer serious and irreparable damage as a result of the alleged prohibited practice.

Orders of the Authority

20. After considering the statements made, or documents or articles produced, in the course of an investigation conducted by it under this Act, or where such investigation was conducted by an Inspector authorized by it, after considering the report of the Inspector, the Authority may issue orders prohibiting an enterprise from carrying on a prohibited practice, and where necessary, requiring such enterprise to take such action as is specified in the order to eliminate the harmful effects of such practice and to prevent the recurrence of such practice.

Duty to preserve secrecy

21.(1) Every member and officer of the Authority and every expert and Inspector employed to assist the Authority shall preserve, and aid in preserving secrecy with regard to –

(a) all matters relating to the business, commercial or official affairs of any person;
(b) all matters that have been identified as confidential under subsection (2) of this section; and
(c) all matters relating to the identity of persons furnishing information to the Authority;

that may come to his or her knowledge in the performance and discharge of his or her duties and functions under this Act and shall not communicate any such matter to any person, except insofar as such communication is necessary for the performance or discharge of any such duty or function.

(2) Any person, when furnishing any information to the Authority, may identify information that he or she claims to be confidential information. Every such claim shall be supported by a written statement giving reasons why the information is confidential.

Offences

22.(1) Every person who –

(a) does any act referred to in section 7 (4), amounting to a serious abuse of dominant position of market power;
(b) repeatedly does any act, other than an act referred to in subsection 7(4), amounting to an abuse of dominant position of market power;
(c) fails, without reasonable cause, to give effect to, or comply with, a decision or order of the Authority; or
(d) being a person who is required to give a notification to the Authority under section 8 (3), fails to give such notification,

is guilty of an offence under this Act, and shall on conviction after summary trial by a Magistrate court (court exercising original criminal jurisdiction) be liable to a fine not less than the prescribed amount and not exceeding the prescribed amount.

(2) Every person who –

(a) being a person on whom summons has been served under this Act –
(i) fails without reasonable cause, to appear before the Authority or an Inspector authorized by the Authority, at the time and place mentioned in the summons;
(ii) fails without reasonable cause, to answer any question put to him touching the matters being investigated by such Authority or Inspector ; or
(iii) fails without reasonable cause, to produce or show to the Authority or such Inspector, any document or article in h is or her possession and which is, in the opinion of the Authority or Inspector, necessary for arriving at the truth of the matters being investigated by such Authority or Inspector;

(b) resists or obstructs an officer of the Authority or any expert or Inspector employed to assist the Authority, in the exercise by that officer, expert or Inspector, of any power conferred on him or her, by or under this Act;
(c) makes any statement, or furnishes any information, which to his or her knowledge is false, to the Authority or any Inspector authorized by the Authority;
(d) wilfully omits from any statement made, or information furnished, to the Authority or any Inspector authorized by the Authority, any material particular; or
(e) does any act in violation of the provisions of section 21,

is guilty of an offence under this Act, and shall on conviction after summary trial by a Magistrate court (court exercising original criminal jurisdiction), be liable to a fine not exceeding the prescribed amount.

Right of persons affected to institute civil action.

23.(1) Any person who suffers loss or damage as a result of –

(a) a prohibited practice; or
(b) an act committed in violation of an order made by the Authority,

shall be entitled to institute action in a civil court of competent jurisdiction (court exercising original civil jurisdiction) for damages for such loss or damage, and for reasonable costs incurred in investigating such prohibited practice or act, and in instituting such action.

(2) A person who apprehends loss or damage as a result of –

(a) an alleged prohibited practice; or
(b) an act allegedly committed in violation of an order made by the Authority,

shall be entitled to make an application to a civil court of competent jurisdiction (a court exercising original civil jurisdiction) for an injunction restraining the commission or continuation of such prohibited practice or act.

(3) Upon an application made under subsection (2), the court may, after giving the person named as the respondent to the application a reasonable opportunity of being heard, grant the injunction applied for if it is satisfied that –

(a) there is evidence of the alleged prohibited practice or act; and
(b) a person or a group of persons is likely to suffer serious or irreparable damage if the prohibited practice or act is not restrained.

(4) Where a group of persons suffers any loss or damage referred to in subsection (1) or apprehends any loss or damage referred to in subsection (2), a person belonging to that group shall be entitled to –

(a) institute action under subsection (1); or
(b) make an application under sub section (2),

on behalf of that group of persons.

(5) Where it is established, in an action instituted under subsection (1), that a person or group of persons has suffered loss or damage as a result of an agreement or practice fixing, directly or indirectly ,the selling or purchase price of a good, the court may award as damages for such loss or damage, a sum equal to three times the loss or damage established to have been suffered by that person or group of persons.

(6) The Authority shall, on a request made by a plaintiff in an action instituted under subsection (1), make available to such plaintiff, any documents or information (other than documents or information, the disclosure of which is prohibited under section 21) in the possession of the Authority and which may be of assistance to the plaintiff in establishing that such plaintiff or the group to which such plaintiff belongs has suffered loss or damage as a result of a prohibited practice or other act.

Power of Authority to give advance rulings

24.(1) An enterprise may apply to the Authority for an advance ruling as to its eligibility for an authorization under section 4,5 or 8 exempting the enterprise from any of the prohibitions imposed by those sections, and the Authority may give such advance ruling if it is satisfied that the enterprise is eligible for such authorization.

(2) An advance ruling given under subsection (1) shall be valid for such period as is specified in the ruling, be subject to such conditions and requirements as the Authority may think fit to impose to prevent the abuse of such ruling, and shall be binding on the Authority.

(3) The Authority may renew an advance ruling for a further period, on an application for such renewal made by the enterprise on whose application the ruling was made.

(4) The Authority may revoke or modify an advance ruling given by it under subsection (1) or renewed by it under subsection (3) if -

(a) a significant change of circumstances has occurred since the ruling or the renewal of the ruling, as the case may be;
(b) the enterprise on whose application the ruling was given, has violated a condition or requirement specified in the ruling;
(c) the decision to give or renew such ruling was materially influenced by fraudulent, inaccurate or misleading evidence ; or
(d) the enterprise on whose application the ruling was given, has abused an exemption granted to it.

Applications for judicial review

25.(1) A person aggrieved by a decision of the Authority shall be entitled to make an application to .....(court vested with jurisdiction to grant prerogative writs) for a judicial review of that decision.

(2) Notwithstanding anything in any other law, ... (the court vested with jurisdiction to grant prerogative writs) shall not entertain an application seeking judicial review of a decision of the Authority unless the application is made within 60 days of the date on which that decision was communicated to the person making the application.

Power to make regulations

26.(1) The Minister, in consultation with the Authority, may make regulations for giving effect to the principles and provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Authority may make regulations in respect of all matters which are required by this Act to be prescribed, or in respect of which regulations are authorized by this Act to be made; and in particular, may make regulations fixing the amount of the fines that may be imposed for offences under this Act. Different amounts may be fixed in respect of different offences, having regard to the gravity of the offence, and the losses likely to be caused by the commission of the offence.

Schedule (Section 10 (4))

1. No person shall be appointed as a member of the Authority unless that person is qualified for that appointment, having regard to the functions of the Authority, by virtue of that person's expert knowledge or experience in law, economics, commerce or consumer affairs.

2. No person shall be qualified for being appointed or continuing as a member of the Authority if he or she -

(a) has been sentenced to imprisonment for a term not less than 6 months;
(b) has been declared under any law in force in ...(name of country), to be of unsound mind;
(c) has been adjudged by a competent court to be bankrupt or insolvent, and remains an undischarged bankrupt or insolvent; or
(d) has any such financial or other interest as is likely to affect prejudicially the discharge of his or her functions under this Act.

3. A member of the Authority may resign from office by letter in that behalf addressed to the Minister, and the resignation shall take effect upon it being accepted by the Minister in writing.

4. The Minister may remove a member of the Authority from office if he or she-

(a) becomes subject to any of the disqualifications set out in paragraph 2;
(b) becomes permanently incapacitated ; or
(c) engages in any activity which would, in the view of the Minister, be prejudicial to the independence of the Authority.

5. A member of the Authority shall not make private use of, or profit from, any confidential information obtained by him on her in the course of exercising or discharging his or her powers or functions under this Act.

6. Subject to the provisions of paragraphs 3 and 4, the term of office of a member of the Authority shall be 5 years.

7. Where a member of the Authority vacates office by death, resignation or removal, the Minister may appoint another member in his or her place, and the member so appointed shall hold office for the remainder of the term of office of the member whom he or she succeeds.

8. A member of the Authority vacating office, otherwise than by removal, shall be eligible for re-appointment.

9. (a) The Chairman may resign from the office of Chairman by letter in that behalf addressed to the Minister and the resignation shall take effect upon it being accepted by the Minister in writing.
(b) The Minister may, remove the Chairman from the office of Chairman, on any of the grounds referred to in paragraph 4.
(c) Subject to the provisions of sub paragraphs (a) and (b) of this paragraph, the term of office of the Chairman shall be his or her period of membership of the Authority.

10. (a) The quorum for a meeting of the Authority shall be two.

(b) The Chairman shall preside at all meetings of the Authority. In the absence of the Chairman from any meeting of the Authority, the members present shall elect, from among themselves, a member to preside at such meeting.

(c) Subject to the provisions of subparagraphs (a) and (b) of this paragraph, the Authority may regulate the procedure in regard to its meetings and the transaction of business at such meetings.

(d) A member of the Authority who is in any way interested in any decision proposed to be made by the Authority, shall disclose the nature of his or her interest at a meeting of the Authority. The disclosure shall be recorded in the minutes of the Authority and that member shall not take part in such decision.

(e) No act or decision of the Authority shall be deemed to be invalid by reason only of a vacancy in the Authority or defect in the appointment of any of its members.

11. The members of the Authority shall be paid remuneration at such rates as may be determined by the Minister with the concurrence of the Minister of Finance.

12. No civil or criminal proceedings shall be instituted –

(a) against the Authority for any act which in good faith is done by the Authority under this Act;

(b) against the member or officer of the Authority or any expert or Inspector employed to assist the Authority, for any act which in good faith is done by him or her under this Act, or on the direction of the Authority.

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DRAFT MODEL LAW ON ELECTRONIC TRANSACTIONS

1. At their 1999 Meeting, Law Ministers recognised that the development of electronic commerce was of importance to all countries, with the potential to bring about major changes in business practices. The Meeting received a number of papers outlining the steps taken by some Commonwealth countries in developing the legal structure for electronic commerce. While Ministers recognised that existing legal principles could be rendered applicable to new forms of commerce, they stressed the need to ensure that existing rules and laws did not prevent full advantage being taken of new technology. The Meeting also received a presentation from the Secretary- General of the United Nations Commission on International Trade Law, and agreed that the UNCITRAL Model Law provided a suitable basis for legislative action in Commonwealth countries, being both flexible and technological neutral.

2. On the basis of the outcome of the Law Ministers meeting in July 2000, an expert working group was convened to prepare recommendations on the legal aspects of international technology and related evidence; and on computer and computer related crime. The recommendations were presented to the Commonwealth Senior Law Officials Meeting in 2001.

3. At the Commonwealth Senior Law Officials meeting in London, it was recommended that the work on the draft provisions on e-commerce required further development. The Commonwealth Secretariat convened the 2nd meeting of the expert group on the e-commerce model law. The aim of the meeting was to refine and modify the model law taking into consideration the comments of member countries and a report prepared by the Commonwealth Secretariat.

4. The group reconsidered all the issues and decided to redraft the model legislation and to include, in footnotes to the revised model. The group also decided that the related evidentiary issues should be dealt within a separate model law on electronic evidence in order to ensure admissibility of civil evidence. The model law on electronic evidence is the subject of paper LMM(02)12.

5. The draft Model Law on E-Commerce contains provisions that the Secretariat believes address the concerns expressed by Senior Officials. It is appended for consideration by Ministers who may feel it appropriate to recommend it as providing a sound basis for the passage of laws by those member countries which seek to adopt legislation that addresses all major issues covered by the UNCITRAL Model law and is adapted for the specific use of common law jurisdictions.

ELECTRONIC TRANSACTIONS BILL

AN ACT to facilitate electronic transactions

BE IT ENACTED by the Parliament of ..*[name of country]* as follows:

Short title

1. This Act may be cited as the Electronic Transactions Act.[1]

Commencement

2. This Act commences on *[a date fixed by usual provision for enacting country]*.

Objects

3. The objects of this Act are:

(a) to eliminate legal barriers to the effective use of electronic communications in transactions;
(b) to promote the harmonization of legal rules on electronic transactions across national boundaries;
(c) to facilitate the appropriate use of electronic transactions;
(d) to promote business and community confidence in electronic transactions; and
(e) to enable business and the community to use electronic communications in their transactions with government.[2]

Definitions

4. (1) In this Act:

"electronic" includes created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic, optical or by any other means that has capabilities for creation, recording, transmission or storage similar to those means.[3]

"electronic signature" means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with a document.[4]

"public body" ["organ of state"] includes:[5]

(a) a Minister, ministry or department of government;
(b) courts
(c) bodies exercising statutory authority, of legislative, executive or judicial nature
(d) subnational or local public authorities, including municipalities.[6]

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1 If the enacting state decides on a broader or narrower scope, as discussed at s. 5 below, then the title and short title could change to reflect the actual coverage.

2 If more detail is desired, consider section 3 of Singapore's *Electronic Transactions Act*, with possible exception of paragraph (c) of that Act.

3 This is intended to be an expansive definition, to apply to future developments, without being too closely bound by engineering considerations.

4 This definition includes the word "sign" to show that the legal effect of an electronic signature is the same as that of a handwritten signature.

"information system" means a system for generating, sending, receiving, storing or otherwise processing electronic communications.

"Rule of law" means the common law, legislation, and subordinate legislation

[Crown/Government/ State] to be bound

5. This Act binds the [Crown/Government/State].[7]

Non-discrimination against electronic information

6.(1) Information shall not be denied legal effect, validity or enforcement solely on the ground that it is in electronic form.[8]

(2) In sections 7, 8, 9, 10 and 11,

(a) where rules of law require information to be in writing, given, signed, original, or retained, the requirement is met if the section is complied with;
(b) where rules of law provide consequences where the information is not in writing, given, signed, original, or retained, the consequences are avoided if the section is complied with; and
(c) where rules of law provide consequences if the information is in writing, given, signed, original or retained, the consequences are achieved if the section is complied with.

Writing requirements

7.(1) A rule of law that requires information to be in writing or to be given in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference.

(2) In subsection (1), giving information includes, but is not limited to, the following:

(a) making an application;
(b) making, filing or lodging a claim;
(c) giving, sending or serving a notification;
(d) filing or lodging a return;
(e) making a request;
(f) making a declaration;
(g) filing, lodging or issuing a certificate;
(h) making, varying or cancelling an election;
(i) filing or lodging an objection;
(j) giving a statement of reasons.

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5 The reasons to include particular rules on public bodies are to ensure their authority to use electronic records, to protect them against unwitting consent to the use of such records, and to permit them expressly to impose technical requirements on incoming electronic records to promote interoperability of systems and the reliability of the records. See sections 14 and 17.

6 Enacting countries can create the list that suits them. The list might exclude private bodies doing public functions, like a Law Society. Consider state-owned corporations and entities that are agents of the state. It may be convenient to be avoiding doubt by designating entities as public bodies by regulation.

7 Enacting jurisdictions will choose the usual term in their law. This is needed where the Crown (etc) is not bound by legislation unless it is mentioned expressly. The statute generally applies to everyone subject to the law of the jurisdiction, unless there is an express exemption.

8 Information here is likely to be interpreted as included recorded speech. Enacting countries may wish to exclude this, or to restrict speech to that which is processed by an automated voice recognition system.

(3) Information in electronic form is not given unless the information is capable of being retained by the person to whom it is given.[9]

Prescribed forms

8. A rule of law that requires a person to provide information in a prescribed non-electronic form to another person is satisfied by the provision of the information in an electronic form that is:

(a) organized in the same or substantially the same way as the prescribed non-electronic form;
(b) accessible to the other person so as to be usable for subsequent reference; and
(c) capable of being retained by the other person.

Signature requirements

9.(1) If a rule of law requires the signature of a person, that requirement is met by an electronic signature.[10]

(2) Parties may agree to use a particular method of electronic signature, unless otherwise provided by law.[11]

Requirement to produce an original document

10. A rule of law that requires a person to produce, examine or keep an original document is satisfied if the person produces, examines or retains the document in electronic form, if:

(a) having regard to all the relevant circumstances, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
(b) in a case where an original document is to be given to a person, the document given to the person in electronic form is accessible so as to be usable for subsequent reference and capable of being retained by the person.[12]

Keeping written documents[13]

11. A rule of law that requires a person to keep information either that is in writing or that is in electronic form, is satisfied by keeping the information in electronic form, if:

(a) having regard to all the relevant circumstances when the electronic form of the document was generated, the method of generating the electronic form of the document provided a

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9 This section is intended to interpret a rule of law saying "give" or "send" or "deliver" information in writing (like a notice). The point is that the information has to be put within the control of the addressee.

10 Enacting countries may wish to give power to their regulation making authority to prescribe that signatures for particular purposes must be as reliable as appropriate in the circumstances, including any relevant agreement, or that they must use a method specified in the regulation. If a reliability test is wanted, it may be expressed in the language of Article 6 (1) through (4) of the UNCITRAL Model Law on Electronic Signatures.

11 The Experts' Group recommended that electronic signatures in general should not have to meet a test of their reliability. Handwritten signatures are subject to no such test. If a person who wants to rely on a signature proves the identity of the person who signed and the signer's intention to be linked to the information, that should be sufficient to meet a requirement that information must be signed. Having to show in addition that the signature method was appropriately reliable adds uncertainty to proof that would suffice to support a manual signature.

12 This provision may not be needed for the law of evidence if the enacting country has made other rules about electronic evidence, and that law might then be expressly excluded.

13 This section allows people to retain records electronically, whether the original was on paper or electronic, if the rules in this section are followed. It should be noted, however, that keeping records in electronic form means adapting them to new hardware and software from time to time, so that they continue to be accessible for the period required by law. It may turn out to be more practical to keep records stored for very long periods, such as land titles, birth and death records, and the like".

reliable means of assuring the maintenance of the integrity of the information contained in the document; and

(b) when the electronic form of the document was generated, the information contained in the electronic form of the document is accessible so as to be usable for subsequent reference to any person entitled to have access to the information or to require its production.[14]

Integrity of information

12. For the purposes of sections [10 and 11], the integrity of information in a document is maintained if, and only if, the information has remained complete and unaltered, apart from:

(a) the addition of any endorsement; or
(b) any immaterial change;

which arises in the normal course of communication, storage or display.

Recognition of foreign electronic documents and signatures

13. In determining whether or to what extent information in electronic form is legally effective, no regard shall be had to the location where the information was created or used, or to the place of business of its creator.[15]

Government uses [public bodies]

14.(1) If a public body has power to create, collect, receive, store, transfer, distribute, publish, issue or otherwise deal with information and documents, it has the power to do so electronically.

(2) Subsection (1) is subject to any rule of law that expressly prohibits the use of electronic means or expressly requires them to be used in specified ways.

(3) For the purposes of subsection (2), a reference to writing or signature does not in itself constitute an express prohibition of the use of electronic means.

(4) Where a public body consents to receive any information in electronic form, it may specify:

(a) the manner and format in which the information shall be communicated to it;
(b) the type or method of electronic signature required, if any;
(c) control processes and procedures to ensure integrity, security and confidentiality of the information;
(d) any other attributes for the information that are currently specified for corresponding information on paper.

(5) The requirements of subsections 7(1) and (3) and section 8 also apply to information described in subsection (4).

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[14] Government departments responsible for record retention rules may wish to consider if additional rules are needed for retaining electronic records for their purposes. Such additional rules would supplement this section because of s. 14 of this Act.

[15] If the enacting country has imposed a reliability test on electronic signatures, then this section should include paragraphs (3) and (4) of the UNICTRAL Model Law on Electronic Signatures.

(6) A public body may make or receive payment in electronic form by any manner specified by the public body [and approved by the Minister of Finance – responsible authority].

Exclusions[16]

15. This Act does not apply to:

(a) the creation or transfer of interests in real property;
(b) negotiable instruments[17];
(c) documents of title;
(d) wills and trusts created by will[18]; and
(e) any class of documents, transactions or rules of law excluded by regulation under this Act.

Certain other laws not affected

16.(1) Nothing in this Act limits the operation of any other rule of law that expressly authorizes, prohibits or regulates the use of information in electronic form, including a method of electronic signature.

(2) Nothing in this Act limits the operation of any other rule of law requiring information to be posted or displayed in a specified manner or requiring any information to be transmitted by a specified method.

(3) A reference to writing or signature does not in itself constitute a prohibition for the purpose of subsection (1) or a legal requirement for the purpose of subsection (2).

Consent

17.(1) Nothing in this Act requires a person to use, provide or accept information in electronic form without consent, but a person's consent to do so may be inferred from the person's conduct.[19]

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16 The statute can be given a narrower or wider scope than the "transactions" referred to in its title.

A: It can be limited to commercial transactions only. Footnote **** of the UNCITRAL Model Law on Electronic Commerce 1996 indicates usefully the scope of such an application.
The advantages of such a limit are that parties to commercial transactions usually engage in them voluntarily and thus may be more willing to take the risk of dealing in the new electronic medium, and such transactions will engage public policy considerations less often than others.
The disadvantages of such a limit are that it does not permit the use of electronic communications in areas where many countries are finding them useful, such as communications between citizen and government, and that it is sometimes hard to know if a particular transaction is commercial: consider the provision of services to government or to a not-for-profit organization.

B: The scope can be expanded to all information or documents, not just (commercial) transactions. As a drafting alternative, the expanded statute could focus not on transactions or communications but on electronic records. For example, most Canadian statutes discuss electronic documents or information.
The advantages of such an expansion are that it is very flexible; it makes all laws media neutral. (Most Canadian statutes based on the UN Model Law take this approach); it avoids having to know exactly what a transaction is: consider applications, or the retention of a document. T o extent that the main body of incidents not a transaction relates to dealing with government, and the Act contains rules about public bodies' communications – inbound and outbound – then there may be no particular risk in expanding scope to all communications. Risks can be dealt with by exempting particularly risky documents or transactions from the scope and by ensuring that parties to communications have a choice whether to accept them in electronic form, i.e. that they can opt into the electronic system.

17 This means that bills of lading cannot be done electronically under this Act. To extend the statute to transport documents one would need express legislative authority, not necessarily in this Act.

18 Probate documents are not listed here because they are issued by a public body – a court – which will determine under section 14 whether and how they may be created and submitted electronically.

19 This provision allows a person to set conditions on acceptance, based on readiness or trust, or estimations of compatibility of formats or reliability standards, or to accept electronic communications for some purposes and not for others. It does not prevent a person from being bound by other means – such as by contract - to communicate electronically.

(2) Despite subsection (1), the consent of a public body [use the term also used in s. 14 for government] to accept information in electronic form may not be inferred from its conduct but must be expressed by communication accessible to the public or to those most likely to communicate with it for particular purposes.[2021]

(3) Nothing in this Act authorizes a public body [use the term also used in s. 14 for government] to require any person to use, provide or accept information in electronic form without consent.[22]

Contracts

18.(1) Unless the parties agree otherwise, an offer, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed:

(a) by means of information in electronic form; or
(b) by an act that is intended to result in electronic communication, such as touching or clicking on an appropriate icon or other place on a computer screen, or by speaking.

(2) A contract is not invalid or unenforceable by reason only of being in electronic form.

Automated contracts

19. A contract may be formed by the interaction of computer programs or other electronic means used to initiate an act or to respond to electronic information, in whole or in part, without review by an individual at the time of the response or act.

Mistakes in partly-automated transactions

20.(1) An electronic transaction between an individual and another person's automated source of information has no legal effect if,:

(a) the individual makes a material error in electronic information or an electronic document used in the transaction;
(b) the automated source of information does not give the individual an opportunity to prevent or correct the error;
(c) on becoming aware of the error, the individual promptly notifies the other person; and
(d) in a case where consideration is received as a result of the error, the individual, returns or destroys the consideration in accordance with the other person's instructions or, if there are no instructions, deals with the consideration in a reasonable manner, and does not benefit materially by receiving the consideration.

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20 This provision allows government to opt into electronic communications gradually, department by department, agency by agency, or even program by program. Some enacting countries may wish to compel all parts of government to be ready for electronic communications at the same time. Such countries may state that the consent of government is not needed for electronic communications to it to be legally effective. Nevertheless governments will have legitimate reasons to insist on standards of interoperability, reliability, proof of delivery and the like. These are now dealt with expressly in section 14 of the Act.

21 The provision about communicating the consent shows that a means other than a formal regulation may be used.

22 While "nothing in this Act" authorizes a government to require the use of electronic communications, governments may have or give themselves such authority by other means. It was not thought appropriate to do so in generally applicable legislation.

(2) This section does not limit the operation of any other rule of law relating to mistake:

Expressions of will

21. As between the originator and the addressee of a communication in electronic form, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form.[23]

Time and place of sending and receiving electronic communications

22.(1) An electronic communication is sent when it enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee.

(2) An electronic communication is presumed to be received by the addressee:

(a) if the addressee has designated or uses an information system for the purpose of receiving communications of the type sent, when it enters that information system and becomes capable of being retrieved and processed by the addressee; or

(b) if the addressee has not designated or does not use an information system for the purpose of receiving communications of the type sent, or if the addressee has designated or used such a system but the communication has been sent to another system, when the addressee becomes aware of the communication in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.

(3) Subsections (1) and (2) apply unless the parties agree otherwise.

(4) An electronic communication is deemed to be sent from the sender's place of business and received at the addressee's place of business.

(5) If the sender or the addressee has more than one place of business, the place of business for the purposes of subsection (4) is the one with the closest relationship to the underlying transaction to which the electronic communication relates or, if there is no underlying transaction, the person's principal place of business.

(6) If the sender or addressee does not have a place of business, the person's place of habitual residence is deemed to be the place of business for the purposes of subsection (4).

Attribution of electronic communications

23. An electronic communication is that of the person who sends it, if it is sent directly by the person or by an information system programmed by or on behalf of the person to operate automatically.

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[23] This section applies to declarations of intention outside the context of a transaction, such as declarations of trust, gifts without delivery, and the like. The usual law about their validity and enforceability continues to apply.

Consumer protection[24]

24.(1) A person using electronic communications to sell goods or services to consumers shall provide accurate, clear and accessible information about themselves, sufficient to allow:

(a) the legal name of the person, its principal geographic address, and an electronic means of contact or telephone number;
(b) prompt, easy and effective consumer communication with the seller; and
(c) service of legal process.

(2) A person using electronic communications to sell goods or services to consumers shall provide accurate and accessible information describing the goods or services offered, sufficient to enable consumers to make an informed decision about the proposed transaction and to maintain an adequate records of the information.

(3) A person using electronic communications to sell goods or services to consumers shall provide information about the terms, conditions and costs associated with a transaction, and notably:

(a) terms, conditions and methods of payment; and
(b) details of and conditions related to withdrawal, termination, return, exchange, cancellation and refund policy information.

Regulation-making powers

25. The [regulation-making authority] may make regulations:

(a) to designate an entity as a public body;
(b) to provide that electronic signatures for specified purposes shall be as reliable as appropriate for those purposes;[25]
(c) to provide that electronic signatures for specified purposes shall be created by specified means;
(d) to provide formats by which information may be communicated electronically, whether or not there exist prescribed non-electronic forms.
(e) to exclude classes of transactions, documents, or rules of law from the application of this Act; and
(f) for any other purpose for the more effective achievement of the objects of the Act.

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[24] These provisions could be put in a general statute about consumer protection. Otherwise it may be necessary to state how one decides that someone is a consumer. The provisions are adapted from the OECD Guidelines for Consumer Protection in the context of Electronic Commerce.

[25] If such a regulation is made, it may be helpful to incorporate into the regulation, or the statute, the tests of reliability in the UNCITRAL Model Law on Electronic Signatures, Article 6.

DRAFT MODEL LAW ON ELECTRONIC EVIDENCE

1. Law Ministers and Attorney-Generals of Small Commonwealth Jurisdictions, at their 2000 meeting, recognized that common law rules of evidence were not adequate to deal with technological advances and needed to be modernised. They welcomed the convening of an Expert Group to develop model legislation on electronic evidence to address the needs of small Commonwealth jurisdictions.

2. The Expert Group examined the admissibility of electronic evidence and the question whether the rules that apply to other forms of documentary evidence can be applied in a like manner to electronic documents. Computer records are sophisticated systems that may be more prone or vulnerable to alteration and degradation than are records on paper. Therefore it was thought that the admissibility rule should take account of this risk. The Group noted that most jurisdictions seeking to impose a minimum level of reliability for admissibility of documents do so by focusing not on the document itself but rather on the method (system) by which the document was produced. This is because it is very difficult to show anything about the electronic document per se. By showing the reliability of the system one can lay the basis for admissibility of the document which is the product of that system. The Group agreed that system reliability is the most sensible measurement.

3. The model law contains provisions on general admissibility, the scope of the model law, authentication, application of best evidence rule, presumption of integrity, standards, proof by affidavit, cross examination, agreement on admissibility of electronic records, and admissibility of electronic signature.

4. On the basis of these deliberations, the Commonwealth Secretariat decided that because of the complexity of the issues, a separate model law on electronic evidence should be drawn up in order to ensure admissibility of such evidence. The model law draws on the Singapore Evidence Act Section 35 (1), the Canada Uniform Electronic Evidence Act and UNCITRAL Model Law on E-Commerce. Member countries wishing to make use of the model E-Evidence Law may choose to do so as –

- a separate piece of legislation; or
- part of a law on electronic transanctions; or
- as amendments to existing laws on evidence; or
- as an addition to the proposals contained in paper **LMM(02)4** which deals with modernisation of evidence laws but concentrates primarily on criminal law matters and business records in their more traditional sense.

5. The model provisions on electronic evidence are annexed to this paper.

ACTION BY LAW MINISTERS

6. Law Ministers may wish to endorse the annexed Electronic Evidence Model Law and commend it to member countries for adoption (or adaptation to national circumstances) as a Commonwealth model of good practice.

ELECTRONIC EVIDENCE MODEL LAW

AN ACT to make provision for the legal recognition of electronic records and to facilitate the admission of such records into evidence in legal proceedings.

BE IT ENACTED by the Parliament *[name of legislature]* of ..... *[name of country]* as follows:

Short Title

1. This Act may be cited as the Electronic Evidence Act, 2002

Interpretation

2. In this Act,

"data" means representations, in any form, of information or concepts;

"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, print out or other output of that data.

"electronic records system" includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and preservation of electronic records.

"legal proceeding" means a civil, criminal or administrative proceeding in a court or before a tribunal, board or commission.

General Admissibility

3. Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.

4. (1) This Act does not modify any common law or statutory rule relating to the admissibility or records, except the rules relating to authentication and best evidence.

Scope of Act

(2) A court may have regard to evidence adduced under this Act in applying any common law or statutory rule relating to the admissibility of records.

Authentication

5. The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Application of Best Evidence Rule

6. (1) In any legal proceeding, subject to subsection (b), where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.

(2) In any legal proceeding, where an electronic record in the form of printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, the printout is the record for the purposes of the best evidence rule.

Presumption of Integrity

7. In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding:

(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record.

(b) where it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

Standards

8. For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved, having regard to the type of business or endeavour that used, recorded or preserved the electronic record and the nature and purpose of the electronic record.

Proof by Affidavit

9. The matters referred to in sections 6, 7, and 8 may be established by an affidavit given to the best of the deponent's knowledge or belief.

Cross Examination

10. (1) A deponent of an affidavit referred to in section 9 that has been introduced in evidence may be cross-examined as of right by a party to the proceedings who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced.

(2) Any party to the proceedings may, with leave of the court, cross-examine a person referred to in subsection 7(c).

Agreement on Admissibility of Electronic Records

11. (1) Unless otherwise provided in any other statute, an electronic record is admissible, subject to the discretion of the court, if the parties to the proceedings have expressly agreed at any time that its admissibility may not be disputed.

(2) Notwithstanding subsection (1), an agreement between the parties on admissibility of an electronic record does not render the record admissible in a criminal proceeding on behalf of the prosecution if at the time the agreement was made, the accused person or any of the persons accused in the proceeding was not represented by a solicitor.

Admissibility of Electronic Signature

12. (1) Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.

(2) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

INTERNATIONAL CO-OPERATION TO COMBAT CRIME

THE COMMONWEALTH LEGAL RESPONSE TO TERRORISM:
Progress report on action taken on the recommendations of the Commonwealth Ministerial Committee on Terrorism

BACKGROUND

1. On 25 October 2001, Commonwealth Heads of Government issued a statement in which they reiterated their condemnation of all forms and manifestations of terrorism. They affirmed their resolve to individually and collectively take concerted and resolute action against terrorism. Leaders undertook to assist each other with implementation of the United Nations Security Council Resolution 1373 (Resolution 1373), universal implementation of the existing counter terrorism conventions, improving international cooperation and increased efforts to prevent the use and abuse of the financial services sector by terrorists and their organizations.

2. In furtherance of the leaders statement, a Commonwealth Committee on Terrorism was established to ensure that the commitments of Heads of Government would be translated into concrete action against terrorism and that the measures and initiatives called for would be implemented.

3. The Committee, comprised of Ministers from Australia, the Bahamas, Canada, India, Malaysia, South Africa, Sri Lanka, the United Republic of Tanzania, Tonga and the United Kingdom, held its first meeting in London on 29 January 2002. At that time, a Commonwealth Plan of Action on Terrorism was agreed and referred to Heads of Government for their consideration.

INTRODUCTION

4. At their meeting in Coolum in March, leaders welcomed the Report of the Commonwealth Committee on Terrorism and the Plan of Action. They requested the Secretary-General to implement the measures identified by the Committee and urged all member countries to take the steps outlined in the Plan of Action and to assist small and less developed members to implement the obligations under Resolution 1373.

5. Senior Officials of Law Ministries had also discussed possible legal responses to terrorism at their meeting in London in November. They were of the view that the Commonwealth Secretariat was well placed to assist member countries with the development of technical legal measures to combat terrorism. There was general support for the proposal that the Secretariat provide assistance to member countries with implementation of Resolution 1373 and the various existing United Nations conventions on terrorism, through the development of guidelines, model laws and implementation kits. Senior Officials also noted that this work should take into account the special recommendations on terrorist financing issued by the Financial Action Task Force on Money Laundering (FATF). The FATF recommendations, like the Security Council Resolution, have a tight and challenging timetable for legislative and practical implementation.

IMPLEMENTATION OF THE PLAN OF ACTION

6. In accordance with the Commonwealth Action Plan, the Legal and Constitutional Affairs Division has undertaken various projects to assist member countries with the implementation of Resolution 1373.

7. In January 2002 a small legal expert group meeting was convened in London to analyse the requirements of the resolution and provide guidance on the legislative and administrative measures required for implementation. The report of the Expert Working Group has been distributed to all member countries and made available generally through the United Nations Counter Terrorism Committee.

8. On the basis of the drafting instructions contained within that report, draft model legislative provisions were prepared and circulated to Law Ministers for their comments. Taking into account the responses received, a final version was prepared and the Model Legislative Provisions on Measures to Combat Terrorism have been circulated to all Law Ministers and made generally available through the United Nations Counter Terrorism Committee.

9. In addition, "implementation kits" for the twelve existing counter terrorism conventions have been prepared. These kits provide detailed explanations of the relevant conventions and model legislative provisions that can be used as a guide for domestic implementation. These are now being distributed. The development of the model legislation and the implementation kits was made possible through the donation of extra budgetary funds by the Government of Canada.

10. The Criminal Law Section is running an extensive project of assistance on legislative implementation of Resolution 1373, involving regional workshops and on-site assistance by consultants. The original program has been expanded in scope due to extra budgetary contributions from, (as at the time of writing this note) the Governments of the United Kingdom and Canada. It now covers several regions and will provide assistance with reporting obligations, legislative enactment and, subsequently, follow-up of implementation.

11. In conjunction with the Government of the United Kingdom, the Criminal Law Section will also be administering a parallel project on law enforcement training focusing in particular on terrorist financing.

12. The topic of measures to combat terrorism was also the subject of a panel discussion at the Secretariat's recent 2002 Oxford Conference on International Co-operation in Criminal Matters. Delegates from many member countries were represented at the conference and had the benefit of hearing from experts in the subject area and from a general discussion of relevant issues.

13. The implementation work on legal measures is being carried out in close consultation with the United Nations Security Council Counter Terrorism Committee and with other international organizations, to maximize the use of resources and avoid duplication.

COMMONWEALTH LEGAL RESPONSE TO TERRORISM
Furthering the work mandated by Heads of Government

1. As detailed in the related information paper (LMM(02)13), pursuant to the Commonwealth Heads of Government Statement of 25 October 2001 and the subsequent Plan of Action adopted at Coolum, several activities have been undertaken to provide assistance to member countries with implementation of Security Council Resolution 1373 (*Annex A*) and the existing counter terrorism conventions.

2. Law Ministers may wish to discuss other ways in which the Commonwealth legal response to terrorism can be enhanced and provide guidance as to further types of assistance that may be beneficial to member countries.

3. To facilitate the discussion, this paper outlines some possible areas where Law Ministers may wish to agree to particular action or recommend future work by the Secretariat.

INTERNATIONAL CO-OPERATION

4. All states are obligated under the Security Council Resolution to "deny safe haven to those who finance, plan, support or commit terrorist acts or provide safe haven" and to "afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts". These obligations are directly related to regimes for international co-operation, in particular extradition and mutual legal assistance.

5. Heads of Government in their statement on terrorism called for greater international co-operation and underscored "the important role which can be played by the Association due to our similar legal systems and in particular through Commonwealth schemes for mutual assistance to counter crime."

6. Within the Commonwealth, the London Scheme for the Rendition of Fugitive Offenders and the Harare Scheme for Mutual Assistance in Criminal Matters reflect the agreement of Law Ministers that member countries will extradite and provide mutual assistance to each other in accordance with the provisions of the Schemes and without the requirement for a treaty. Member countries therefore require domestic legislation to implement the Schemes accordingly.

7. Specific reference to the Commonwealth Schemes is also made in the Commonwealth Plan of Action on Terrorism as being of particular importance in terms of the need for enhanced international co-operation to combat terrorism. With reference to the London Scheme, the Plan of Action notes that while most countries do have implementing legislation for this Scheme, some of it is quite dated. Therefore, Heads of Government urged member countries to "review their domestic laws for extradition and rendition to determine if they are sufficient to fully implement the obligations under the London Scheme and to allow for effective extradition between member countries."

8. With reference to the Harare Scheme for Mutual Assistance in Criminal Matters, the Plan of Action recognizes that "despite ongoing efforts to encourage the adoption of domestic legislation, many member countries have yet to enact mutual assistance legislation to fully implement the Harare Scheme". Given the importance of effective international evidence gathering to terrorist case investigations and prosecutions, the Plan of Action stresses the need for urgent action to implement the scheme under domestic law and requests that Law Ministers follow up on the issue.

9. Law Ministers may wish to discuss the opportunities for collaboration, co-operation and assistance between member countries to facilitate the enactment of domestic legislation to implement fully the Schemes so that countries can comply with the obligations under Resolution 1373 to remove safe havens and to afford international assistance to other countries.

LONDON SCHEME AND THE POLITICAL OFFENCE EXCEPTION

10 Under this agenda item Law Ministers have before them a proposed revised London Scheme for the Rendition of Fugitive Offenders (**Paper LMM(02)15**). Several of the recommended changes are directly relevant to the issue of terrorism, such as the application of the Scheme to extraterritorial offences and the enhanced "conduct based" approach to dual criminality. In addition to those recommended amendments, Law Ministers may wish to discuss further changes or additions to the London Scheme, in particular with respect to the application of the political offence exception.

11. Security Council Resolution 1373 calls on states to ensure, in conformity with international law, that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists. The London Scheme provides for the refusal of rendition where the offence is of a political character. It further states that this ground of refusal does not apply to:

> "offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition."

12. The Scheme goes on to provide that countries may choose to expand on the list of offences that are excluded from the application of the political offence exception, but this aspect of the Scheme is entirely discretionary.

13. Senior officials considered this issue in their November meeting concluding that the provisions of the Scheme were sufficient to meet this particular requirement of the Resolution. However, they did not have before them at the time the report of the Expert Working Group and its analysis of the requirements of the Resolution and the Commonwealth Committee on Terrorism had yet to meet. The Commonwealth Plan of Action on Terrorism recommended by the Committee makes specific reference to the issue of the political offence and Law Ministers are asked to have special regard to those aspects of the scheme dealing with refusal of extradition on the basis of the political offence exception, to ensure that extradition of a person for alleged terrorist activity could not be refused on that basis.

14. Therefore, Law Ministers may wish to consider the provisions of the Scheme relating to this issue (attached as *Annex B*) and discuss if they are fully compliant with the statement in the Security Council Resolution, particularly given that many terrorist acts and the general "support" offences mandated by Resolution 1373, do not constitute offences established under a multilateral convention. Further, it is only the very recent multilateral conventions that "declare" the offences established under it not to be regarded as political offences for the purpose of extradition. If Law Ministers determine that a further amendment to the Scheme is required to make it fully compliant with this very particular obligation under the Security Council Resolution, a possible text of an amendment is attached as *Annex C*.

MISUSE OF INFORMATION TECHNOLOGY

15. One of the critical areas of concern in the context of terrorist activity is the misuse of information technology either through terrorist attacks on information systems or terrorist use of such technology to facilitate the commission and financing of such acts through enhanced communication and support networks.

16. The model legislation on Computer and Computer Related Crime, which is before Law Ministers (LMM(02)17), is intended to assist member countries with the development of legislative structures that will enhance capacity generally with respect to crime relating to computer systems and in terms of gathering evidence generated through technology. As such it will be applicable and relevant in the context of terrorist activities.

17. Law Ministers may wish to discuss and recommend additional activity that will enhance the capacity of member countries to develop and protect technology systems and infrastructure such as:

- development of law enforcement networks for information exchange and co-operation;
- relevant training programs

18. As well, Law Ministers may wish to examine the specific issue of data preservation both in terms of domestic law and international co-operation. At their meeting in London in November 2001, Senior Officials briefly considered possible amendments to the Harare Scheme relating to interception of communications, including computer communications and preservation of computer data. Senior Officials were of the view that these issues required further study before any action could be taken. They asked the Secretariat to continue examination of these issues and to provide member countries with information on recent initiatives in this field. In light of the relevance of these developing areas to investigations and prosecutions relating to terrorist activities, Law Ministers may wish to consider if particular directed action in this area needs to be undertaken on an urgent basis.

REGIMES RELATING TO ASSET RESTRAINT AND FORFEITURE

19. On the important related subject of the freezing, seizure and confiscation of proceeds of crime and terrorist funds, considerable general work has been done to assist member countries with the development of effective laws and practice in this area. Under Resolution 1373, countries are required to "freeze assets of persons or groups identified by the Security Council as being involved in terrorist activity". This has created unique challenges for all countries and Law Ministers may wish to share experience on this topic.

20. In addition to special freezing powers, member countries need to determine if existing proceeds of crime laws are sufficiently broad to cover the assets of terrorists, their agents, sponsors and supporters and are generally effective. Law Ministers may wish to consider what assistance might be provided to member countries in this context. Possible recommended action could include:

- model legislative provisions for civil forfeiture regimes;
- training of investigators and prosecutors;
- possible consideration of changes or additions to the existing provisions of the Harare Scheme for Mutual Assistance (Clauses 26-28) on proceeds of crime to strengthen co-operation in cases of cross border restraint and forfeiture.

ADDITIONAL WORK ON SECURITY COUNCIL RESOLUTION 1373

21. Law Ministers may wish to consider if there are other aspects of the Resolution where it would be useful and appropriate to work on implementation within a Commonwealth context and, if so, what forms of assistance would be most beneficial. Some topics for consideration would be:

(a) exchange of operational information;

(b) co-operation in the prevention of terrorist acts;

(c) enhancement of border controls and the prevention of counterfeiting, forgery or fraudulent use of identity papers and travel documents;

(d) measures for the protection of critical infrastructure;

(e) preventing abuse of refugee systems.

UNITED NATIONS SECURITY COUNCIL RESOLUTION 1373

"*The Security Council*,

"*Reaffirming* its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

"*Reaffirming also* its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

"*Reaffirming further* that such acts, like any act of international terrorism, constitute a threat to international peace and security,

"*Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

"*Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

"*Deeply concerned* by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

"*Calling* on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

"*Recognizing* the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

"*Reaffirming* the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

"*Acting* under Chapter VII of the Charter of the United Nations,

"1. *Decides* that all States shall:

"(a) Prevent and suppress the financing of terrorist acts;

"(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

"(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

"(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

"(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

"(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

"(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

"(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

"(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

"(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

"(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

"3. *Calls upon* all States to:

"(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

"(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

"(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

"(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

"(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

"(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;

"(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

"4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

"5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

"6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

"7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

"8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

"9. *Decides* to remain seized of this matter."

28 September 2001

POLITICAL OFFENCE EXCEPTION
The current provision in the London Scheme

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),
(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,
(iii) murder, or any related offence as described above,
(iv) an act declared to constitute an offence under a multilateral international convention the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought,
(v) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

POLITICAL OFFENCE EXCEPTION

Suggested provision for inclusion in the London Scheme in place of the proposed Paragraph 12

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) **Sub paragraph (a) shall not apply to:**

(i) offences established under any multilateral international convention to which the requesting and the requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought;

(ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including:

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence),

(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above,

(iii) murder, or any related offence as described above,

(iv) [SUBPARAGRAPH 2(A)IV TO BE DELETED - COVERED BY NEW SUBPARAGRAPH 1(B) i]

(v) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

PROPOSED REVISION OF THE LONDON SCHEME ON THE RENDITION OF FUGITIVE OFFENDERS

INTRODUCTION

1. In 1996 Law Ministers noted that because of developments internationally and in the case law of Commonwealth countries, there might be a need to review and modernize Commonwealth extradition practice. The Secretariat was asked to continue work in this area and to report to Senior Officials on the issue. At their 1998 meeting Senior Officials agreed that the London Scheme for the Rendition of Fugitive Offenders (the Scheme) was in need of amendment to take account of experience gained since 1990 and developments in global practice, such as those addressed in the United Nations Model Treaty on Extradition (UN Model Treaty).

2. A paper **(LMM)(O)(99)3** on proposed amendments to the Scheme was prepared by the Secretariat for the 1999 Law Ministers Meeting. It included a description of the proposals and a summary of the comments that had been submitted in writing by member countries.

3. Senior Officials discussed the proposed amendments at their meeting in 1999, which immediately preceded the meeting of Law Ministers. However, due to time constraints, officials did not have an opportunity to fully conclude their discussions on the amendments. This was reported to Law Ministers who decided that, notwithstanding the view of some member countries that the Scheme was working satisfactorily, Senior Officials should continue their work with a view to making firm recommendations as to possible amendments for consideration at the next Law Ministers Meeting.

4. At their meeting in London in November 2001 Senior Officials discussed the issue again and reviewed the proposed amendments to the Scheme. After consideration Senior Officials agreed to several specific amendments to the Scheme, which are outlined below. They also recognized that the Scheme was in need of restructuring to properly incorporate amendments made over the years. In addition, it would be useful if the language and terminology of the Scheme were updated and made consistent with modern extradition practice. This included a recommendation that the Scheme be renamed as the London Scheme on Extradition. A summary of the types of changes incorporated in the general revisions is outlined below as well. A revised Scheme containing these specific and general amendments is included in the *Annex* to this paper. Specific amendments are highlighted in the proposed revision but the general non-substantive changes to terminology and language are not.

5. It should also be noted that in the Commonwealth Plan of Action on Terrorism endorsed at the Commonwealth Heads of Government meeting in Coolum, Law Ministers were encouraged to give priority consideration to the recommended revisions to the London Scheme.

GENERAL AMENDMENTS

6. The Scheme was adopted originally in 1966 and has been the subject of amendments and additions over the last 35 years. The last amendment was made over a decade ago. Some of the amendments adopted were placed in Annexes, with the result that subject matters such as grounds of refusal and evidentiary provisions were divided between the Scheme proper and the Annexes. The three Annexes dealt with four optional provisions that may be applied at the discretion of the relevant Commonwealth jurisdiction. These related to the definition of political offence, refusal on the basis of the death penalty, non-return of nationals, and alternative evidence provisions for

committal proceedings. Senior Officials recommended that the Annexes be incorporated into the Scheme. Thus in the proposed revision clause 19 of the Scheme, on the use of the Annexes, has been deleted and the existing Annexes have been included in the body of the Scheme as follows:

- the definition of political offence as paragraph 2 of Clause 12;
- the death penalty and nationals provisions as Clause 15 on optional discretionary grounds of refusal; and
- the optional committal proceedings as Clause 6.

The clauses where the Annexes have been incorporated are highlighted in the text.

7. The terminology of the Scheme has been amended to:

- replace the term "rendition" with extradition and "fugitive offender" with "person sought";
- introduce the term "country" as opposed to the "part of the Commonwealth" applying the same definition of country as in the Harare Scheme;
- employ gender-neutral language and modernize the text.

SPECIFIC AMENDMENTS

A. Double Criminality (Clause 2(3))

8. Two amendments have been made with respect to the requirement for dual criminality. First, the Scheme contained two provisions impacting on the dual criminality assessment – clauses 2 and 12. Clause 2 defined "returnable offence" as an offence punishable in both the requesting and requested part of the Commonwealth by two years imprisonment or more. It therefore made "dual criminality" with respect to the offence, a prerequisite to rendition. Clause 12 then provided for refusal on a discretionary or mandatory basis where the facts underlying the offence would not constitute an offence in the requested part of the Commonwealth.

9. While there was a slight distinction between the two clauses, it seemed unduly complicated to make reference to both requirements. This approach was very difficult to apply in practice and inconsistent with general international extradition standards. Therefore, in the proposed text Clause 12 has been deleted and Clause 2, consistent with extradition practice generally, has been maintained to establish dual criminality as a pre-condition for extradition.

10. The second change is the addition of sub sections (3)(a) and (b) to Clause 2. These provisions make it clear that the focus should be on whether the underlying acts or omissions would constitute an offence in the requested state, regardless of whether the offence is categorized in the same way or whether the elements of the offences differ. This approach is consistent with modern extradition practice as reflected in the *UN Model Treaty* and other instruments.

B. Offences Committed outside the Territory of the Requesting Part of The Commonwealth – (2(4) and 14(1)(b))

11. The current scheme makes no reference to extraterritorial offences and whether or not extradition is available in such circumstances.

12. Senior Officials recognized that within common law countries, jurisdiction over criminal offences is generally restricted to territorial offences. However, in recent years, primarily as the result of several international conventions, there has been a growing trend, to extend jurisdiction extraterritorially. For example, the Torture Convention and several of the "counter-terrorism" treaties mandate the extension of jurisdiction for States Parties and both the 1988 United Nations

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the recently concluded Palermo Convention, allow states to extend their jurisdiction extra territorially over relevant offences.

13. In addition to jurisdiction premised on multilateral instruments, there are some offences which are of such a nature that effective law enforcement requires consideration of an extension of jurisdiction. Computer crime offences fall within that category. With the existing technology it is possible to commit a range of offences in another country, without ever physically entering the jurisdiction. For example, there have been several recent instances where an individual in Country A uses a program to gain illegal access to a data base in Country B or to design and input a virus in Country A that destroys a computer system in Country B. The law of some countries may allow for prosecution in such cases on the basis of a liberal interpretation of the concept of territorial jurisdiction or by use of conspiracy charges. In other countries, jurisdiction may be extended by legislation to cover these scenarios. In still others, no action may have been taken to apply or extend jurisdiction to cover such cases.

14. It was because of these possible variations in jurisdiction that the computer crime expert group noted the importance of allowing for extradition, even though the jurisdictional provisions of countries for such offences may vary.

15. As a result of these developments Senior Officials decided to include a specific reference to extraterritorial offences, within the definition of "extradition offence" in the London Scheme. This addition at sub-clause 2(4)(b) makes such extraterritorial offences extraditable pursuant to the Scheme.

16. At the same time, while the legitimate use of extra-territorial jurisdiction has expanded, it is recognized that there will be cases where a claim of extra-territorial jurisdiction is not grounded in principles of international law and is exorbitant. In such instances, a requested country must be able to decline rendition on the basis that it does not recognize or accept that purported exercise of jurisdiction. Therefore, any recognition of extra territorial offences as being extraditable should at the same time allow for refusal, at the discretion of the requested country, to address cases of unacceptable jurisdictional claims. A discretionary ground of refusal reflecting this principle has been included in the proposed revision as subparagraph (1)(b) of Clause 14.

C. Additional Information – (Clause 7)

17. Senior Officials agreed that the Scheme should provide that a competent authority in the requested country may seek additional information where the extradition request is insufficient. There was general agreement as well that a discretionary provision on adjournments, where the request is made after proceedings have commenced, should be included. These additions are reflected in Clause 7 of the proposed revision.

D. The Basis for Refusing Extradition – (Clauses 12, 13, 14 and 15)

18. Most modern extradition treaties and instruments contain two articles on grounds of refusal, divided as between mandatory and discretionary grounds. Senior Officials were of the view that a similar approach should be adopted in the London Scheme and thus clauses 12, 13, 14 and 15 now contain all the applicable grounds of refusal – divided as between mandatory and discretionary grounds. Clauses 12 and 13 are the mandatory grounds of refusal. Clause 12 addresses the political offence exception separately because of the detailed provisions and optional approaches to exclusion of its application. This clause is also the subject of paper **LMM(02)14** dealing with terrorism. Clause 13 covers the remaining mandatory grounds. Two clauses on discretionary grounds of refusal – 14 and 15 – have been included to distinguish between discretionary grounds for which there is

general consensus (Clause 14) and those, coming from the Annexes, on which there is not (Clause 15). In the case of the grounds set out under Clause 15, the Scheme provides that if a country adopts these grounds of refusal, another country may vary the application of other sections of the Scheme to that first country or may subject their application to conditions. This reflects the position adopted by Law Ministers when these optional grounds of refusal were incorporated in an Annex to the Scheme in 1966.

19. Senior Officials went on to consider the content of the clauses on refusal of extradition. Taking into account the existing Scheme as well as international practice, Clauses 12 and 13 on mandatory refusal reflect the grounds of refusal found in the existing clause 10 - political offence, discriminatory prosecution or punishment, unjust and oppressive and previous conviction or acquittal. The agreed discretionary grounds - *in absentia* conviction, extraterritorial offences, immunity, and military offence are in Clause 14. The optional discretionary provisions on death penalty and nationality have been moved from the Annexes into Clause 15.

20. Clause 13 on mandatory grounds of refusal has also been slightly amended from the existing clause 10 as follows:

a. addition of *sex* as a ground of persecution in 13(1)(a), with consequential deletions of gender references in the paragraph; and
b. the removal of existing paragraphs 10(5) and (6), dealing with judicial and executive authorities, from clause 10 into a separate clause 17.

The addition to paragraph 13(1)(a) reflects the *UN Model Treaty*, as well as many recent instruments such as the *Palermo Convention*, all of which include this ground. Sub clauses 10(5) and (6) have been moved into a separate clause to make the text clearer and more focused.

E. Options where Rendition is Refused on the Basis of Nationality - (Clause 16)

21. Clause 15 includes a discretionary provision on refusal of extradition on the basis that the person sought is a national or permanent resident of a Commonwealth country. Senior Officials were concerned that the refusal of extradition on the basis of nationality could result in safe haven for fugitives if there are no alternatives available to allow for the person to be tried or punished. Thus, Clause 16 has been added to require that steps be taken to facilitate the trial or punishment of the person.

22. Some possible methods for achieving this are listed in paragraph 2 of Clause 16, including allowing for prosecution in the requested country, and providing for temporary surrender for trial, on condition of return for the service of any sentence imposed.

23. This proposal reflects current international practice as evidenced by the *UN Model Treaty* and the *Palermo Convention*, both of which make reference to domestic prosecution in lieu of extradition and temporary surrender.

Action

24. Law Ministers are requested to consider adoption of the revised text of the London Scheme as set out in the proposed revision in the *Annex* to this paper.

THE LONDON SCHEME FOR EXTRADITION WITHIN THE COMMONWEALTH

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.

(2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.

(3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

EXTRADITION OFFENCES AND DUAL CRIMINALITY RULE

2. (1) A person sought will only be extradited for an extradition offence.

(2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.

(3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:

(a) **the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;**

(b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.

(4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:

(a) is of a purely fiscal character; **or**

(b) was committed outside the territory of the requesting country

where extradition for such offences is permitted under the law of the requested country.

WARRANTS, OTHER THAN PROVISIONAL WARRANTS

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -

(a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or

(b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.

(2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

PROVISIONAL WARRANTS

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.

(2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.

(3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.

(4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

COMMITTAL PROCEEDINGS

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.

(3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix;

(a) a warrant has not been endorsed or issued in accordance with clause 3(1), or

(b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued,

the competent judicial authority will order the person to be discharged.

(4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -

(a) such evidence is produced as establishes a prima facie case that the person committed the offence; and

(b) extradition is not precluded by law

but, otherwise, will order the person to be discharged.

(5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

OPTIONAL ALTERNATIVE COMMITTAL PROCEEDINGS

(Clause 6 has not been amended. It is highlighted as it was previously contained in clause 19(2) (now 6(1)) and Annex III (now 6(2) –(4))

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.

(2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -

(a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and

(b) extradition is not precluded by law,

but otherwise will order that the person be discharged.

(3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -

(a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and

(b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.

(4) A record of the case will contain -

(a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;

(b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;

(c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition ;

(d) a recital of the evidence acquired to support the request for extradition; and

(e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

SUPPLEMENTARY INFORMATION

7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.

(2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

CONSENT ORDER FOR RETURN

8. (1) A person sought may waive committal proceedings, and if satisfied that the person sought has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the person sought to prison, or for admission to bail, to await extradition.

(2) The competent executive authority may thereafter order extradition at any time, notwithstanding the provisions of clause 9.

(3) The provisions of clause 20 shall apply in relation to a person sought extradited under this clause unless waived by the person.

RETURN OR DISCHARGE BY EXECUTIVE AUTHORITY

9. After the expiry of 15 days from the date of the committal of a person sought, or, if a writ of habeas corpus or other like process is issued, from the date of the final decision of the competent judicial authority on that application (whichever date is the later), the competent executive authority will order extradition unless it appears to that authority that, in accordance with the provisions set out in this Scheme, extradition is precluded by law or should be refused, in which case that authority will order the discharge of the person.

DISCHARGE BY JUDICIAL AUTHORITY

10. (1) Where after the expiry of the period mentioned in paragraph (2) a person sought has not been extradited an application to the competent judicial authority may be made by or on behalf of the person for a discharge and if -

(a) reasonable notice of the application has been given to the competent executive authority, and

(b) sufficient cause for the delay is not shown,

the competent judicial authority will order the discharge of the person.

(2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either -

(a) not later than two months from the person's committal to prison, or

(b) not later than one month from the date of the order for extradition made in accordance with clause 9.

HABEAS CORPUS AND REVIEW

11. (1) It will be provided that an application may be made by or on behalf of a person sought for a writ of habeas corpus or other like process.

(2) It will be provided that an application may be made by or on behalf of the government of the requesting country for review of the decision of the competent judicial authority in committal proceedings.

POLITICAL OFFENCE EXCEPTION

(The provisions of clause 12, paragraph 2 have not been amended. They are highlighted as they were previously contained in paragraph 1 of Clause 10 and Annex 1)

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;

(b) Sub paragraph (a) shall not apply to offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.

(c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

(2) (a) **A country may provide by law that certain acts shall not be held to be offences of a political character including -**

(i) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence);

(ii) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above;

(iii) murder, or any related offence as described above;

(iv) an act declared to constitute an offence under a multilateral international convention the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought; or

(v) any other offence that a country considers appropriate.

(b) A country may restrict the application of any of the provisions made under sub paragraph (b) to a request from a country which has made similar provisions in its laws.

13. (1) The extradition of a person sought also will be precluded by law if -

(a) it appears to the competent authority that:

(i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, **sex**, nationality or political opinions, or

(ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, **sex**, nationality or political opinions.

(b) the competent authority is satisfied that by reason of

(i) the trivial nature of the case, or

(ii) the accusation against the person sought not having been made in good faith or in the interests of justice, or

(iii) the passage of time since the commission of the offence, or

(iv) any other sufficient cause,
it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.

(c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

DISCRETIONARY BASIS FOR REFUSAL OF EXTRADITION

14. (1) A request for extradition may be refused in the discretion of the competent authority of the requested country if -

(a) judgment in the requesting country has been rendered in circumstances where the accused was not present; and
(i) no counsel appeared for the accused; or
(ii) counsel instructed and acting on behalf of the accused was not permitted to participate in the proceedings;

(b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances;

(c) the person sought has, under the law of either the requesting [or requested] country become immune from prosecution or punishment because of [any reason, including] lapse of time or amnesty;

(d) the offence is an offence only under military law or a law relating to military obligations.

OPTIONAL DISCRETIONARY GROUNDS OF REFUSAL

(The provisions of clause 15 have not been amended. They are highlighted as they were previously contained in clause 19(1) and Annex 2)

15. (1) Any country may adopt the provisions of this clause but, where they are adopted, any other country may in relation to the first country reserve its position as to whether it will give effect to the other clauses of the Scheme or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 23(a).

(2) A request for extradition may be refused if the competent authority of the requested country determines -
(a) that upon extradition, the person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country; and

(b) it would be, having regard to all the circumstances of the case and to the likelihood that the person would be immune from punishment if not extradited, unjust or oppressive or too severe a punishment for extradition to proceed.

(c) In determining under paragraph (a), whether a person would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting country may make with regard to the possibility that the death penalty, if imposed, will not be carried out.

(3) (a) A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country.

(b) For the purpose of sub paragraph a, a person shall be treated as a national of a country that is -
(i) a Commonwealth country of which he or she is a citizen; or
(ii) a country or territory his or her connection with which determines national status.

(c) The assessment under paragraph (b) should be at the date of the request.

ALTERNATIVE MEASURES IN THE CASE OF REFUSAL

16 (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

(2) The legislative action necessary to give effect to paragraph (1) may include –
(a) providing that the case be submitted to the competent authorities of the requested country for prosecution;

(b) permitting:
(i) the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and
(ii) the transfer of convicted offenders; or

(c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

COMPETENT AUTHORITY

17 (1) The competent authorities for the purpose of clauses 12, 13, 14 and 15 will include
(a) any judicial authority which hears or is competent to hear an application described in clause 11, and
(b) the executive authority responsible for orders for extradition.

(2) It will be sufficient compliance with sub paragraphs 12, 13, 14 and 15 if a country decides that the competent authority for those purposes is exclusively the judicial authority or the executive authority.

POSTPONEMENT OF EXTRADITION AND TEMPORARY TRANSFER OF PRISONERS TO STAND TRIAL

18. (1) Subject to the following provisions of this clause, where a person sought -

(a) has been charged with an offence that may be tried by a court in the requested country or

(b) is serving a sentence imposed by a court in the requested country,

then until discharge (by acquittal, the expiration or remission of sentence, or otherwise) extradition will either be precluded by law or be subject to refusal by the competent executive authority as the law of the requested country may provide.

(2) Subject to the provisions of this Scheme, a prisoner serving such a sentence who is also a person sought may, at the discretion of the competent executive authority of the requested country, be extradited temporarily to the requesting country to enable proceedings to be brought against the prisoner in relation to the extradition offence on such conditions as are agreed between the respective countries.

PRIORITY WHERE TWO OR MORE REQUESTS MADE

19. (1) Where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests.

(2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular –

(a) the relative seriousness of the offences,

(b) the relative dates on which the requests were made, and

(c) the citizenship or other national status and ordinary residence of the person sought.

SPECIALTY RULE

20. (1) This clause relates to a person sought who has been extradited from one country to another, so long as the person has not had a reasonable opportunity of leaving the second mentioned country.

(2) In the case of a person sought to whom this clause relates, detention or trial in the requesting country for any offence committed prior to extradition (other than the one for which the person was extradited or any lesser offence proved by the facts on which extradition was based), without the consent of the requested country, will be precluded by law.

(3) When considering a request for consent under paragraph (2) the executive authority of the requested country may seek such particulars as it may require in order that it may be satisfied that the request is otherwise consistent with the principles of this Scheme

(4) Consent under paragraph (2) shall not be unreasonably withheld but where, in the opinion of the requested country, it appears that, on the facts known to the requesting

country at the time of the original request for extradition, application should have been made in respect of such offences at that time, that may constitute a sufficient basis for refusal of consent.

(5) The requesting country shall not extradite a person sought who has been surrendered to that country pursuant to a request for extradition, to a third country for an offence committed prior to extradition, without the consent of the requested country .

(6) In considering a request under paragraph (5) the requested country may seek the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.

(7) Nothing in this clause shall prevent a court in the requesting country from taking into account any other offence, whether an extradition offence or not under this Scheme, for the purpose of passing sentence on a person convicted of an offence for which he or she was surrendered, where the person consents.

RETURN OF ESCAPED PRISONERS

21. (1) In the case of a person who –

(a) has been convicted of an extradition offence by a court in any country and is unlawfully at large before the expiry of the sentence for that offence, and

(b) is found in another country,

the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern extradition to the country in which the person was convicted.

(2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence for which there is a conviction and, in particular –

(a) any reference to a person sought shall be construed as including a reference to such a person as is mentioned in paragraph (1); and

(b) the reference in clause 5(4) to evidence that establishes a prima facie case shall be construed as a reference to such evidence as establishes that the person has been convicted.

(3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

ANCILLARY PROVISIONS

22. Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate –

(a) the transit through its territory of a person sought who is being extradited under this Scheme;

(b) the delivery of property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and

(c) the proof of warrants, certificates of conviction, depositions and other documents.

ALTERNATIVE ARRANGEMENTS AND MODIFICATIONS

23. Nothing in this Scheme shall prevent –

(a) the making of arrangements between Commonwealth countries for further or alternative provision for extradition, or

(b) the application of the Scheme with modifications by one country in relation to another which has not brought the Scheme fully into effect.

PROPOSED AMENDMENTS TO THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

BACKGROUND

1. Senior Officials at their meeting in November 2001 considered several possible amendments to the Harare Scheme on Mutual Assistance in Criminal Matters. The specific issues considered were:

- the availability of court-based mutual legal assistance channels to the defence;
- issues relating to privilege, including legal privilege and the protection against self-incrimination;
- the interception of (and evidence obtained from the interception of) telecommunications and other forms of electronic surveillance;
- the taking of personal samples; and
- provisions relating to computer data.

PROPOSED AMENDMENT

2. At the conclusion of their deliberations, Senior Officials recommended one amendment to the Scheme, relating to the protection against self-incrimination and the process for determining questions of privilege. The proposed amendment to Clause 6 of the Scheme, with the additions in bold, is annexed to this paper.

3. Regarding other issues such as the interception of telecommunications and electronic surveillance, the taking of DNA samples and provisions relating to computer data, Senior Officials requested that further work be undertaken in respect of these proposed amendments.

4. In relation to computer and computer related crime, Law Ministers may wish to note that at the second meeting of the Computer Crime expert group, the recommendations respecting possible amendments to the Harare Scheme were reiterated. (See LMM(02)17)

ACTION

Law Ministers are requested to consider the adoption of the amendment to the Harare Scheme as set out in the *Annex*.

ANNEX

PROPOSED AMENDMENT TO PARAGRAPH 6 OF THE HARARE SCHEME ACTION IN THE REQUESTED COUNTRY

6. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers

(a) that the request does not comply with the provisions of this Scheme, or

(b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or

(c) that the request cannot be complied with, in whole or in part, or

(d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

MODEL LAW ON COMPUTER AND COMPUTER RELATED CRIME

BACKGROUND

1. In Port of Spain, Law Ministers considered the impact of technology on various aspects of the law. One of the issues highlighted for further consideration was computer crime. Ministers recognized the challenges for law enforcement arising from the developments in technology including the new types of criminal activity and the difficulties associated with the gathering and use of electronic evidence. Ministers asked that an expert group be convened to consider the content of a model law on the basis of the work of the Council of Europe on the Draft Convention on Cyber Crime (*COE Draft Convention*). Topics that were specifically mentioned for consideration included criminalisation of various forms of computer abuse, admissibility of computer evidence, and investigation of computer related crime.

EXPERT GROUP

2. Following the course of action identified, the Secretariat convened an expert group to address the topic of Computer Crime and related issues.

3. Working on the basis of the *COE Draft Convention*, the expert group on Computer Crime and Related Criminal Law issues made recommendations, *inter alia*, for the content of a model law. On the basis of their report a draft model law, combined with the model law on e-commerce, was prepared and submitted to Senior Officials for their consideration.

SENIOR OFFICIALS

4. At their meeting in November 2001 Senior Officials decided that the Expert Group should be reconvened to review the draft model law in light of recent developments, in particular the changes made to the Council of Europe Convention on Cyber Crime, since the original meeting of the group. They also requested that the combined model law be separated into two model laws addressing the separate subject areas of e-commerce and computer crime and related issues.

5. The Expert Group was reconvened in March 2002 and based on their report (*Annex A*) a revised Model Law on Computer and Computer Related Crime was prepared. (*Annex B*).

6. The redrafted Model Law was circulated to Senior Officials for their consideration and comment. On the basis of comments received from Senior Officials, some small drafting changes and corrections were made and additional notes were added to the model. The only substantive change is a proposal by Canada to redraft paragraph 3 of Clause 9 on illegal devices. The original text and the proposal from Canada are highlighted in bold in *Annex B*.

ACTION SOUGHT

7. The Model Law on Computer and Computer Related Crime is recommended for endorsement by Law Ministers.

ANNEX A

REPORT OF 2ND MEETING OF EXPERT GROUP ON COMPUTER AND COMPUTER RELATED CRIME

I INTRODUCTION

1. In July 2000, an expert group meeting was convened by the Commonwealth Secretariat to prepare drafting instructions for a model law on computer and computer related crime. This was in response to the mandate given to the Secretariat by Law Ministers.[1] On the basis of the report of that group, a draft model law was prepared and submitted to Senior Officials of Law Ministries at their meeting in London in November 2001.

2. Senior Officials were of the opinion that the expert group should be reconvened to review the draft model law in light of recent developments, in particular the changes made to the Council of Europe Convention on Cyber Crime, since the original meeting of the group. The Government of Canada offered to fund the reconvened meeting of the group.

3. Senior Officials agreed that any interested member countries that wished to provide written submissions on the draft model law should do so by the end of December 2001. The Government of Australia submitted written comments, which were referred to the Expert Group for their consideration.

4. The 2nd meeting of the expert group on Computer and Computer Related Crime took place in London, 5-7 March 2002. A list of participants is attached as *Annex I*.

II REVIEW OF DRAFT MODEL LAW - GENERAL

5. The Group reviewed the draft model law and the written comments submitted and made recommendations for amendments to reflect recent developments and to ensure that the draft prepared was consistent with the instructions and intent of the Group as set out in the original report. A revised model law has been prepared on the basis of the recommendations arising from the second meeting of the Expert Group..

III REVIEW OF DRAFT MODEL LAW – SPECIFIC ISSUES

1. Separation of E-Commerce and Computer Crime Models

6. As recommended by Senior Officials, the Group was of the view that the original draft model, which encompassed both e-commerce and computer crime, should be separated into two model laws. As a result, only those provisions relating to computer crime were considered at this meeting. The model law in this area has been renamed accordingly - The Computer and Computer Related Crimes Act and the titles and object provisions have been redrafted to reflect this more limited subject area.

2. Definitions (Section 3)

7. In light of the separation of the model laws, the Group went on to reconsider the definition provisions, relevant to computer crimes, which in the combined draft model law had been merged with definitions for e-commerce. The Group reiterated its original recommendation for inclusion of

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[1] See publication Law in Cyber Space for report of the expert group.

the four definitions from the Council of Europe Convention – *computer data*, *computer system*, *service provider* and *traffic data*. On a general point, the Group noted that for some of the definitions, the Council of Europe had moved from the term "includes" to the term "means". The Group was of the view that for the purpose of legislation, the narrower more defined term "means" should be employed for all the definitions. As to the content of those definitions, each one was considered separately.

8. No changes were made to the definition of *computer data*, which had also remained the same in the Council of Europe Convention. However, there was some discussion as to whether the definition should be restricted to computer data or extend to data generally. On the basis that this model law is addressing computer and computer related issues, it was determined that the definition should relate to the narrower term "*computer data*".

9. Two issues were discussed with respect to the definition of *computer system*. The Group noted that the words "or any other function" had been deleted from the Council of Europe definition in the final version. This was apparently because the term would capture too broad a range of devices including things such as washing machines and cars that contain computer chips. However, the Group was of the opinion that it would be better to have an inclusive definition in a model law, which would allow for flexible application to developing technology. The Group noted that in the common law the tradition of prosecutorial discretion would provide a protection against inappropriate application of the offence provision.

10. The Expert Group considered it important to cover the Internet in model offence provisions. While some concerns about overreaching were considered, it was determined that the combination of prosecutorial discretion, the qualification of "without lawful justification or excuse and targeting the Internet network located in the country's territory could prevent misapplication of the offences. In order to be certain that the definition adopted would cover the Internet, the Group recommended that specific reference be made to it in the definition.

3. Offence provisions

11. The Group went on to review all of the offences individually, though only a few were the subject of discussion or recommendation for substantive amendment. Only the key points of discussion or amendment are summarized in this report below.

(a) Illegal Interception of Data (Section 8)

12. In its original report the Group had recommended against limiting the application of this offence to "non- public" transmissions because of concerns that this would unduly limit the scope of the offence. However, in light of the importance that the Council of Europe placed on this qualifying language and its inclusion in the final version of the Convention, the Group reconsidered the issue.

13. The discussion revealed that some of the problems with the qualifying language arose from wording that made it unclear whether the word "transmission" was being used as a verb to connote the medium or as a noun covering the communication itself. The Group was of the opinion that the offence provision had to be framed in sufficiently broad terms to capture interception of any communication that was non – public, regardless of whether the medium used was public or private. Thus the Group recommended a new draft of the offence provision to reflect this principle.

14. The Group also gave consideration to the question of the appropriate *mens rea* for the offence but concluded that the original approach – intentionally or recklessly – was an appropriate standard to employ.

(b) Illegal Devices (Section 9)

15. One of the difficult issues with the offence of illegal devices is how to distinguish the use, import, production etc. of such devices for legitimate purposes, such as testing or protecting a system, as opposed to illegitimate purposes. The issue was of such significance that the final version of the Council of Europe Convention contained a new clause specifically excluding the application of this offence provision in cases of legitimate purpose.

16. There was a lengthy discussion as to whether such an exclusion clause should be similarly reflected in the model law. While the Group agreed that the section should not apply to situations of innocent purpose, they were satisfied that the combination of "without lawful excuse or justification" and the requirement for a specific intention of criminal purpose was sufficient to prevent an overly broad application of the section.

(c) Child Pornography (Section 10)

17. The possible defence to the child pornography offence was reconsidered in light of concerns that it was too broadly worded. There was particular focus on the general reference to "rehabilitation", which would allow anyone to raise a doubt on the basis that he or she was using the material to "rehabilitate" him or herself. The Group decided to remove the reference to rehabilitation and limit the defence to situations of bona fide scientific research or medical purposes. The Group was also of the view that the defence should extend to the possession of such material for law enforcement purposes, such as seizure and possession in the course of evidence gathering or court processes. On that basis law enforcement was added to the list of legitimate purposes.

4. Procedural Powers (Part 3)

18. The various procedural powers in the model law were reviewed in detail. The major issues discussed are outlined below.

(a) Search and seizure powers (Section 12)

19. The Group considered at length how best to reflect the necessary powers for search and seizure in the computer context, given that most jurisdictions will have existing general search powers that will need to be amended. As set out in the detailed note in the model law, the Group decided to provide an example of amendments to a general search power, without including a lengthy model provision for general search and seizure powers, which would be unnecessary for most jurisdictions.

20. In recognition of the vast range of approaches to search and seizure throughout Commonwealth jurisdictions, the example also uses alternative language to further illustrate that it is intended as an example only. Those alternatives are also used to highlight that there are various approaches to search and seizure in Commonwealth countries in terms of the authorities that apply for and issue the warrant, the type of material to be filed in support of applications and the threshold to be met for issuance of the warrant.

21. The example illustrates that the items to be searched for and seized should clearly include not only tangible "things" but also intangible "computer data". Thus, that specific language needs to be included throughout any search provision.

22. Another important point to consider is the definition of terms such as "thing" or "item" – the example uses "thing" and the definition of "seize". Because of the nature of computer systems and data, those definitions need to be sufficiently broad and flexible to ensure that the police can carry

out a proper and thorough search and seizure within the computer context. Definitions of that nature have been included in the draft model law.

23. The Group emphasized that each jurisdiction will need to review all existing search powers, whether statutory or by common law, and adopt legislative provisions that will ensure that all such powers extend to search and seizure in the computer context.

(b) Assisting police (Section 13)

24. There was an extensive discussion of this provision (former section 14), which obligates persons in control of computer systems or storage mediums to assist law enforcement in the course of a search. As was recognized by the Group in their original report, in the computer context such assistance is critically important in order for the person making the search to obtain the computer data in an intelligible and useful form. Therefore, the Group remained convinced that a specific provision on assistance should be included in the model law, above and beyond the normal powers of the police to seek assistance during a search. The Group discussed a proposal by Australia that the offence should be limited to assistance that is reasonable and necessary. Ultimately it was decided that the qualification of without lawful excuse or justification would provide a sufficient protection against unreasonable requests and that it would be too onerous to require proof in each instance that the request was necessary and reasonable. The Group however adopted the further Australian suggestion that because this provision is framed as an obligation on persons and not a power flowing from an order of the court, a specific penalty for failure to comply with a request for assistance should also be included.

25. However, the Group recognized that, even with possible penalties attaching to non-compliance, because the assistance involves information held by a person, there were practical limits to the effectiveness of the compulsion power. As is the case with breathalyser provisions, a person could decide to refuse to provide the information and face the applicable penalties rather than giving the police access to the computer data. Countries may wish to keep this in mind in determining the applicable penalty for failure to comply with a request.

26. At the same time, the Group emphasized that within each jurisdiction careful consideration will have to be given to the interplay between this legislative provision and constitutional or common law protections against self-incrimination, given that the section requires a person to provide information that may in some circumstances be self incriminating. There were varying opinions as to the extent to which the protection against self-incrimination would preclude the use of evidence obtained as a result of the compelled disclosure of the information. It was clear that the extent of any violation of the protection and the impact on the use of the evidence would vary from country to country. In addition, there will be substantial differences as to how countries deal with this issue depending on whether there is a constitutional or common law protection against self-incrimination. It is for each jurisdiction to determine how to incorporate such an obligation in domestic law and whether or not it will need to be qualified in light of the protection against self-incrimination.

(c) Record of and access to seized data (Section 14)

27. The Group considered the practical application of this provision at length. The intent of the provision was primarily to ensure that the police keep a proper record of the items seized in the search and that the record is provided to the occupant or person in control of the computer system on a timely basis. The language of the draft was amended to make this clear. In addition, in those instances where the police decide to remove or render computer data inaccessible or physically seize a computer system, provision needs to be made for the occupant to request and obtain copies of the seized material, particularly where the records relate to an ongoing business or enterprise. At the

same time, it was recognized that there would be instances where it would not be appropriate to give copies or access because of possible prejudice to an investigation or proceeding or where possession of the seized material would itself constitute an offence e.g. child pornography. The provision recommended by the Group is intended to achieve a balance between these interests.

(d) Production order power (Section 15)

28. As recommended in the original report, the model law contains a production order power that can be used as an alternative to a search warrant. The target group for such orders would be third parties unrelated to the suspects in the investigation, where there is no risk that the information or data sought will be destroyed. Under this power, the court will issue an order requiring a person to produce specified computer data within a set time period.

29. While the Group was unanimous as to the importance and usefulness of such a power, there was division as to the threshold to be met for the order to issue. For some countries, because the material to be produced may carry the same expectation of privacy as material seized by search warrant, the view was that the same standard and procedure should apply to both processes. However it was recognized that for other countries, because the production power is less intrusive in that the police do not enter and search the premises for the material, it is viewed as more analogous to a subpoena power than a search warrant. Those countries would apply a lesser threshold for the order and a simplified process. The model law reflects this latter position. However, each country will need to carefully consider its constitutional and other requirements relating to search and seizure in order to determine what standard and process should be applicable to production orders.

(e) General

30. The Group discussed whether the model law should contain general provisions on penalties for obstruction during the course of a search or failure to comply with a court order. It was concluded that no specific provisions would be necessary as the laws of general application on these issues would be equally applicable to searches conducted or court orders issued under this statute. Countries would need to ensure that any necessary consequential amendments were made to apply such general provisions.

IV RECOMMENDATIONS REGARDING MUTUAL ASSISTANCE

31. The expert group reiterated their concern about the absence of effective provisions in the Harare scheme to deal with requests for assistance relating to computer data. In particular they noted that the absence of provisions for preservation orders, disclosure of traffic data, and assistance with collection of real time data makes the scheme of limited use in cases where computer data evidence is sought. The resulting problems are likely only to increase as more cases arise where such evidence is required.

32. The expert group recognized that Senior Officials did not recommend the inclusion of any such provisions into the Harare Scheme at their November meeting. It was noted however that given the postponement of consideration of the model law, there may not have been a sufficient opportunity to consider the specific recommendations for the Harare scheme in the area of computer evidence, within the context of the general recommendations of the expert group and the draft model law.

33. The expert group recommended that Senior Officials reconsider all of the recommendations on Mutual Assistance set out in the original report of the Expert Group and in particular those relating to amendments to the Harare Scheme, when considering the revised draft model law. A copy of the recommendations on mutual assistance from the original report of the expert group is

attached as *Annex II*. *Annex III* to the Report contains excerpts from the Harare Scheme, with proposed revisions that reflect the expert group recommendations highlighted in bold in the text.

V ISSUES REFERRED TO E-COMMERCE GROUP

34. In the course of their discussions, the Group identified two issues which they felt the expert group on E-commerce should consider. First they noted that the term "data" was used in the definitions relating to E-commerce but the content of the definition was substantially the same as the term "computer data" in the computer crime context. For the reasons outlined in Part III, section 2 above could the term "computer data" be used in the e-commerce model law as well to make it consistent in both models?

35. Secondly, the Group noted the inconsistency between the definition of "information" in the E-commerce model law and the definition of document in the evidence model law. Given that the evidence model has been referred by Senior Officials to Law Ministers already, the Group suggested that consideration be given to amending the definition in the E-commerce model to make it consistent with the evidence model.

VI CONCLUSION

36. The Expert Group recommended that the revised model law and proposed amendments to the Harare Scheme be referred to Senior Officials.

37. The Commonwealth Secretariat expressed its thanks to the members of the expert group for their participation and to the Government of Canada for their generous support in sponsoring the reconvening of the expert group.

ANNEX I

2ND MEETING EXPERT GROUP ON COMPUTER AND COMPUTER RELATED CRIME

Marlborough House, London, 5-7 March 2002

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ANNEX II

RECOMMENDATIONS OF EXPERT GROUP ON COMPUTER AND COMPUTER RELATED CRIME REGARDING MUTUAL ASSISTANCE

1. The Harare Scheme on Mutual Assistance in Criminal Matters should permit requests between states for the preservation of specified stored computer data, in particular, but not limited to, traffic data.

2. The requirements for the content of a request for a preservation order should be less then those required for general mutual assistance, with the most essential points being:

(a) the authority seeking preservation;
(b) a brief description of the conduct under investigation;
(c) a description of the stored data to be preserved and its relationship to the investigation;
(d) a statement that the Country intends to submit a request for mutual assistance for the search or access, seizure or similar securing or disclosure of the data.

3. There should be a provision that any preservation effected in response to a request shall be for a period of not less than 40 days in order to enable the requesting Country to submit a request for the search or similar access, seizure or similar securing, or disclosure of the data. Following the receipt of such request the data shall continue to be preserved pending a decision on the request.

4. The grounds of refusal applicable should be as minimal as possible, perhaps limited solely to prejudice to sovereignty, security, order public or essential interest.

5. Consideration should be given to whether an amendment is required to reflect the principle that if the requested Country considers that the preservation order will not ensure the future availability of the data or will threaten the confidentiality of, or other wise prejudice the requesting Country's investigation, it shall promptly inform the requesting Country, which shall then determine whether the request should nevertheless be executed.

6. There should be no requirement for dual criminality in relation to such requests. Countries that require dual criminality for mutual assistance requests should consider removing the requirement, at the very least for requests for preservation orders. Countries that may on a discretionary basis decline requests on the basis of an absence of dual criminality, as provided for in the Harare scheme, should not do so in the case of requests for preservation orders. As the Harare scheme does not require dual criminality as a prerequisite to mutual assistance, no amendment is necessary in that regard. However, as noted in 3 above, an amendment may be necessary to clarify that, inter alia, the dual criminality ground of refusal does not apply in the case of requests for preservation orders.

ANNEX III

EXCERPTS FROM THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITH PROPOSED REVISIONS ARISING FROM EXPERT GROUP RECOMMENDATIONS

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

(a) identifying and locating persons;
(b) serving documents;
(c) examining witnesses;
(d) search and seizure;
(e) obtaining evidence;
(f) facilitating the personal appearance of witnesses;
(g) effecting a temporary transfer of persons in custody to appear as a witness;
(h) obtaining production of judicial or official records; and
(i) tracing, seizing and confiscating the proceeds or instrumentalities of crime.
(j) preserving data stored by means of a computer system on an interim basis;

CONTENTS OF REQUEST FOR ASSISTANCE

13. (1) **Except in the case of a request for preservation of computer data under 1(3)(j), a** request under the Scheme shall:

(a) specify the nature of the assistance requested;
(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;
(c) indicate any time-limit within which compliance with the request is desired, stating reasons;
(d) contain the following information:
  (i) the identity of the agency or authority initiating the request;
  (ii) the nature of the criminal matter; and
  (iii) whether or not criminal proceedings have been instituted.
(e) where criminal proceedings have been instituted, contain the following information:
  (i) the court exercising jurisdiction in the proceedings;
  (ii) the identify of the accused person;
  (iii) the offences of which he stands accused, and a summary of the facts;
  (iv) the stage reached in the proceedings; and
  (v) any date fixed for further stages in the proceedings.
(f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.

(2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

PRESERVATION OF STORED COMPUTER DATA

28bis (1) A request under this Scheme may seek assistance in preserving specified stored computer data of any form, pending the submission of a request for the production of the data.

(2) "Computer data" includes any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function.

(3) The request shall specify:

(a) the authority seeking preservation;

(b) a brief description of the conduct under investigation;

(c) a description of the data to be preserved and its relationship to the investigation or prosecution;

(d) a statement that the requesting country intends to submit a request for mutual assistance for the production of the data.

(4) Preservation granted in response to a request under (1) above shall be for a period of forty (40) days, in order to enable the requesting Party to submit a request for the production of the data. Following the receipt of such request, the data shall continued to be preserved pending a decision on that request and, if the request is granted, until the data is disclosed or seized for production.

(5) If the requested country considers that the preservation order will not ensure the future availability of the data or will threaten the confidentiality of, or other wise prejudice the requesting country's investigation, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.

(6) Notwithstanding Clause 7, a request for assistance under this Clause may be refused only to the extent that it appears to the Central Authority of the requested country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country.

ANNEX B

COMPUTER AND COMPUTER RELATED CRIMES BILL

PART I

INTRODUCTION

Section

PART II

OFFENCES

PART III

PROCEDURAL POWERS

COMPUTER AND COMPUTER RELATED CRIMES BILL

AN ACT to combat computer and computer related crime and to facilitate the collection of electronic evidence.

PART I

INTRODUCTION

Short title

1. This Act may be cited as the *Computer and Computer Related Crimes Act.*

Object

2. The object of this Act is to protect the integrity of computer systems and the confidentiality, integrity and availability of data, prevent abuse of such systems and facilitate the gathering and use of electronic evidence.

Definitions

3. In this Act, unless the contrary intention appears:

"computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;

"computer data storage medium" means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device;

"computer system" means a device or a group of inter-connected or related devices, including the Internet, one or more of which, pursuant to a program, performs automatic processing of data or any other function;

"service provider" means:

(a) a public or private entity that provides to users of its services the ability to communicate by means of a computer system; and
(b) any other entity that processes or stores computer data on behalf of that entity or those users.

"traffic data" means computer data:

(a) that relates to a communication by means of a computer system; and
(b) is generated by a computer system that is part of the chain of communication; and
(c) shows the communication's origin, destination, route, time date, size, duration or the type of underlying services.

Jurisdiction

4. This Act applies to an act done or an omission made:

(a) in the territory of [enacting country]; or
(b) on a ship or aircraft registered in [enacting country]; or
(c) by a national of [enacting country] outside the jurisdiction of any country; or

(d) by a national of [enacting country] outside the territory of [enacting country], if the person's conduct would also constitute an offence under a law of the country where the offence was committed.

NOTE: *The nature of cyber crime is such that it is important to have an extended jurisdictional basis for such offences, as often acts committed in the territory of one jurisdiction may have a substantial impact on other jurisdictions. Some countries can address this issue through case law that interprets "territorial jurisdiction" broadly to include situations where there is a "real and substantial link" to that jurisdiction albeit elements of the offence may have been committed elsewhere. In other countries the legislation specifically provides that jurisdiction may be assumed where there is one substantial link to the country, which term is broadly defined. Whichever approach is adopted, it is important that countries consider the question of jurisdiction carefully and adopt provisions that will ensure no safe haven for those who commit cyber crime.*

PART II

OFFENCES

Illegal access

5. A person who intentionally, without lawful excuse or justification, accesses the whole or any part of a computer system commits an offence punishable, on conviction, by imprisonment for a period not exceeding [**period**], or a fine not exceeding [**amount**], or both.

Interfering with data

6.(1) A person who, intentionally or recklessly, without lawful excuse or justification, does any of the following acts:

(a) destroys or alters data; or
(b) renders data meaningless, useless or ineffective; or
(c) obstructs, interrupts or interferes with the lawful use of data; or
(d) obstructs, interrupts or interferes with any person in the lawful use of data; or
(e) denies access to data to any person entitled to it;

commits an offence punishable, on conviction, by imprisonment for a period not exceeding [**period**], or a fine not exceeding [**amount**], or both.

(2) Subsection (1) applies whether the person's act is of temporary or permanent effect.

Interfering with computer system

7.(1) A person who intentionally or recklessly, without lawful excuse or justification:

(a) hinders or interferes with the functioning of a computer system; or
(b) hinders or interferes with a person who is lawfully using or operating a computer system;

commits an offence punishable, on conviction, by imprisonment for a period not exceeding [**period**], or a fine not exceeding [**amount**], or both.

In subsection (1) "hinder", in relation to a computer system, includes but is not limited to:

(a) cutting the electricity supply to a computer system; and
(b) causing electromagnetic interference to a computer system; and
(c) corrupting a computer system by any means; and
(d) inputting, deleting or altering computer data;

Illegal interception of data etc.

8. A person who, intentionally without lawful excuse or justification, intercepts by technical means:

(a) any non-public transmission to, from or within a computer system; or
(b) electromagnetic emissions from a computer system that are carrying computer data;

commits an offence punishable, on conviction, by imprisonment for a period not exceeding **[period]**, or a fine not exceeding **[amount]**, or both.

Illegal devices

9.(1) A person commits an offence if the person:

(a) intentionally or recklessly, without lawful excuse or justification, produces, sells, procures for use, imports, exports, distributes or otherwise makes available:
  (i) a device, including a computer program, that is designed or adapted for the purpose of committing an offence against section 5, 6, 7 or 8; or
  (ii) a computer password, access code or similar data by which the whole or any part of a computer system is capable of being accessed;
  with the intent that it be used by any person for the purpose of committing an offence against section 5, 6, 7 or 8; or

(b) has an item mentioned in subparagraph (i) or (ii) in his or her possession with the intent that it be used by any person for the purpose of committing an offence against section 5, 6, 7 or 8.

(2) A person found guilty of an offence against this section is liable to a penalty of imprisonment for a period not exceeding **[period]**, or a fine not exceeding **[amount]**, or both.

[EXPERT GROUP TEXT OF PARAGRAPH (3)

(3) A person who possesses more than one item mentioned in subparagraph (i) or (ii), is deemed to possess the item with the intent that it be used by any person for the purpose of committing an offence against section 5, 6,7 or 8 unless the contrary is proven.]

[ALTERNATE TEXT OF PARAGRAPH 3 PROPOSED BY CANADA

(3) Where a person possesses more than [number to be inserted] item(s) mentioned in subparagraph (i) or (ii), a court may infer that the person possesses the item with the intent that it be used by any person for the purpose of committing an offence against section 5, 6, 7 or 8, unless the person raises a reasonable doubt as to its purpose.]

NOTE: *Subsection 3 is an optional provision. For some countries such a presumption may prove very useful while for others, it may not add much value, in the context of this particular offence. Countries need to consider whether the addition would be useful within the particular legal context.*

Child pornography

10.(1) A person who, intentionally, does any of the following acts:

(a) publishes child pornography through a computer system; or
(b) produces child pornography for the purpose of its publication through a computer system; or
(c) possesses child pornography in a computer system or on a computer data storage medium;

commits an offence punishable, on conviction, by imprisonment for a period not exceeding [***period***], or a fine not exceeding [***amount***], or both.

NOTE: *The laws respecting pornography vary considerably throughout the Commonwealth. For this reason, the prohibition in the model law is limited to child pornography, which is generally the subject of an absolute prohibition in all member countries. However a country may wish to extend the application of this prohibition to other forms of pornography, as the concept may be defined under domestic law.*

NOTE: *The pecuniary penalty will apply to a corporation but the amount of the fine may be insufficient. If it is desired to provide a greater penalty for corporations, the last few lines of subsection (1) could read:*

"commits an offence punishable, on conviction:

(a) *in the case of an individual, by a fine not exceeding* [**amount**] *or imprisonment for a period not exceeding* [**period**]; *or*
(b) *in the case of a corporation, by a fine not exceeding* [**a greater amount**].

(2) It is a defence to a charge of an offence under paragraph (1) (a) or (1)(c) if the person establishes that the child pornography was a bona fide scientific, research, medical or law enforcement purpose.

NOTE: *Countries may wish to reduce or expand upon the available defences set out in paragraph 2, depending on the particular context within the jurisdiction. However, care should be taken to keep the defences to a minimum and to avoid overly broad language that could be used to justify offences in unacceptable factual situations.*

(3) In this section:

"child pornography" includes material that visually depicts:

(a) a minor engaged in sexually explicit conduct; or
(b) a person who appears to be a minor engaged in sexually explicit conduct; or
(c) realistic images representing a minor engaged in sexually explicit conduct.

"minor" means a person under the age of [x] years.

"publish" includes:

(a) distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way; or

(b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or

(c) print, photograph, copy or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing an act referred to in paragraph (a).

PART III

PROCEDURAL POWERS

Definitions for this Part

NOTE: *As most jurisdictions already have legislative or common law search powers, the purpose of sections 11 and 12 is to illustrate the amendments necessary to existing powers to ensure that such powers include search and seizure in relation to computer systems and computer data.*

The example given is of necessary amendments to a sample general search warrant provision but similar amendments would need to be made to all search powers, including powers of search on arrest, search without warrant in exigent circumstances, and plain view seizures

The general search warrant provision is provided for illustration and is not intended as a comprehensive model of general search powers. Some options have been included also where there may be differing standards as between countries. These options are bracketed in bold and italics.

11. In this Part:

"thing" includes:

(a) a computer system or part of a computer system; and

(b) another computer system, if:

(i) computer data from that computer system is available to the first computer system being searched; and

(ii) there are reasonable grounds for believing that the computer data sought is stored in the other computer system; and

(c) a computer data storage medium

"seize" includes:

(a) make and retain a copy of computer data, including by using on-site equipment; and

(b) render inaccessible, or remove, computer data in the accessed computer system; and

(c) take a printout of output of computer data.

Search and seizure warrants

12.(1) If a magistrate is satisfied on the basis of [***information on oath***] [***affidavit***] that there are reasonable grounds [***to suspect***] [***to believe***] that there may be in a place a thing or computer data:

(a) that may be material as evidence in proving an offence; or

(b) that has been acquired by a person as a result of an offence;

the magistrate [*may*] [*shall*] issue a warrant authorising a [*law enforcement*] [*police*] officer, with such assistance as may be necessary, to enter the place to search and seize the thing or computer data.

NOTE: *If the existing search and seizure provisions contain a description of the content of the warrant, either in a section or by a form, it will be necessary to review those provisions to ensure that they also include any necessary reference to computer data.*

Assisting Police

13.(1) A person who is in possession or control of a computer data storage medium or computer system that is the subject of a search under section 12 must permit, and assist if required, the person making the search to:

(a) access and use a computer system or computer data storage medium to search any computer data available to or in the system; and
(b) obtain and copy that computer data; and
(c) use equipment to make copies; and
(d) obtain an intelligible output from a computer system in a plain text format that can be read by a person.

(2) A person who fails without lawful excuse or justification to permit or assist a person commits an offence punishable, on conviction, by imprisonment for a period not exceeding [**period**], or a fine not exceeding [**amount**], or both.

NOTE: *A country may wish to add a definition of "assist" which could include providing passwords, encryption keys and other information necessary to access a computer. Such a definition would need to be drafted in accordance with its constitutional or common law protections against self-incrimination.*

Record of and access to seized data

14.(1) If a computer system or computer data has been removed or rendered inaccessible, following a search or a seizure under section 12, the person who made the search must, at the time of the search or as soon as practicable after the search:

(a) make a list of what has been seized or rendered inaccessible, with the date and time of seizure; and
(b) give a copy of that list to:
  (i) the occupier of the premises; or
  (ii) the person in control of the computer system.

(2) Subject to subsection (3), on request, a police officer or another authorized person must:

(a) permit a person who had the custody or control of the computer system, or someone acting on their behalf to access and copy computer data on the system; or
(b) give the person a copy of the computer data.

(3) The police officer or another authorized person may refuse to give access or provide copies if he or she has reasonable grounds for believing that giving the access, or providing the copies:

(a) would constitute a criminal offence; or
(b) would prejudice:
  (i) the investigation in connection with which the search was carried out; or
  (ii) another ongoing investigation; or

(iii) any criminal proceedings that are pending or that may be brought in relation to any of those investigations.

Production of data

15. If a magistrate is satisfied on the basis of an application by a police officer that specified computer data, or a printout or other information, is reasonably required for the purpose of a criminal investigation or criminal proceedings, the magistrate may order that:

(a) a person in the territory of [enacting country] in control of a computer system produce from the system specified computer data or a printout or other intelligible output of that data; and

(b) an Internet service provider in [enacting country] produce information about persons who subscribe to or otherwise use the service; and

(c) *[a person in the territory of [enacting country] who has access to a specified computer system process and compile specified computer data from the system and give it to a specified person.]*

NOTE: *As noted in the expert group report, in some countries it may be necessary to apply the same standard for production orders as is used for a search warrant because of the nature of the material that may be produced. In other countries it may be sufficient to employ a lower standard because the production process is less invasive than the search process.*

NOTE: *Countries may wish to consider whether subparagraph c is appropriate for inclusion in domestic law because while it may be of great practical use, it requires the processing and compilation of data by court order, which may not be suitable for some jurisdictions.*

Disclosure of stored traffic data

Option 1

16. If a police officer is satisfied that data stored in a computer system is reasonably required for the purposes of a criminal investigation, the police officer may, by written notice given to a person in control of the computer system, require the person to disclose sufficient traffic data about a specified communication to identify:

(a) the service providers; and

(b) the path through which the communication was transmitted.

Option 2

16. If a magistrate is satisfied on the basis of an *ex parte* application by a police officer that specified data stored in a computer system is reasonably required for the purpose of a criminal investigation or criminal proceedings, the magistrate may order that a person in control of the computer system disclose sufficient traffic data about a specified communication to identify:

(a) the service providers; and

(b) the path through which the communication was transmitted.

Preservation of data

17.(1) If a police officer is satisfied that:

(a) data stored in a computer system is reasonably required for the purposes of a criminal investigation; and

(b) there is a risk that the data may be destroyed or rendered inaccessible;

the police officer may, by written notice given to a person in control of the computer system, require the person to ensure that the data specified in the notice be preserved for a period of up to 7 days as specified in the notice.

(2) The period may be extended beyond 7 days if, on an ex parte application, a [*judge*] [*magistrate*] authorizes an extension for a further specified period of time.

Interception of electronic communications

18.(1) If a [*magistrate*] [*judge*] is satisfied on the basis of [*information on oath*] [*affidavit*] that there are reasonable grounds [to suspect][*to believe*] that the content of electronic communications is reasonably required for the purposes of a criminal investigation, the magistrate [*may*] [*shall*]:

(a) order an Internet service provider whose service is available in [enacting country] through application of technical means to collect or record or to permit or assist competent authorities with the collection or recording of content data associated with specified communications transmitted by means of a computer system; or

(b) authorize a police officer to collect or record that data through application of technical means.

Interception of traffic data

19.(1) If a police officer is satisfied that traffic data associated with a specified communication is reasonably required for the purposes of a criminal investigation, the police officer may, by written notice given to a person in control of such data, request that person to:

(a) collect or record traffic data associated with a specified communication during a specified period; and

(b) permit and assist a specified police officer to collect or record that data.

(2) If a magistrate is satisfied on the basis of [*information on oath*] [*affidavit*] that there are reasonable grounds [*to suspect*] that traffic data is reasonably required for the purposes of a criminal investigation, the magistrate [*may*] [*shall*] authorize a police officer to collect or record traffic data associated with a specified communication during a specified period through application of technical means.

Evidence

20. In proceedings for an offence against a law of [enacting country], the fact that:

(a) it is alleged that an offence of interfering with a computer system has been committed; and

(b) evidence has been generated from that computer system;

does not of itself prevent that evidence from being admitted.

Confidentiality and limitation of liability

21.(1) An Internet service provider who without lawful authority discloses:

(a) the fact that an order under section 13, 15, 16, 17, 18 and 19 has been made; or

(b) anything done under the order; or

(c) any data collected or recorded under the order;

commits an offence punishable, on conviction, by imprisonment for a period not exceeding [**period**], or a fine not exceeding [**amount**], or both.

(2) An Internet service provider is not liable under a civil or criminal law of [enacting country] for the disclosure of any data or other information that he or she discloses under sections 13, 15, 16, 18 or 19.

ROUND TABLE DISCUSSION

CURRENT LEGAL ISSUES – ROUND TABLE DISCUSSION

INTRODUCTION

1. At their 1999 Meeting Law Ministers expressed the view that it was an opportune time to give consideration to the question how they might maximise the opportunities given by their meetings for the development of pan-Commonwealth solutions to shared problems; for the devising of means of advancing the shared legal tradition of the Commonwealth and for maintaining and implementing the core values of the Association. They concluded that meetings should balance the tradition of sharing national experiences with the need to ensure time for adequate debate on new issues.

2. Seeking to give effect to the wish of Ministers to have a general opportunity to share national experience, the Secretary-General, in his letter notifying this meeting proposed the inclusion in the agenda of a session lasting a couple of hours where Ministers could take the opportunity simply to raise major topical issues of concern. He expressed his hope that such a formation would allow the continuation of the strong tradition of facilitating the presentation of national perspectives and at the same time provide opportunities for the identification of subjects upon which Ministers believed pan-Commonwealth collaboration could add to the achievement of the Commonwealth's fundamental political values.

3. While not wishing to constrain the breadth of discussion in this session, the Secretariat has prepared some short notes on issues it perceives, from its experience working with law ministries, might be of some interest to Ministers and might lend themselves to brief discussion. Accordingly, annexes to this paper canvass the following issues –

- the evolving role of regional courts (*Annex A*);
- traditional and cultural knowledge and their protection under intellectual property rights regimes (*Annex B*);
- training of legislative drafters (*Annex C*);
- eliminating corruption in the judicial system (*Annex D*);
- legal education (*Annex E*);
- freedom of the press (*Annex F*);
- creditors' remedies (*Annex G*).

4. Ministers may choose to consider some of these issues in the context of their national situations while at the same time bringing to the table any other issues of relevance to them.

ANNEX A

THE EVOLVING ROLE OF REGIONAL COURTS WITHIN THE FRAMEWORK OF INTERNATIONAL LAW WITH THE ATTENDANT NEED FOR INTRA REGIONAL HARMONISATION OF LAWS

REGIONAL DEVELOPING TRENDS

1. The association of the practice of law across international borders with that of the International Court of Justice (ICJ) is now undergoing change as the emergence of regional courts is progressively materializing. This is as a result of the thrust of globalisation which has changed not only the financial landmark of the planet, but has increasingly modified the legal parameters of the traditional forms of justice at the international level and access thereto. At the regional level, the challenges are indeed assuming an energy of their own and in some respects, are in the process of developing regional jurisprudence as a hybrid form of international law within the general body of international law itself.

2. The forerunner of a regional court without doubt has been the European Court of Justice established pursuant to Article 177 of the Treaty of Rome, *viz:*

> *"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*
>
> (a) *the interpretation of this Treaty;*
> (b) *the validity and interpretation of the acts of the institutions of the Community;*
> (c) *the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

3. In the southern hemisphere, the need for the creation of a regional court to adjudicate on matters deemed particular to the dictates of that region was evidenced in the Agreement Creating the Court of Justice of the Cartagena Agreement being signed in 1979 and coming into effect in 1983. It will be recalled that the constituent members of the Andean Community – Bolivia, Colombia, Ecuador, Peru and Venezuela are associated through the Andean system of integration as they deem it necessary to co exist on the mutuality of shared regional interests.

4. Since the formation of these regional courts there is heightened interest as the world is increasingly being described as a global village and the advances of technology now enlighten the manner in which multilateral conventions are to be elaborated for the transborder movement of goods and services and the attendant institutional framework to let it all come together.

5. Communities in their regions have felt the need to, in some instances, deepen their traditional form of regional camaraderie so as to present a unified force to the challenges of globalisation. Weighing in the balance of all this, are the justifiable concerns of developing and less developing countries to maintain a posture of competitiveness on an uneven playing field. The need to associate not only becomes more compelling, but also evolves at a heightened level. It is at this stage that regional communities recognise the need to formalise the development of their communal law.

6. In order to provide a legal framework for the operation of the regional system, pursuant to the particular Treaty of association, a regional court in turn unfolds. In the instance of the European Court of Justice, that institution assumes the characteristic of a court of supra-national status, effectively being the final instance of appeal from courts of national jurisdiction in the countries of the European Member States themselves. A similar situation arises in the Court of Justice of the

Cartagena Agreement. That agreement has expressed that the creation of a tribunal at the highest level shall have the authority to define "communitarian" law.

REGIONAL COURTS AND LEGAL SYSTEMS

7. In an examination of the regional activities of the Commonwealth family, the following judicial arrangements are of note:

- The Court of Justice of the Economic Community of West African States (ECOWAS)
- The Court of Justice of the Common Market For Eastern and Southern Africa (COMESA)
- The proposed Caribbean Court of Justice For The Caribbean Community (CARICOM)

The various Treaties of association of these regional groups and/or the instruments creating the courts are consistently thematic in their purposes.

ECOWAS

8. The aims and objectives of ECOWAS, as stated in its founding Treaty of association at Article 3, declared, *inter alia*, "...the establishment of an enabling legal environment". This "enabling legal environment" is facilitated by the creation in Article 15 of the "Court of Justice of the Community", as the Treaty was revised in 1993. The Court, while not yet functional, is in the process of putting in place all the preparatory arrangements for its inauguration.

9. The Court of Justice will replace the Community tribunal. The functions and powers of the Court are assigned to it independently of the Member States and the institutions of the Community and its judgements are binding on the Member States, the Community and its institutions as well as on individuals and corporate bodies. The Court is deemed to therefore be an organ for jurisdictional control and has the added role of assessing the extent to which states fulfil their obligations and verifying the legality of acts adopted by the institutions of the Community.

COMESA

10. COMESA's objectives echo those of an association seeking to increase levels of integration. Of particular note is the creation of a free trade area and promotion of trade through the provisions of its Treaty. In endowing its association with the requisite infrastructure, COMESA is seeking to create the necessary legal framework which will encourage growth of the private sector, the establishment of a secure investment environment and the adoption of a common set of standards.

11. The Court of Justice of the Common Market of COMESA is charged with the responsibility of realising these legal objectives and is established under Article 7 of the COMESA Treaty as one of its organs. The Court has power to hear:

- matters referred to it over legal and natural persons resident in a Member State;
- disputes between COMSESA and its employees;
- matters relating to arbitration and special agreements;
- any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which COMESA or any of its institutions is a party and to determine any dispute between the Member States regarding the Treaty if the dispute is submitted under a special agreement between the Member States concerned.

12. The Court of Justice will then foster the development of the regional body of laws and this is additionally consolidated by the fact that decisions of the Court on the interpretation of the provisions of the Treaty will have precedence over decisions of national courts or tribunals.

CARICOM

13. The proposed Caribbean Court of Justice (CCJ) is expected to commence its jurisdictions on a phased basis. The first active members are expected to be Barbados, Guyana, Jamaica and Trinidad and Tobago, and possibly, Belize. Thereafter, other Member States in the sub regional grouping of the OECS will follow suit as soon as their constitutional arrangements are in place. Since the Bahamas is not a member of the common market, its attachment to the Court is not yet defined.

14. The CCJ is designed to replace the Judicial Committee of the Privy Council as the highest appellate municipal court of the Member States. However, it is designed to be an international tribunal with the consequent attention to the rules of international law, particularly as they relate to the interpretation of CARICOM's treaty of association. This latter function will see the CCJ rule, in original jurisdiction mode, on matters relating to the operation of the CARICOM Single Market and Economy (CSME). Both functions are to be employed so as to ensure legal certainty and send a message of stability to investors in the region.

15. It should also be noted that the original jurisdiction of the CCJ regarding the CSME ensures that any questions relating to its operation and interpretation of rules relating thereto are accorded consistent elucidation since these will be removed from national jurisdictions. Equally, the CCJ's appellate chambers will also adjudicate as an appellate body for the CSME.

16. The implications of this will not only afford the level of respectable assurances necessary for investment and development in the region, but will nurture the true development of a regional Caribbean jurisprudence, thereby constituting another area of meaningful regional maturity.

THOUGHTS ON THE CONTRIBUTION OF THE COMMONWEALTH SECRETARIAT

17. What have emerged as consistent in these regional efforts are the following:

- regional communities have recognised the need to establish a judicial body to ensure that there is uniformity and confidence in the legal system of those communities;
- the drive to seek such assurances of a legal system go to the heart of providing an inviting environment for development of the particular region; and
- buttressing these efforts will require that the specific legal framework is sufficiently harmonious throughout that region on one hand and on the other, fully compliant with the international standards mandated by multilateral or bilateral treaties.

18. The various regional groupings in which Commonwealth countries participate (in some cases the groups comprise only, or a vast majority of, Commonwealth countries) have tacitly or expressly declared through their various instruments of association that their developmental needs and goals are:

- the intra regional free movement of goods and persons for enhanced trade and investment opportunities; and
- the indication to any potential investor in the respective region that there are sufficient levels of predictability and self-assurance in the relevant legislative framework to render belief in the investment being undertaken.

The legal instruments governing regional integration, such as CARICOM's Treaty of Chaguaramas, require harmonisation of relevant laws of Member States.

ISSUE OF CONSIDERATION BY MINISTERS

19. Ministers may wish to consider whether there is merit in the Commonwealth facilitating collaboration and co-operation among regions that are working towards parallel goals to facilitate the creation of legal regimes that will foster common developments in corporations and other trade related laws.

ANNEX B

TRADITIONAL AND CULTURAL KNOWLEDGE AND THEIR PROTECTION UNDER INTELLECTUAL PROPERTY RIGHTS REGIMES

1. Law Ministers will recall at their last meeting in Trinidad, they noted the significance of the United Nations Framework Convention on Biological Diversity 1992 and its provisions on intellectual property rights, not least in the context of rights in plants used in traditional medicine. They asked the Commonwealth Secretariat to continue its work in this important field including the provision of advice and assistance in the implementation of the Convention.

2. Since that meeting there has been increased awareness of the issue of the protection of indigenous folklore that is of great significance in many member countries.

3. Folklore has been defined as: "the totality of tradition-based creations of a cultural community, expressed by a group of individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means".[1] It has been determined that the heritage of indigenous peoples, includes among others, the expressions of song, literary works, music, dance, games, mythology, rituals, customs, handicrafts, architecture and their consequent documentation on film, photographs, video tape or audio tape.

4. The challenges faced for the protection of folklore arise because -

- the usual requirement is that an author is clearly identifiable for his/her creation. Because of the collective nature of indigenous folkloric works, and their essence being an accumulation of culture overtime, no one individual can be specifically identified as author or owner;
- ownership of folklore is therefore collective of its indigenous community, and such community may be charged with the responsibility of protection of its indigenous folklore, equivalent to that of a custodian; and
- while rights of an individual invariably facilitate economic benefit, communal ownership has far reaching consequences of an economic and social nature.

5. Beyond the concerns of the legal ability to protect folklore, there are further areas of disquietude, notably:

- traditional forms of folklore are particularly fragile, especially the oral tradition which is under threat of being lost;
- folklore is a constituent of the universal heritage of mankind, which not only fosters cultural identity, but becomes a catalyst for bringing together diverse peoples and social groups;
- without the appropriate forms of protection, folklore is subject to unwanted economic exploitation which is often prejudicial to the integrity of the indigenous community;
- as a somewhat intangible heritage, folklore is endangered within the increasing thrust of globalisation which may alter life styles and undermine the environment in which these traditions are practised and maintained; and
- erosion of cultural knowledge and heritage brings about degradation of a communal society with the attendant problems of sustained underdevelopment and grave social insecurities

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[1] See Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the General Conference at its twenty fifth session. Paris, 15 November 1989.

6. Some of the above concerns have directed international and regional attention towards safeguarding folklore. The differing attempts to protect expressions of folklore have been disappointing. A brief examination will indicate though the level of activity has been high, the results have yielded a pitiful harvest -

- In 1973 a UNESCO action began with the proposal of Bolivia that a Protocol be added to the Universal Copyright Convention in order to protect folklore;
- In 1976 under the auspices of UNESCO and WIPO a committee of governmental experts adopted the Tunis Model, which refers to the protection of folklore;
- In 1982 UNESCO and WIPO jointly issued Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions;
- In 1989 UNESCO published its Recommendations on the Protection of Traditional Culture and Folklore. This effort has been hailed as being particularly meaningful since it heralded an important precedent for the recognition of the heritage aspects of traditional culture and folklore;
- In 1997 UNESCO and WIPO jointly organised a World Forum on the Protection of Folklore which was held in Thailand;
- In 1999 four regional consultations on the protection of expressions were organised with WIPO for Africa; Asia – Pacific Region; Arab States; and Latin America and the Caribbean;
- In 1999 UNESCO organised a symposium on the protection of traditional knowledge and expressions of indigenous cultures; and
- In 2000 at the WIPO General Assembly, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was created.

7. In terms of the existing legal framework on intellectual property rights, while there is studious attention to the other forms of intellectual property, traditional folklore and its intangible nature have not been sufficiently embraced by the various conventions. Indeed the World Forum meetings in Thailand concluded that intellectual property does not give appropriate protection to expressions of folklore and a *sui generis* regime specific to this purpose needs to be developed.

8. National legislation for the protection of folklore will only have effect in those national jurisdictions and thereby will not facilitate the global thrust for international recognition of these rights. Consequently, while national legislation will certainly help, it is not the cure.

9. Of note, is the fact that the awareness of potential economic exploitation of this type of traditional knowledge and the need for redress has already inspired law courses in some law faculties in parts of the Commonwealth. The importance then should not be underestimated.

10. While the issue of traditional knowledge as it relates to the use of indigenous medicinal plants has earned appropriate attention within the body of intellectual property rights for further elaboration under the WTO, the other issue for developing countries relating to folklore, arguably warrants attention. It is apparent that the work already undertaken on folklore has not yielded real results. To this end, pressure could perhaps be brought to bear in international fora for the purpose of establishing a regime for negotiation on the matter of the proper place of traditional folklore, within the family of intellectual property rights.

11. Law Ministers may wish to consider whether there ought to be adjudged parameters for the economic exploitation of such intimate ways of life and to discuss whether the issue of folklore protection is a subject of common concern warranting collaboration and co-operation between member countries.

ANNEX C

TRAINING OF LEGISLATIVE DRAFTERS

INTRODUCTION

1. The training of legislative drafters, especially in "small" jurisdictions, has been a concern of Commonwealth Law Ministers since at least the early 1970s. Virtually every Communiqué emanating from their meetings has expressed concern with the supply and retention of qualified drafters in these jurisdictions. In the Communiqué from their 1993 Meeting, for example, the Law Ministers stated that "Without professionally drafted laws, Parliaments no less than the courts could not operate effectively and yet, almost without exception, member countries were suffering from an acute shortage of law drafters." Ministers also recognized that it was for them and their countries to ensure that the terms and conditions of service of law drafters were such as to attract new recruits and retain experienced practitioners in the drafting service. It is important to recall that terms and conditions of service relate not only to salaries but also to the opportunities given to staff to improve skills through appropriate training.

2. Over the years the Commonwealth Secretariat has invested vast resources in the provision of assistance to member countries relating to the provision and training of drafters. For many years significant funding was provided to enable students to attend a LMM course at the University of the West Indies specifically focusing on drafting. Early in the 1990's the Secretariat, with the Commonwealth of Learning invested heavily in the development of materials for distance learning (welcomed by Law Ministers in 1993). For all of its history the Secretariat has funded and provided trained drafters for a significant range of member countries. All this notwithstanding the problem of securing adequate supplies of competent drafters remains and, for some countries hampers seriously the development of their laws. At a time when the demands of globalisation (for all countries) and donor conditions on good governance reforms (for developing countries) require the passage of new laws, the issue of training and retaining drafters is one of high priority.

RECENT DEVELOPMENTS

3. A conference on training legislative drafters took place in St. Lucia in July 2002, under the auspices of the University of the West Indies Faculty of Law. This conference was significant because it marked the first time that the training of legislative drafters had been the primary focus of a meeting of legislative drafters.

4. The Conference conclusions will undoubtedly be of interest to Law Ministers. A summary of the main conclusions is therefore set out below.

(a) In principle, in-house training remains the best method of training legislative drafters. Programmes such as those found in the drafting offices in the Office of Parliamentary Counsel in Canberra and the Department of Justice in Ottawa offer useful models for those jurisdictions with the resources to implement them. However, in-house training on these lines requires a large and fully staffed office with adequate numbers of experienced senior staff willing to act as mentors, and in terms of demands it makes on office resources, it is potentially expensive. In regions such as the Caribbean, few drafting offices are in a position to put in place training programmes of the range and quality found in Ottawa and Canberra.

(b) International courses concerned with the basics of drafting can provide a valuable introduction to the subject and a broader understanding of the processes connected with the preparation of legislation. However, they are expensive and remove trainees and the training from the environment in which drafting will be practised.

(c) There is a place in training for formal courses concerned with the core aspects of legislative composition as they relate to a particular jurisdiction. These are likely to be most effective if they are designed to be part of a well-structured programme devised to meet the needs of the particular drafting office. Aspects of training concerned with such matters as computer use, time management, negotiation, collaborative working and development of interpersonal skills are better delivered in-house. The drafting office should determine the actual content and mode of delivery of this training. It is valuable to be able to assign to a senior drafter responsibility for organising and supervising the delivery of training.

(d) While there is advantage in having training undertaken by senior drafters interested and competent in such an activity, there is a place for experienced trainers from outside the drafting of office working with in-house trainers.

(e) There is some merit in trainees attending a foundation course in drafting which could provide basic training in the techniques of legislative composition and the development of sound analytical skills, as well as an awareness of the role and responsibilities of drafters and a sound understanding of such matters as the policy formation, preparation and legislative processes and the effects of statutory interpretation on drafting. In this context the programme offered by the University of Papua New Guinea using the distance learning materials developed by the Commonwealth of Learning (COL) might be a useful model that could be adapted for use in other regions.

(f) In addition to training new drafters, more attention should be paid to training as part of the career development of all drafters. This could entail participation in drafting workshops on specialized topics such as drafting in accord with constitutional and administrative law principles, drafting international conventions and implementing legislation, drafting fiscal legislation, etc.

POSSIBLE ACTION BY LAW MINISTERS

5. The difficulties being experienced by member countries in obtaining drafting services, and by the Commonwealth Secretariat in seeking to meet the continued and growing demand for such services leads to the conclusion that this issue remains on to which serious attention must be given if a long-term sustainable solution is to be found.

6. Some suggestions that have been made include:

- the establishment of bilateral support programmes under which countries having a reasonable supply of drafters could consider, as part of the career development of those officers, making drafters available to serve in other member countries;
- the establishment of regional associations of legislative drafters and the development of websites which would include a database of training materials and links to other useful sites;
- collaboration between law ministries and/or offices of legislative drafting and national or regional universities to devise collaborative strategies for the development of appropriate training programmes;
- adoption of relevant conclusions of the recent Caribbean regional conference as a means of improving training – both external and on-the-job.

7. Ministers may wish to consider whether the Secretariat is able to facilitate any national or regional efforts to address this problem in a way that takes account of the significant investment already made by the Commonwealth in training drafters and makes use, at least in part, of the distance learning programme already developed.

ELIMINATING CORRUPTION IN THE JUDICIAL SYSTEM

BACKGROUND

1. Law Ministers will recall their work on the Commonwealth Principles on Promoting Good Governance and Combating Corruption. Following the adoption of those Principles by Heads of Government, the Secretariat, as part of its ongoing multidisciplinary work in this area, organised with the Commonwealth Magistrates and Judges Association, a judicial colloquium on combating corruption within the judicial. Participants asked that their conclusions be conveyed to Law Ministers.

THE LIMASSOL COLLOQUIUM

2. The substantive parts of the Report of the Judicial Colloquium is set out below for the information of Ministers.

LIMASSOL CONCLUSIONS

1. Commonwealth Judicial Officers, including heads of judiciary, judges from a range of courts and magistrates, met in Limassol, Cyprus from 25-27 June 2002 to consider how best the judiciary could contribute to the goals of eliminating corruption and promoting high ethical standards in the court system. They represented 23 Commonwealth countries and jurisdictions. Their number was supplemented by judicial educators and experts in the area of combating corruption and by government officers whose responsibilities include the investigation of acts of judicial corruption.

2. The Judicial Officers accepted, as a common philosophical and practical starting point, the Commonwealth Harare Declaration that commits all member countries to the fundamental values of democracy, rule of law, independence of the judiciary and the promotion and protection of fundamental human rights.

3. They acknowledged that a judicial system free from corruption was an essential component of a truly democratic country and is critical to national development and the eradication of poverty. A court system that is free from corruption was recognised as one of the essential features of a country able to attract investment and thus develop in a way that would enhance the welfare of its people.

4. The colloquium welcomed the 1999 commitment of Commonwealth Heads of Government to the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption (the Framework). They acknowledged, in particular, the commitment of Heads of Government to the concept that all Commonwealth countries should develop national strategies to promote good governance and eliminate corruption and recognised that judicial action to complement and supplement governmental action was both necessary and desirable.

5. Judicial Officers re-affirmed the statement of Heads of Government in the Framework that -

> *"An independent and competent judiciary, which is impartial, efficient and reliable is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure and independence from the executive and legislative branches of government.*

However, judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial".

6. In their deliberations, judicial officers sought to identify strategies, best practices and actions that would achieve the objective of securing independence, integrity and accountability of judicial officers and a judicial system free from corruption.

7. The Colloquium conclusions combine recommendations for consideration, and where necessary and appropriate in national circumstances, implementation by the judiciary itself, by government and by the legal profession. Some of the recommendations may commend themselves for consideration by international organisations, both intergovernmental and non-governmental. The Colloquium trusts that its deliberations will assist in informing the thinking of, and action by, the appropriate national and international bodies that are seeking to achieve the Commonwealth's goal of zero tolerance of corruption.

8. The Colloquium conclusions and recommendations cover a number of subjects and areas. Those considered by the Colloquium to be of paramount importance are the following: –

The Colloquium -

i. recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines;

ii. urges all national and international legal professional organisations within the Commonwealth to promote anti-corruption programmes for the legal profession;

iii. encourages the formulation of national strategies aimed at eliminating conflicts of interest and corrupt practices within the judiciary;

iv. recognising that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court's operations, role and function;

v. places on record its support in principle for the Latimer House Guidelines and their footnotes as they relate to the judiciary; and

vi. notes that traditional or customary courts and other tribunals recognised in some national constitutions make a positive contribution to the administration of justice. The public that is served by such bodies should continue to expect and receive fair and just resolution of their disputes.

9. In considering action within the courts, the Colloquium expresses the view that –

vii. judicial training programmes should be available and should include training on ethical and corruption issues. For newly appointed judicial officers the practice of mentoring should be encouraged; and

viii. there should be greater interaction between judicial officers at all levels nationally, regionally and internationally in order to promote the best judicial practice.

10. The Colloquium recommends for consideration by law ministers and governments the following: -

ix. recognising the interdependence of an efficient, impartial and accessible machinery of justice and the process of good governance and development, that governments should allocate sufficient resources to the courts to ensure their ability to provide that efficient, impartial and accessible service;

x. The process of appointment and promotion of judges should respect the principle of separation of powers and reflect principles of transparency, competitiveness and merit;

xi. to promote the recruitment and retention of persons of the requisite integrity and competence, Governments should ensure at all times that the remuneration of judicial officers is fixed at a level that will ensure that they enjoy financial security during their tenure of office and that upon retirement they continue to enjoy such security.

xii. Governments, in the light of threats to the personal safety of judicial officers, should provide adequate personal protection for all judicial officers particularly those who are regularly required to adjudicate on serious criminal offences.

11. In order to strengthen judicial independence and integrity the Colloquium requests the Commonwealth Secretariat to facilitate the carrying out of a comprehensive survey of the methods of determining conditions of service of judicial officers throughout the Commonwealth so as to provide guidelines on prevailing best practices. The Colloquium notes the practice adopted in some jurisdictions of determination of judicial salaries and terms and conditions by an independent commission.

12. In dealing with the issue of judicial accountability, the Colloquium -

xiii. notes with approval that in some jurisdictions the judiciary publishes periodic reports of its activities. The Colloquium considers that this is a desirable practice for purposes of accountability and promoting greater understanding of its role.

xiv. expresses its view that there should be a greater degree of judicial awareness of the work of the court staff and liaison with the said staff should be encouraged in order to ensure the smooth operation of the judicial system.

xv. in order to maintain public confidence in the judicial system, recommends that the Courts should at all times ensure that their rules and procedures are simplified and that, except for good cause, cases should be heard in public.

xvi. recommends that judicial officers should ensure that their judgments are well reasoned and delivered within a reasonable time; and

xvii. notes that a pro-active leadership role of Heads of Judiciary is essential in promoting an impartial and independent, competent, efficient and effective judiciary.

13. The Colloquium considered the issue of judicial education and training. Its recommendations on this subject are set out in Annex A to this report (not included in this paper).

14. The Colloquium requests the Commonwealth Secretariat to convey its conclusions to national heads of judiciary, Law Ministers and each of the Commonwealth legal professional associations. It also requests the Secretariat to continue to work with the Commonwealth Magistrates and Judges Association, as well as with national judiciaries, to advance programmes that will assist in the entrenchment of principles of independence, integrity and accountability of the judiciary at all levels.

3. Following the meeting in Limassol the recommendations were placed before the Jubilee Conference of the Commonwealth Magistrates and Judges Association which endorsed the conclusions and called on governments and judiciaries of the Commonwealth to give every support to those conclusions.

ISSUES FOR CONSIDERATION BY LAW MINISTERS

4. The specific request of the participating members of the judiciary that their recommendations be put before Law Ministers arises, primarily, from the recommendations contained in paragraphs 10 and 11 of the report set out above. Law Ministers may wish to express their views on those issues.

5. A recurring subject of discussion by the Limassol participants was the issue of the relationship between judicial officers and court staff. In many, if not most, jurisdictions court staff are employed by a department of state and are not subject to specific control by the judges. The question therefore arose as to how judges could ensure that corruption in court administration did not undermine efforts of judicial officers to instill zero tolerance of it in their courts. Judges recognized that they had a responsibility to ensure that court staff understood their commitment to eradicate corruption amongst judicial officers but also sought to identify ways in which they could work formally with court staff to ensure the court system, as a whole, was not affected by corruption. Ministers may wish to address this question.

6. They may also wish to welcome the attention given to the development of strategies to combat corruption in the judiciary and to express their support for the commitment of CMJA and individual judges to the implementation of appropriate training and mentoring programmes for judges.

ANNEX E

LEGAL EDUCATION

1. The Report of the Commonwealth Legal Education Association is contained in paper LMM(02)19. That Report identifies various areas in which the Association has found that there is need to develop curricula for the teaching of subjects in law schools. The specific areas identified are -

- Human Rights for the Commonwealth
- Transnational crime/Anti-terrorism law
- Environmental Justice
- International Trade Law
- Law and Development

2. The report describes the work being done by the Association in conjunction with the Commonwealth Secretariat on the first of these two subjects. Law schools would like to be in a position to offer courses on the other subjects and, in particular, it would be helpful if they could identify sources of assistance in the development of materials and in securing law teachers with the requisite knowledge to deliver the courses.

3. Law Ministers may wish to consider whether there is opportunity for them to work with the law faculties in their countries to assist in the development of these and other programmes of study that will produce graduates having a background in areas of public law that are of particular relevance to government legal services.

4. Consideration could be given, for example, to facilitating, where possible, the release (on a part time basis) of experienced government lawyers to assist in the delivery of courses that are of particular relevance to the government legal service.

5. Ministers may wish to welcome the development of the law curriculum programme and to encourage its further development – either generally or in areas they wish to identify.

GOOD GOVERNANCE AND FREEDOM OF THE PRESS

1. In any well functioning democratic government, the public is adequately informed as to the actions of Government officials and the elected representatives. Information is not just a necessity for people – it is an essential part of good government. It allows people to scrutinise the actions of a government and is the basis for proper, informed debate of those actions. The free flow of this information necessitates a free press and this freedom is guaranteed under the Constitutions of most democratic countries. It is however subject to restrictions for the protection of social order, the administration of justice, and personal rights and interests.

2. Although press freedom is instrumental in the realisation of other rights and freedoms, (e.g freedom to seek, impart and receive information and freedom of thought), this does not mean that the press is free to investigate or publish anything it wishes or anything that readers may wish to know. The Royal Commission on the Press in the United Kingdom explained:

> *"Proprietors, contributors and editors must accept the limits to free expression set by the need to reconcile claims which may often conflict. The public, too, asserts the right to accurate information and fair comment, which, in turn has to balanced against the claims both of national security and of individuals to safeguards for their reputation and privacy except when these are overridden by the public interest. But the public interest does not reside in whatever the public may happen to find interesting, and the press must be careful not to perpetrate abuses and call them freedom"*- Royal Commission on the Press, Final Report (London, Cmnd 6810, 1977), para 2.2

3. The act of balancing the freedom of the press against other interests is a vexing issue.

PRESS SELF REGULATION OR PRESS COMPLAINTS TRIBUNAL?

4. Regulating the press by legislation requires the "balancing" of competing interests in the sense that the values of freedom of expression and the government's regulatory interests will be balanced on a case-by-case basis.

5. In many developed and developing countries self-regulating bodies like press councils are fairly common. Their primary function is to draw up and keep under review a code of practice and to receive complaints of alleged breaches of the code. Very rarely have statutory tribunals been established on the premise that imposition of statutory controls might open the way for regulating content, thereby laying the governments open to charges of press censorship.

6. On the other hand, criticisms have been levelled at self-regulating press councils for providing inadequate redress for a wronged person.

7. Law Ministers may wish to consider the role of the press in democratic countries as well as the appropriate form of regulating the ethics and standards of the media in their respective jurisdictions.

CREDITORS' REMEDIES

SUMMARY JUDGMENT PROCEEDINGS AND SMALL CLAIMS TRIBUNALS

1. Access to capital and finance largely create lender/borrower, mortgagee/mortgagor and lender/guarantor relationships between lending institutions and individuals who raise capital from them.

2. The legal rights and obligations created by these relationships give lending institutions the right to foreclose on property offered as security and the right to sue for recovery of debt. In many countries, the process of filing commencement proceedings up to obtaining judgment against a debtor at first instance, is long and drawn out especially where monies to be recovered are liquidated amounts. In some cases, the costs for such proceedings do not justify the pursuit of small debts.

3. Where a loan is not secured by land which is identifiable, enforcement of judgment can be thwarted by the lack of a chattels register and a computerised register of land owners and properties they own. A creditor is therefore prevented from ascertaining if the debtor has chattels and real property that can be seized or charged in satisfaction of debt.

4. Law Ministers may wish to consider:-

- the introduction of Summary Judgment proceedings which would speed up the process for obtaining judgment against a debtor;
- the establishment of Small Claims Tribunals which are not only cost effective to both creditor and debtor but would avoid delay;
- the establishment of Chattels and Real Property registers to facilitate enforcement of judgments;
- a review and amendment of their Courts' civil procedure rules.

ACTIVITIES OF THE COMMONWEALTH AND ITS PARTNERS IN THE LEGAL FIELD

ACTIVITIES OF THE COMMONWEALTH IN THE LEGAL FIELD

INTRODUCTION

1. The period since the last meeting of Law Ministers in 1999 has seen significant changes in the priorities of member countries and in the Secretariat. Chief Emeka Anyaoku retired as Secretary-General and was replaced by the Rt. Hon. Don McKinnon of New Zealand in April 2000. The scheduled meeting of Heads of Government had to be postponed following the tragic events of 11 September 2001. The 2002 CHOGM delivered the Coolum Declaration on the "Commonwealth in the 21st Century – Continuity and Renewal" which focussed on equality of access to economic opportunities and the need to apply new international standards evenly, equitably and without exception. Heads of Government called for the establishment of an expert group to advise on how democracies might best be supported in combating poverty. They also adopted the report of the High Level Review Group and in so doing committed themselves to forging new opportunities for member countries in trade, investment and in private sector development. To achieve the goals set by Heads of Government, the Secretariat is refocusing its work programmes and readjusting its structures so that it provides a more simplified structure capable of responding more quickly and effectively to country needs.

2. The period since the 1999 Meeting has been a mixture of good and not so good news and has not been entirely without difficulties. The advances in democratisation associated with the return of South Africa, Fiji and Nigeria have been accompanied by ongoing efforts by the Secretary-General to ensure that the Association's fundamental values and principles form the basis of governance in all member countries. In this regard, the Millbrook Commonwealth Action Programme designed to give effect to the commitments contained in the Harare Commonwealth Declaration, has added value to the usefulness of the Harare Commonwealth Declaration as the engine that drives the Commonwealth. The Action Programme includes measures which continue to support processes and institutions needed for the practice of the Harare principles, as well as measures to deal with violations of those principles. The Harare Commonwealth Declaration and principles continue to be a focal point of Secretariat activities, particularly in the field of the promotion of good governance supported by national, regional and pan-Commonwealth capacity building workshops, as well as the provision of technical assistance.

3. The High Level Review Group called upon Commonwealth professional bodies to join with the official Commonwealth to help improve Commonwealth values. The Secretariat was asked to form stronger links and better two-way communication and co-ordination between the official and non-governmental Commonwealth to give Commonwealth activities greater impact and to produce lasting benefit. For LCAD this call presented no new challenges as its links with the legal professional Commonwealth have always been strong. In recent years we have worked with the Commonwealth Lawyers Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Parliamentary Association and the Commonwealth Legal Education Association to develop the Latimer House Guidelines. More recently these groups have agreed to work with the Secretariat in a common forum on a wider range of issues relevant to good governance and the law. Reports from our three partner legal organisations are annexed to this paper.

GENERAL

4. The staff of the Division has played a full supporting role in the election monitoring activities of the Secretariat. During the period under review, for example, members of staff assisted on the missions to Zimbabwe in May and June 2000, Tanzania in October 2000, the Seychelles in September 2001 and to Lesotho in May 2002.

5. Considerable time and resources were also directed to facilitating discussions between several Commonwealth member countries and the OECD and its member states, in relation to the OECD initiative on harmful tax. This initiative, which carries the threat of very serious sanctions against some member countries had to be dealt with on an urgent basis. The Division was instrumental in identifying important legal issues to be considered in the course of the discussions. This contributed to the significant progress that has now been made in finding an acceptable way forward for all parties in relation to this issue. Work in this area is ongoing.

6. The role played by the now regular meeting of Senior Officials in shaping the direction of the work of the Division continues to gain in significance. Officials met in 2001 to consider a wide range of issues referred to them by Ministers and to deal with some issues identified by the Secretariat as being of possible pan-Commonwealth interest. The achievements of that meeting were significant both in terms of quality and volume and have been reported to member countries.

7. Two meetings where senior Commonwealth Law Officers traditionally discuss matters of special interest to small states and in which professional staff of the Division traditionally play an important role are the regular meetings of Law Officers of Small Commonwealth jurisdictions, now re-titled Meeting of Law Ministers and Attorney General of Small Commonwealth Jurisdictions, and at the regional level, the Pacific Islands Law Officers Meeting.

8. In May 2000 Jersey hosted the seventh pan-Commonwealth Meeting of Law Officers and Attorney General of Small Commonwealth jurisdictions. Meetings of the Pacific Islands Law Officers were held in Papua New Guinea in 1999, the Cook Islands in 2000 and Fiji in 2001. The Secretariat was able to attend each of these meetings but unfortunately was not able to attend the 2002 meeting held in Samoa.

ORGANISATION AND STAFFING OF THE DIVISION

9. The former Director of LCAD retired at the end of 1999. His invaluable contribution to the legal Commonwealth in its official sense is much missed. Mr Nzerem's retirement was the first of a number of changes in staffing in the Division. Former Deputy Director Kosi Latu was promoted to another position in what is now the Special Advisory Services Division. He continues his good work in areas such as law of the sea and with trade related legal issues. Mr Latu's position remained vacant for 13 months before a successor was recruited.

10. As Ministers would be aware, the Human Rights Unit became part of the LCAD in 1993. Following a review of the activities of the Secretariat in the human rights area and recommendations on how the broad spectrum of rights issues could be addressed, the decision was taken to create a stand-alone unit to deal with human rights so that the whole subject could be more integrated into the range of Secretariat work in a more holistic way. With the Human Rights Unit went its new Deputy Director, Hanif Vally whose previous role in the Division was to deal, inter alia, with constitutional, electoral and legal advice issues.

11. From September 2002 the Division is reorganised into three sections:

- Criminal Law Section, headed by Kimberly Prost from Canada, which has the same remit as before with the obvious addition of terrorism to the list of subjects it covers;

- Justice Section, headed by Katalaina Sapolu from Samoa, which will cover issues such as access to justice, courts, co-ordination with partner professional organisations as well as various specialist issues relevant to protection and promotion of legal interests;

- Law Development Section, headed by Cheryl Thompson-Barrow from Jamaica, which will deal with the provision of information services of the Division (including the CLB), the development of model legislation in various areas and the section will provide legal input into Secretariat work on trade issues and in other areas relevant to development law.

PROVISION OF INFORMATION

Commonwealth Law Bulletin

12. The *Commonwealth Law Bulletin* (*Bulletin*) is central to the Legal and Constitutional Affairs Division's prime function of disseminating information on legal developments around the Commonwealth. Now in its twenty-seventh year of publication, the *Bulletin* continues to be the flagship publication of the Secretariat in the legal field.

13. Although originally a quarterly publication, from 1996 onwards the *Bulletin* has been published bi-annually, in June and December, for reasons of economy, but without any reduction in page content. A serious backlog was effectively eliminated before moving production overseas in late 1998 but problems have continued to beset the timely production of this publication including typesetting and printing problems experienced with publishers overseas used to minimize cost.

14. Annual Indexes for each of the years from 1996-1998 have now been published as has the Cumulative Index covering the period 1995-1999.

15. With a view to bringing the *Bulletin* nearer to a self-financing status, there has been a significant reduction in the number of complimentary copies distributed to Governments. Depending on the size of the jurisdiction, the maximum number of complimentary copies sent is 10 whilst the minimum is two. Since 1998, the complimentary mailing list has contained around 650 entries. Revenue for the financial period 2000/01 was approximately £15,000, making the *Bulletin* the highest earner of revenue from Secretariat publications. The current subscription of £60 per annum will be increased to £75 per annum from 2003, and with proper marketing an increase in revenue is expected.

16. The information provision role played by the *Bulletin* is essential if one of the Commonwealth's major comparative advantages is to be maintained – that of sharing of legal tradition and experience. It fosters development of common approaches to new issues and saves significant time and effort, particularly in small states. But with the advancement of information technology, the issue now is whether there is another way of providing this service, perhaps making it available on-line, but bearing in mind the lack of Internet facilities in many of the smaller jurisdictions, and, where available, the prohibitive costs of access or service disruption caused by lack of a reliable electricity supply, in some cases.

Other Legal Information

17. Within the limits of its resources, the Division continues to provide assistance on a whole range of matters as and when requested but on an *ad hoc* basis, particularly to small states that rely to a greater extent on the *Bulletin* for much of their legal information. Often the assistance provided is in the nature of legislative precedents.

Periodic Publications

18. The Division continued its other publications designed to assist countries by providing up to date information on national and international legal developments. The major publications are *CLAN (Commonwealth Legal Assistance News)* and *Crimewatch*. The Manual on International Cooperation in the Administration of Criminal Justice was also updated.

19. The Criminal Law Section also maintains a database on the laws of member jurisdictions relating to the Commonwealth Schemes on the Rendition of Fugitive Offenders, Mutual Assistance in Criminal Matters and the Transfer of Convicted Offenders, as well as on a broad range of topics such as money laundering, proceeds of crime, corruption and recently, terrorism. Based on its database and information obtained from member countries, the Unit distributes updated versions of a manual entitled *International Co-operation in the Administration of Criminal Justice*, which summarises existing laws in member countries that implement the three Commonwealth Schemes. This document was updated in 2001 and distributed to member countries.

FUNDAMENTAL POLITICAL VALUES AND GOOD GOVERNANCE

Good Governance and the Elimination of Corruption in Economic Management

20. The Criminal Law Section has been working with other Divisions in the Secretariat to develop a Secretariat-wide strategy to take forward the work of the Commonwealth Expert Group on Good Governance and implement the principles contained in the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption endorsed by Heads of Government at their 1999 Meeting. As a first step, the Secretariat sought information to identify the present state of anti-corruption strategies and legislation in member countries and to assess what has been done or is being done by member countries to implement the Framework. The results of the survey are in the process of being compiled and will be used in the development of programs for assistance to member countries. The Section also hosted a workshop on seeking the repatriation of proceeds of corruption within the margins of the United Nations ad hoc Committee negotiations of a convention against corruption.

21. The Division also participated at the expert group meeting on the development of the terms of reference for the negotiation of a United Nations Convention against Corruption held in Vienna in July/August 2001 and is now participating in the Convention negotiations. Meetings of Commonwealth countries attending the negotiating sessions are being facilitated by the Division as a means of seeking to achieve the objective that the provisions of the UN Convention will be consistent with the principles contained in the Commonwealth Framework.

22. Details of the judicial colloquium on combating corruption that was organised by the Secretariat are contained in paper LMM(02)18.

National Human Rights Institutions: Best Practice

23. The first Commonwealth conference of national human rights institutions was held at Cambridge University in the UK, in July 2000. Some 58 delegates representing national institutions, governments, the UN Office of the High Commissioner for Human Rights, and international non-governmental organisations attended. The conference considered how national human rights institutions could advance the Commonwealth's promotion and protection of human rights as reflected in the 1991 Harare Commonwealth Declaration. Following this conference, an expert group was convened in London, in March 2001, to develop an authoritative guide to best practice for national human rights institutions, in consultation with the Office of the United Nations High

Commissioner for Human Rights. This Best Practice guide is available to all member countries and Senior Officials.

Rights of the Child

24. With the aim of promoting the rights of children throughout the Commonwealth, regional workshops were held in Africa, the Caribbean and the Pacific on the Convention on the Rights of the Child over the last two years. The workshops focused on the practical implementation of the children's convention and encouraged member countries to ratify and implement its recent optional protocols and the International Labour Organisation convention on the worst forms of child labour. This programme is intended to result in the development of a Commonwealth Agenda for Children.

Needs Assessment and Capacity-building Missions

25. Following Cameroon's admission to membership of the Commonwealth association in November 1995 and a needs assessment in March 1998, the Human Rights Unit organised a capacity-building workshop in Yaoundé, in February 2000, to strengthen the national commission on human rights and freedoms of Cameroon. The Human Rights Unit also undertook a needs assessment in the Gambia, in January 2001, in response to the specific requirements identified by that country as necessitating priority assistance and a similar mission was undertaken in Mozambique early in 2002.

Promoting Commonwealth Values amongst Youth

26. As part of the module of the Commonwealth Youth Programme Diploma in Youth in Development Work, the Division, in collaboration with the Commonwealth Youth Programme, developed materials covering the subjects of Commonwealth Values, Human Rights, Democratic Values and Structures and Citizenship which aim to teach young people to understand their legal rights and obligations as Commonwealth citizens.

27. In July 2001, co-ordinating tutors from 22 institutions across the Commonwealth were trained in Commonwealth values. Their recommendations, following the review of the draft module, have been incorporated, and the module will be finalised shortly. Some 2,000 students are expected to be trained by the co-ordinating tutors in the 22 institutions involved in this programme. Most of these students are youth workers who will be active at grassroots level.

CRIMINAL LAW SECTION (CLS)

Curriculum Development

28. A key area of work in relation to the ongoing mandate to assist member countries with respect to combating crime involved the introduction of a course on International Co-operation to Combat Crime for the law schools in the Caribbean, West Africa and Southern Africa regions. The curriculum, developed by the Secretariat, is designed to equip students with general knowledge and practical skills in the area of international co-operation in criminal matters. The course covers such subjects as mutual legal assistance, extradition, and proceeds of crime. The programme is intended to enhance the general legal capacity of countries to combat crime through effective international co-operation. Introductory meetings and "train the trainers" seminars were held in Barbados for the Caribbean region, Ghana for Western Africa and Zambia for Eastern and Southern Africa. The three regional projects are ongoing, with curriculum material having been developed and steps for introduction of the academic course agreed to. Additional work in this area is planned to continue over the next two years.

Oxford Conference

29. As part of a continuing series, in August 2002 the CLS organized a conference at Christ Church in Oxford on the subject of the Changing Face of International Cooperation in Criminal Matters in the 21st century, which considered various subjects such as combating terrorism and organized crime, corruption and the pursuit of proceeds of crime. Over 60 countries from within and beyond the Commonwealth participated in the conference.

Technology and the Law

30. In accordance with the mandate of Law Ministers, expert working group meetings were convened to develop model legislation on computer and computer related crime and on evidence. The results of this work are before Ministers at this meeting.

Implementing International Obligations

31. The Criminal Law Section also continued to assist member countries, small states in particular, and to represent Commonwealth interests in the context of international negotiations including those relating to the United Nations Convention against Transnational Organised Crime and its protocols and the proposed comprehensive convention on terrorism.

32. Several projects were run aimed at assisting member countries to implement international treaty obligations. Workshops were held in the Caribbean, Eastern and Southern Africa and the Pacific on implementing the Rome Statute of the International Criminal Court. As well a seminar on implementation of the Transnational Organized Crime Convention was held for the Asian region. Most recently assistance has been provided to member countries with respect to implementation of the Security Council resolution on terrorism and the international conventions in that subject area.

Extradition and Mutual Legal Assistance

33. Work, independently and with other international organisations such as UNDCP, UNCICP, OAU and the Council of Europe on enhancing the effectiveness of the tools of international cooperation, in particular extradition and mutual legal assistance, is ongoing.

OTHER ACTIVITIES

Legal Aspects of Establishing a Bare Boat Register

34. In mid-2000, an in-house expert was provided for a two-month period to the Government of Samoa by the Legal and Constitutional Affairs Division to assist with the legal aspects of establishing a Bare Boat Register under the Samoan Shipping Act. The CFTC provided seed funding to cover the travel costs of the in-house expert, while the main project funding, administered by the General Technical Assistance Services Division, was devoted to the commercial aspects of the project.

Biodiversity and the Protection of Traditional Knowledge

35. Other issues of great importance have been the protection of biodiversity and the protection of traditional knowledge. The concern relating to the use of biotechnology in the development of genetically modified organisms has also been the focus of the Division's activities. In the area of international trade law, LCAD followed up a series of regional workshops with the development of WTO resource materials for government officials, and conducted joint technical assistance missions to member countries on WTO issues. For example, a joint WTO/Com-Sec mission to Malawi in May 2000 recommended the need for a legal expert to be placed with the Ministry of Commerce in

Malawi to provide advice on WTO issues. In many of the Division's activities there has been close collaboration with other relevant international and regional organisations, including, for example, the WTO, the World Bank and UNEP.

Implementation of the Montreal Protocol on Biosafety

36. A regional seminar on the implementation of the Montreal Protocol on Biosafety was organised jointly with the Science and Technology Division in March 2001, in Samoa.

Implementation of the WTO Agreements

37. In support of a joint EIDD/FAO Pacific Roundtable on WTO issues and developments held in New Zealand, in April 2001, the Division provided a resource person to make inputs with respect to the legal considerations.

Internal Secretariat work

38. In addition to their Commonwealth-wide responsibilities, the Division performs a wide range of duties in carrying out its mandate as the in-house legal adviser to the Secretary-General and the Secretariat, including the CFTC that has contractual and other obligations arising from its Commonwealth-wide operations. These and the Secretariat's other needs take up a considerable proportion of the time of the professional staff of the Division.

39. By way of illustration, recently a number of matters arising from the establishment of a Commonwealth Secretariat Arbitral Tribunal have taken and are expected to continue to take a fair amount of the time of the professional staff of the Legal and Constitutional Affairs Division. The Tribunal has now ruled in four cases with a decision expected in the fifth case shortly. In each of these LCAD staff has represented the Secretariat's legal interests. In two cases applicants have sought, so far without success, intervention by the courts of the United Kingdom to review the decisions of the Secretariat's Tribunal. Examples of other matters which illustrate the range of issues the Division is called upon to deal with are the review of some of the operational agreements of the Commonwealth Youth Programme, revision of the Staff Regulations and Rules and significant advice on a range of contracts and memoranda of understanding entered into by the Secretariat.

INTERNATIONAL LEGAL ACTIVITIES

Hague Convention on Private International Law

40. In accordance with the decision by Commonwealth Law Ministers in 1977, that rather than develop their own competence in intra-Commonwealth private international law, they would work with the Hague Conference, the Division continues to monitor developments and was represented at the Special Commission on the Child Abduction Convention in March 2001, and at the Nineteenth Diplomatic Session on Jurisdiction and Foreign Judgments in Civil and Commercial Matters in June 2001. A commissioned report on the latest developments was provided to Senior Officials at their 2001 meeting and is contained in the papers of that meeting that have been circulated to Governments.

TECHNICAL ASSISTANCE IN THE LEGAL FIELD

41. The Economic and Legal Section (ELS) of the Special Advisory Services Division is an in-house consulting unit of the Commonwealth Secretariat. ELS responds to requests from Governments in areas of activity which have been identified by Commonwealth Governments as developmental priorities. ELS staff comprises specialists in economics, commercial and contract law

and international law. In cases requiring highly specialised services, ELS augments its services with the support of external technical consultants. ELS lawyers work closely with the Section's economists to provide an integrated advisory service covering both economic and legal aspects of the projects undertaken by ELS, including the review and revision of legislation, preparation of new legislation, agreements, contractual documents including fiscal terms and dealing with legal issues relating to the execution and implementation of projects.

42. Over the period under review, ELS has continued to receive requests for its services in its traditional programme activities of terrestrial and marine resources development and other areas of economic management such as private sector development, promotion of foreign investment and development of domestic capital markets.

43. In the area of foreign investment, ELS is assisting Ghana in a diagnostic study with a view to improving the enabling investment environment. ELS has assisted the Gambia on Competition Policy and is assisting in the preparation of a new Competition Law. ELS has also advised Grenada on its electricity sector arrangements. With respect to the development of capital markets, ELS has provided assistance to the Governments of Maldives, Sierra Leone, and Uganda in establishing or strengthening their regulatory frameworks for securities trading and stock exchanges. ELS has also advised the Government of Uganda on the development of a regulatory framework for the establishment and operation of Collective Investment Schemes.

44. ELS continues to provide specialist legal and economic policy advice and assistance in the establishment and maintenance of a legal and economic framework conducive to foreign investment in the mining and petroleum sectors. Over the past two years, it has undertaken numerous projects throughout the Commonwealth which have potential for attracting considerable risk capital in several member countries.

45. For example, ELS has been particularly active in Namibia, which received assistance with the second and third petroleum licensing rounds as well as with the negotiation of major diamond and copper mining agreements. ELS has also been assisting other countries such as Barbados, Dominica, Ghana, Seychelles, Tanzania in the petroleum and gas sectors. This assistance includes the review of model contracts and preparation of new contracts, the promotion of the hydrocarbon sector and participation in negotiations with multinational companies. In Tanzania, ELS has been assisting in the country's deep sea petroleum licensing rounds. In the mining sector, Swaziland and Kenya have received ELS legal, economic or policy advice in respect of development of mineral resources. In the context of natural resources development, it is to be noted that ELS advice includes the consideration of environmental issues as they relate to petroleum and mining activities and the inclusion of suitable provisions in agreements and legislation.

46. ELS runs a programme of assistance for Commonwealth states, particularly small island states seeking to maximise their maritime areas and to benefit from the sovereign rights accorded to them over the resources they contain. It covers the preparation of hydrographic and technical reports, the updating of legislation in conformity with the United Nations Convention on the Law of the Sea, the preparation of negotiating briefs and assistance with negotiation of maritime boundary agreements. It also involves capacity building of senior officials involved in the negotiation of national maritime boundaries. The Governments of Grenada, Guyana, Samoa, Mauritius and Seychelles have received assistance under this programme in the last two years. Grenada has been assisted with the actual maritime boundary delimitation negotiations with a neighbouring State, and the other four Governments with preparations for such negotiations.

47. ELS is also assisting a number Governments in implementing legislation in respect of WTO obligations.

RIGHTS OF WOMEN AND THE GIRL-CHILD

48. Promoting the human rights of women and the girl-child is a critical area identified by the 1995 Commonwealth Plan of Action on Gender and Development. In the period since the last Law Ministers Meeting (LMM) held in 1999, the Gender Section of the Social Transformation Programmes Division (STPD) has continued to promote its work on gender and human rights, and an integrated approach to combating gender-based violence through a number of approaches. The Gender Section assists governments in implementing international agreements on the elimination of all forms of discrimination against women.

The Social Transformation Programmes Division:

- has provided in-depth training on the Secretariat's model framework for an integrated approach for combating violence against women to 14 countries in East and Southern Africa, in collaboration with Secretariat Division, GIDD, and various SADC member governments. To-date, four regional facilitators and 26 national trainers have been trained, and 11 African countries have prepared national plans of action on violence against women. This series of activities has been implemented within the SADC/ECA framework and programme of action on violence against women.

- introduced the model framework to senior officials at the Asian Regional Workshop on Mitigating Violence Against Women held in Malaysia in 2002, in collaboration with UNIFEM. STPD and partners will continue to provide capacity building and technical support for national efforts to combat violence against women in Asia. Best practices and policy recommendations for improving the responses of governments from the African and Asian processes will soon be introduced in the Pacific region in 2003.

- continues to produce relevant and resource materials for policy makers. Publications include:

    (a) A training manual on *Promoting an Integrated Approach to Combat Gender Based Violence*, April 2002;

    (b) *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders*, June 2001;

    (c) The third edition of *Assessing the State of Women: A Guide to Reporting Under the Convention on he Elimination of All Forms of Discrimination Against Women*;

    (d) A compilation of case laws on the human rights of women in the Commonwealth is being published by Cavendish Press.

THE GOVERNANCE AND INSTITUTIONAL DEVELOPMENT DIVISION

49. The principal vehicle through which technical assistance is provided to governments is the Governance and Institutional Development Division (GIDD) which, together with other Secretariat Divisions, administers funds provided by the CFTC. In response to member countries priority needs conveyed through the local CFTC point(s) of contact in each country, GIDD primarily provides long term (6 months to 2 years) technical assistance in the form of advisers or operational experts under CFTC funding.

50. The purpose of technical assistance provided by the GIDD is to meet the government's immediate skills gaps and in the long run to develop national institutional capacity by transfer of skills through counterpart and staff training. Accordingly, technical assistance can only be provided

for a finite period to meet specific needs and is not intended, of course, to go on indefinitely although in some cases, extensions have been sought successfully where these have been accorded very high priority and where a key work programme remains to be completed.

51. Based on mandates provided by Commonwealth Heads of Government and Law Ministers Meetings and in response to government requests, CFTC(GIDD) continues to provide the services of legal advisers and legislative drafters, legal assistance on international treaties and conventions, democracy, good governance and human rights. This also includes assistance provided by electoral and constitutional advisers, legal counsel to Ombudsman's office, and experts in law revision.

52. Occasionally also, as and when requested, the Division assists governments, outside CFTC technical assistance arrangements, in recruiting professional staff into their legal establishments or in finding in-service training placements for the professional staff of Justice Ministries or the Attorney General's Chambers.

PUBLICATIONS OF THE LEGAL AND CONSTITUTIONAL AFFAIRS DIVISION

General

Commonwealth Law Bulletin, Volumes 24, 25 and 26 and Indexes

Meeting of Law Ministers, Trinidad and Tobago, May 1999 (3 volumes)

Meeting of Law Ministers and Attorney General of Small Commonwealth Jurisdictions, May 2000

Meeting of Senior Officials of Law Ministries, November 2001 (2 volumes)

Commonwealth (Africa) Workshop on the Use of and the Enforcement of the Criminal Law in the Prevention of Environmental Crime, 1999

Report of the Expert Group on Evidence, January 2001

Law in Cyber Space, October 2001

Human Rights

Preparing the Ground for the Ombudsman's Office of Belize 1999

Protecting Human Rights – The Role of National Institutions 2000

National Human Rights Institutions – Best Practice 2001

International Co-operation in Criminal Matters

International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement, Papers from the Oxford Conference, August 1998

Commonwealth Legal Assistance News, Issues 28 – 45

Commonwealth Crimewatch, Issues 27 – 44

International Co-operation in the Administration of Criminal Justice: Laws of Commonwealth Countries and Jurisdictions on the subjects of Extradition and Rendition of Fugitive Offenders, Mutual Assistance in Criminal Matters and Transfer of Convicted Offenders. Revised Edition September 2001

International Criminal Law

Report of the Workshop on Implementation of the Rome Statute on the International Criminal Court, Trinidad and Tobago, February 2001

Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism, February 2002

Report of the Workshop on Implementation of the Rome Statute of the International Criminal Court, Dar Es Salaam, Tanzania, February 2002

Report of the Workshop on Implementation of the Rome Statute of the International Criminal Court, Apia, Samoa, March 2002

Model Legislative Provisions on Measures to Combat Terrorism, September 2002

THE COMMONWEALTH LEGAL EDUCATION ASSOCIATION (CLEA)

1. Founded in December 1971 the Commonwealth Legal Education Association has as its broad objects:

- fostering high standards of legal education and research in Commonwealth countries;
- building up contacts between interested individuals and organisations;
- disseminating information and literature concerning legal education and research.

2. In his inaugural address in 1994, the then President of the CLEA, Professor N.R. Madhava Menon of the National Law School of India University emphasised:

> *"... the need to make legal education socially relevant and professionally useful; for law schools to prepare themselves for the demands of the profession in the context of the information revolution and other global challenges and to support continuing legal education and distance learning programmes".*

He also drew attention to the need for a fresh look at law curricula and teaching methods.

3. Based on this, the Association has developed of a six point Programme of Action designed to achieve sustainable improvement in legal education throughout the Commonwealth:

A. **Developing human resources**
- Training of law teachers; and
- Development of and support for research.

B. **Developing non-human resources**
- Improving library facilities; and
- Developing the use of electronically produced data.

C. **Curriculum development**
- Identification and development of new areas for the provision of courses relevant to Commonwealth countries, such as human rights law and law and development; and
- Exchanging information and experiences on the development of courses incorporating a comparative law approach.

D. **Professional training**
- Strengthening links between law schools and vocational training institutions; and
- Addressing the needs of vocational training institutions.

E. **Strengthening links between Commonwealth law schools**
- Facilitating exchange of faculty members;
- Facilitating research collaboration; and
- Encouraging the exchange of information.

F. **Strengthening clinical legal education and law clinics in the Commonwealth**

4. In carrying out this Programme of Action, the Association undertakes a wide range of activities that are detailed below. Of particular importance is the issue of curriculum development.

CURRICULUM DEVELOPMENT

5. The Association is committed to developing and encouraging the development of new law courses that reflect both the importance of Commonwealth jurisprudence and the need for Commonwealth law schools to equip their students to meet the demands of the 21st century lawyer. The Association also recognises the importance of supporting continuing legal education programmes.

6. There remain two major hurdles to effective curriculum development:

(i) Lack of access to relevant materials
(ii) Lack of expertise on these new and developing areas of the law and practice amongst some law teachers themselves

7. The CLEA seeks to address these issues as follows:

A. *Assisting with course development*

The Association has identified the following subject areas where assistance with course development is particularly needed:

- Human Rights for the Commonwealth
- Transnational crime/Anti-terrorism law
- Environmental Justice
- International Trade Law
- Law and Development

8. In respect of the first two areas, the Association works closely with the Commonwealth Secretariat.

(i) Human Rights

The Association was commissioned by the Commonwealth Secretariat Human Rights Unit to produce a model human rights curriculum for Commonwealth law schools and for other faculties interested in offering a course on human rights law to their undergraduate students. The model pays particular attention to, and includes a significant amount of material on, the contribution made by the Commonwealth and Commonwealth countries to the protection and promotion of human rights. In developing the model curriculum, the CLEA remains extremely aware of the need to make such materials readily available, especially to the most impoverished law schools. Thus relevant human rights materials in both hard and electronic form accompany the curriculum. The materials are regularly updated and disseminated through *Commonwealth Legal Education* the Association's thrice yearly Newsletter that is sent, free of charge, to every known law school and law library in the Commonwealth. The CLEA web site, (www.clea.org.uk) also provides relevant information updates. Copies of the current CD ROM will be available for inspection at the Law Ministers Meeting.

(ii) Transnational Crime

The CLEA in partnership with the Commonwealth Secretariat Criminal Law Unit is developing a course and materials on international co-operation to combat crime. It covers the subjects of extradition, mutual assistance in criminal matters, proceeds of crime and money laundering.

B. Developing local expertise

9. As part of the work with the Commonwealth Secretariat Criminal Law Unit, the Association has helped organise three "training the trainer" sessions for law teachers in the area of international cooperation in criminal matters. On the basis of course material developed by the partners, notes/materials are provided. Participants are then expected to incorporate their own local materials into the materials and then seek to develop the course as part of the curriculum in their own law schools. To date training sessions have been held for law teachers in the Caribbean, West Africa, East and Southern Africa and these will be extended to South Asia and Australasia in due course.

OTHER CLEA ACTIVITIES

10. Publications and Research

- *Commonwealth Legal Education* is published three times a year and contains news and views about legal education developments in the Commonwealth
- *Journal of Commonwealth Law and Legal Education* (published twice per year)
- *Directory of Commonwealth Law Schools* (published biennially)
- A variety of books on law and legal education in the Commonwealth
- The Association's web site (www.clea.org.uk) provides access to a wide range of Commonwealth legal materials, model curricula and some publications

11. Conferences

The Association organises regular international and regional conferences and seminars. Recently, it has organised/co-sponsored conferences on topics such as law and development, human rights and just and honest government as well as on legal education. Venues have included Australia, Nigeria, Cayman Islands, UK, Jamaica, Sri Lanka and Malaysia

12. Commonwealth Law Lecture Series

This is a unique series that take place on a Commonwealth-wide basis. Lectures are given by leading legal academics and judges. The collected lectures will be published in 2002.

13. Strengthening law schools

- Assisting in the distribution of law books to Commonwealth law schools
- Establishing the Commonwealth Legal Education Research Centre in Cameroon

14. Strengthening the Harare Commonwealth Principles

- The Association works with the Commonwealth and three other Commonwealth professional organisations, Commonwealth Magistrates' and Judges Association, Commonwealth Lawyers' Association and Commonwealth Parliamentary Association, on the development of the *Latimer House Guidelines for the Commonwealth*
- The Association supports the work of the Commonwealth Human Rights Initiative

15. Activities for law students

- The Commonwealth Law Students' Mooting Competition. This is held biennially with the last three competitions being held in, Sri Lanka, Malaysia and, Canada

- Commonwealth Students' Essay Competition - held biennially.

For further information on the work of the Association and details of membership, please contact

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THE COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION (CMJA)

1. The Association was founded in 1970, and its aims are:

- to promote the independence of the judiciaries in the Commonwealth;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime in the Commonwealth;
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

2. The CMJA is in a unique position being the only international judicial organisation bringing together judicial officers of all ranks and from all parts of the Commonwealth representing the judicial arm of government. We provide a forum for promoting the highest judicial standards at all levels.

3. The importance of an independent Judiciary as an essential element for safeguarding fundamental liberties and human rights is expressed in Article 10 of the Universal Declaration of Human Rights which states:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"*

Promoting and Protecting Judicial Independence

4. The CMJA plays a role within the international judicial community in promoting the UN Basic Principles on the Independence of the Judiciary and international instruments which safeguard this independence. We have also made representations to the Working Group on the Independence of the Judiciary set up by the Commonwealth in 1996. We have been central in the formulation of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and the Independence of the Judiciary and in their continued development. In a submission to the High Level Review of the Commonwealth, the CMJA stressed the importance of a strong, independent and impartial judiciary in strengthening good governance throughout the Commonwealth.

5. Despite the fact that Commonwealth countries have agreed to the principles contained in the Harare Declaration and Millbrook Plan of Action, in the last eighteen months, the CMJA has been increasingly called upon by Members in order to assist with the defence of these principles.

6. The CMJA has expressed its' concern on a number of occasions on the erosion of the independence of the judiciary in a number of jurisdictions around the Commonwealth. We therefore welcomed the Commonwealth Heads of Government 's decision at their meeting in Coolum, Australia, in March this year to agree to an expansion of the mandate of the Commonwealth Ministerial Action Group.

Judicial Education and Training

7. The Commonwealth, as distinct from the general community of nations across the globe, is an organisation particularly suited to mutual co-operation in the judicial sphere as virtually all its membership consist of countries sharing a basic common legal and judicial system. The role of an independent Judiciary at all levels is a cornerstone of democracy, human rights and good governance. As such the quality of a country's Judiciary is an important element not only of the fundamental well being of the people but also of the stability of the society and its economic development. The

CMJA's judicial network promotes the highest standards of judicial behaviour and can provide guidance and support to those members of the Judiciary who may be vulnerable.

8. The educational element of the CMJA's work is central to its purposes. We promote the provision of judicial education and where this is difficult to provide, by invitation from the host Judiciary, can call upon our judicial network to assist in the provision of judicial education programmes.

9. The CMJA promotes judicial training through its Director of Studies, a Circuit Judge from the UK who is given partial release from his other judicial duties by the UK authorities to carry out this function. His responsibilities include the continued promotion and development of our training programme, the devising and supervision of training courses for judicial officers where required, and assistance with the programming of regional conferences. He has co-ordinated the education programme for regional conferences in the Caribbean and has been a facilitator at Regional Conferences in the Pacific and East Africa.

10. We aim to provide a framework where judicial officers may discuss problems of mutual concern, and by doing so raise judicial awareness and knowledge. Many examples can be given where this can be of direct benefit; these include domestic violence, gender equality, and the rights of people suffering from HIV/AIDS (the CMJA, together with the CLA, is currently undertaking a survey on the impact of HIV/AIDS on human resources and human rights awareness within the Commonwealth's legal and judicial professions). From the beginning the Association has concerned itself with the rights of women. In 1994, we issued a Declaration on the Rights of Women. A number of colloquia on the rights of women and the girl-child have been held in conjunction with the Gender and Youth Division of the Commonwealth Secretariat and we set up a Women's Section. The CMJA is also accredited to the United Nations in this area.

11. All Commonwealth countries are affected by economic globalisation and there is a need for more international co-operation between judiciaries to deal with the many problems which arise as a result. *"Human Rights and Human Needs"* is to be the theme of the CMJA's 13th Triennial Conference, being held in Malawi from 24-29 August 2002 and will focus on the role of judicial officers in maintaining and developing a vibrant human rights environment in particular in the area of economic and social rights.

12. The CMJA collaborated with the Legal and Constitutional Affairs Division of the Commonwealth Secretariat on the Anti-Corruption Colloquium held in Limassol, Cyprus in June 2002 and held a follow up session at the Jubilee Conference it held in London from 23-26 September 2002 on ways of combating corruption around the Commonwealth. Since 1998 the CMJA has acted as the repository for Codes of Conduct and Ethics within the Commonwealth which serve as models in the drafting of codes in jurisdictions where they do not as yet exist.

13. Cross border disputes are an increasing aspect of the modern world and, again, communication between judicial officers in respect of the problems which arise over such disputes is vital. This has particularly been demonstrated in the area of child law and the operation of the Hague Convention. The CMJA co-operated with Reunite, the International Child Abduction Centre on an awareness programme within the SADC region which ran from 2001-2002.

Participatory role of the CMJA in the implementation of Commonwealth ideals

14. Just as the Commonwealth Parliamentary Association represents the Parliaments of the Commonwealth, so the CMJA represents the third branch of power within the Commonwealth, the Judiciary. However, the Commonwealth has not always considered the importance of the Judiciary as leaders who are able to influence civil society

15. Promotion of education and training is all well and good but sometimes there are more fundamental problems such as delays in the administration of justice and lack of basic facilities. The provision of adequate funding for the Judiciary must be a very high priority in order to uphold the rule of law, ensure that good governance and democracy is sustained and to provide for the effective and efficient administration of Justice.

16. The CMJA is a valuable network for our members who often face similar problems and great pressures, albeit under widely varying personal circumstances. The network is maintained and developed through our regional, triennial and other conferences and through the Commonwealth Judicial Journal, our regular newsletter and the promotion of email and other forms of electronic communication. The CMJA has also been called upon to assist the Commonwealth Secretariat, the United Nations and other international bodies seeking judicial officers to assist with projects and programmes in different parts of the Commonwealth.

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THE COMMONWEALTH LAWYERS' ASSOCIATION (CLA)

THE PURPOSE OF THE CLA

1. The CLA'S purpose is to maintain and promote the rule of law throughout the Commonwealth, by ensuring that an independent and efficient legal profession serves the people of the Commonwealth. It does this by:

- strengthening professional links among members of the legal profession;
- promoting the honour and integrity of the profession and uniformity in standards of professional ethics;
- supporting improved standards of education and promoting exchanges of lawyers and students; and
- fostering a common bond of Commonwealth.

THE VALUE OF THE CLA

2. The Report of the Commonwealth High Level Review Group and the Coolum Declaration, requires the Commonwealth Secretariat to work with Commonwealth professional associations "in building closer Commonwealth family links and strengthening consultation and collaboration". The CLA is one of a number of Commonwealth professional associations specifically designed for that purpose.

3. The CLA is a Pan-Commonwealth association linking lawyers in every branch of the practising legal profession, and in both the public and private sectors. It is unique among international associations of lawyers in that it has direct access to the official Commonwealth. This is a point of access that local Commonwealth law societies and Bar associations do not have through their other affiliations. Their relationship with the CLA supports their capacity to further their goals of serving justice internationally.

4. There is an urgent need for accessible information on the legal fraternity, cooperation between practising lawyers, and mutual support in dealing with threats to the independence of the profession and other problems as they arise. The CLA promotes and co-ordinates the links between practising lawyers of the Commonwealth and works for their practical benefit.

THE CLA'S MEMBERSHIP AND ORGANISATION

5. The CLA's primary income derives from the subscriptions it receives from its individual members and its institutional members the Bar Associations and Law Societies of the Commonwealth.

6. It employs its own Executive Secretary and will have its own premises in London from June 2003. Its Secretariat provides administrative services to members, represents the CLA externally, develops projects, services the CLA's elected Council and promotes and supports the Commonwealth Law Conference. Much of the Secretariat's work is involved in responding to daily inquiries from members and affiliated institutions.

7. The President and Council are elected by the Association in General Meeting held at the Conference and they hold office until the next Conference. CLA Council Members attend an annual meeting in London. There is an Executive Committee which meets quarterly in London.

THE ACTIVITIES OF THE CLA

8. The CLA's activities include:

- facilitating the flow of information between law societies and Bar associations on developments relevant to the organisation and servicing of the legal profession;
- ensuring the holding of regular Commonwealth Law Conferences;
- responding to requests for information;
- supporting the work of the Commonwealth Legal Education Association ("CLEA"), Commonwealth Magistrates and Judges Association ("CMJA") and other Commonwealth legal associations;
- generally furthering the interests of the legal profession throughout the Commonwealth with a view to improving the legal services available to and provided for the public; and
- finding ways to carry out the benefits conveyed by the Conference during the period before the next Conference.

THE COMMONWEALTH LAW CONFERENCE

9. The best known activity of the CLA is the Commonwealth Law Conference. The Conferences began in 1955. They were organised by an informal body called the Commonwealth Legal Bureau which included a member of the Secretariat and a number of prominent Commonwealth lawyers. Later, the Secretariat ceased to play a part and delegated organisation of the Conferences to the Law Associations of the host countries.

10. During the Conference there is a meeting of the Presidents, Officers and Executive Secretaries of Commonwealth Bar Associations and Law Societies. There are also meetings of Commonwealth Chief Justices, Commonwealth Attorneys General and specialist Commonwealth legal groups, such as the Parliamentary Draftsmen, Military Lawyers and Public Sector Lawyers.

THE CLA'S WORK IN THE OFFICIAL COMMONWEALTH

11. The CLA:

- sends delegations to the Commonwealth Heads of Government Meetings ("CHOGM"). Its representations on Nigeria contributed to Nigeria's suspension at the CHOGM's in New Zealand and Edinburgh;
- sends an official observer to Commonwealth Law Ministers' meetings. The CLA sent an observer in 1999 and is represented at the current meeting;
- sends an official observer to Meetings of Senior Officials of Commonwealth Law Ministries. It made oral representations on the *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*, to the Meeting in November 2001;
- made submissions to the High Level Review Group on the Commonwealth (HLRG) on the expansion of the role of CMAG;
- works regularly with the Legal and Constitutional Division of the Commonwealth Secretariat ("LCAD") on matters of mutual interest and concern. The Director and Deputy Director of the LCAD are *ex officio* members of the CLA Council and attend CLA Council meetings.

THE CLA'S WORK IN THE "UNOFFICIAL COMMONWEALTH"

12. The CLA works closely with the CMJA, the CLEA, and other Commonwealth professional associations.

COMMITTEES

13. The CLA:

- is a Founder and Trustee of the Commonwealth Human Rights Initiative (CHRI). and is represented on the Advisory Commission of the CHRI;
- is an *ad hoc consultant* to Book Aid International;
- meets regularly with the Director of the LCAD and representatives of the CPA, CMJA and CLEA as part of a Working Party for the promotion of the *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence*. The Working Party is also developing a funded project for the monitoring of breaches of judicial accountability within the Commonwealth;
- meets with international Bar associations at half yearly Meetings of Heads of International and Regional Bar Associations sponsored by the IBA with a view to co-ordinating the efforts of law associations worldwide;
- nominates candidates for the Commonwealth Understanding Fellowship Scheme; and
- is a member of the Para 55 Group in the fight against HIV/AIDS and its impact on the legal profession. The CLA is currently undertaking a joint project with the CMJA to explore the impact of HIV/AIDS on the civil, social and economic rights of individuals.

INTERVENTIONS AND MISSIONS

14. The CLA:

- has sent letters of intervention to governments and law societies in defence of lawyers who have been prevented from performing their duties through governmental pressure. These include Nigeria in 1993 and 1996; Malaysia in the late 80's and 90's and Zimbabwe in 2000 and 2002;
- sent a representative to Malaysia in April 1999 as part of a Joint Mission with the IBA, ICJ and UIA into issues relating to the independence of the judiciary there. The Report of the Mission was launched on 5 April 2000;
- participated in an international fact-finding mission in Sierre Leone;
- participated with the IBA in a joint mission in Islamabad at the time of the dismissal of the judges in 2000;
- participated in the first meeting of the International Legal Assistance Consortium in Stockholm in December 2000;
- sent an Observer to the trial in Malaysia of Karpal Singh in 2001-2; and
- made representations to the State Board of Pardons and Paroles, Atlanta, Georgia on behalf of Tracy Housel, a British citizen, who was on death row in the United States (March 2002).

MEETINGS AND RECEPTIONS

15. The CLA holds an Open Meeting in London in June each year to coincide with its annual Council Meeting. Recent meetings have included:

- Edinburgh: CHOGM in 1999 entitled *The Legal and Political Situation in Nigeria*;
- Durban: CHOGM in 1999 on *The Latimer House Guidelines* and on *Fostering Access to Justice: The Role of the Legal Profession*;
- London: a meeting and reception co-hosted with the CMJA addressed by the Chief Justice of Malaysia, the Rt. Hon. YAA Sri HJ Mohamed Dzaiddin Abdullah (September 2001); and

- London: a meeting on *Immigration* addressed by Hon. Phillip Ruddock MP, Australian Federal Minister for Immigration on 22 April 2002.
- the CLA hosts a reception for Commonwealth law students at the CLEA Annual Commonwealth Conference in London.

CONFERENCES AND WORKSHOPS

16. The CLA has:

- co-sponsored with the Northern Ireland Human Rights Commission a seminar in Belfast on *Emergency Powers and Human Rights* (June 2000);
- co-sponsored and provided a speaker at the Cayman Islands Human Rights Conference (2001); and
- held a Seminar and Workshop on Judicial Accountability in Kuala Lumpur in April 2002.

PUBLICATIONS

17. The CLA's publications are distributed three times a year and mailed free to members.

18. The CLA's journal, *The Commonwealth Lawyer*, provides a topical and provocative forum for discussion of issues relating to the legal profession. A wide range of Commonwealth views and developments is reflected in in-depth articles, case reports, short notes and book reviews.

19. The CLA's newsletter, The Clarion, provides information on current issues and the CLA's activities.

20. The CLA publishes jointly with the Legal Division of the Commonwealth Secretariat a Directory of Members, listing all individual and institutional members of the Association. A new edition will be published before the Melbourne Conference.

21. The CLA is currently up-dating its survey on *The Admission of Commonwealth Lawyers (A Technical Survey)*, a study of the mobility of lawyers in the Commonwealth.

THE CLA'S WEBSITE

22. The CLA's website is at www.commonwealthlawyers.com. It is currently being re-developed to include links to important Commonwealth legal issues. The CLA has a database of all Commonwealth Law Societies and Bar Associations

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LIST OF COMMONWEALTH LAW CONFERENCES

The Commonwealth and Empire Law Conference

1955	1st	22-27 July	United Kingdom	London
1960	2nd	14-21 September	Canada	Ottawa
1965	3rd	25 August -1 September	Australia	Sydney
1971	4th	16-13 January	India	New Delhi

The Commonwealth Law Conference

1977	5th	24-29 July	Scotland	Edinburgh
1980	6th	17-23 August	Nigeria	Lagos
1983	7th	18-23 September	Hong Kong	
1986	8th	7-13 September	Jamaica	Ocho Rios
1990	9th	17-20 April	New Zealand	Auckland
1993	10th	3-7 May	Cyprus	Nicosia
1996	11th	24-30 August	Canada	Vancouver
1999	12th	13-18 September	Malaysia	Kuala Lumpur
2003	13th	13-17 April	Australia	Melbourne

ADVICE TO LAW MINISTERS FROM SENIOR OFFICIALS ON VARIOUS ISSUES

INTRODUCTION

1. Senior Officials considered various issues at their meeting in November 2001 that are not the subject of other specific reports or recommendations to Law Ministers. This paper records those matters and the views of Senior Officials.

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

2. Senior Officials considered this issues (which had been before Ministers on various occasions since 1993) and emphasised the distinction between mutual assistance in criminal matters (the Harare Scheme on that matter being applicable to money-laundering offences, and containing particulars on the seizure of the proceeds of crime) and the role of business regulatory agencies in regulating and supervising the financial services sector. They noted the opportunities for the sharing of information between financial intelligence units through the Egmont Group, and the Statement approved by Law Ministers in Kuala Lumpur in 1996 on Mutual Assistance between Business Regulatory Agencies. The meeting considered suggestions on the possible strengthening and clarification of paragraph 6 of the Statement, but Senior Officials felt that the guidelines in the Statement remained appropriate.

3. Senior Officials recommended that this subject remain on the agenda of Ministerial meetings so that consideration can be given to the question whether the guidelines remain adequate or whether further action is needed. The Guidelines are annexed to this paper.

PROTECTION OF CULTURAL HERITAGE

4. In 1993, Law Ministers accepted a Scheme for the Protection of Cultural Heritage within the Commonwealth. The Scheme was intended to complement work on the topic in other fora, notably UNESCO and UNIDROIT. The Scheme establishes mechanisms for certifying that a protected item is lawfully exported, and for the return to the country of export of items unlawfully exported. At their 1999 Meeting Law Ministers agreed to adopt a Draft Model Bill as a guide for countries to use in enacting the necessary legislation to implement the Commonwealth Scheme on Protection of the Cultural Heritage. They noted, however, a number of issues which Senior Officials had identified as possibly needing further consideration.

5. Senior Officials reviewed the position which had been reached. They noted that the preparation of the Scheme had taken many years, and that some Commonwealth countries were, and remained, dissatisfied with its approach and would have welcomed more radical provisions for the restoration of items of cultural heritage to the country of origin. Senior Officials recognised that there was no wish on the part of Law Ministers to reopen the principles of the Scheme, and agreed to reiterate their advice to Ministers in 1999 that the Draft Model Bill in its present form is the best that can be achieved in all the circumstances.

TRIPS AND THE PROTECTION OF TRADITIONAL KNOWLEDGE

6. Senior Officials, in addressing this issue, emphasised the importance of protecting biodiversity related indigenous knowledge, but underscored the need to cooperate with other international organisations which are also working in this area. They recommended that the

Commonwealth Secretariat collate and examine the various regional and international models protecting indigenous knowledge and experiences. They further recommended that a pan-Commonwealth group of experts (comprising lawyers, trade policy, officials, scientists etc) be established to address this issue.

7. The Secretariat was unable to advance work on this request by Senior Officials during the last financial year but hopes to be in a position to so do this year. Senior Officials will be kept informed on progress with work on this issue.

ANNEX

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES GENERAL PRINCIPLES, GUIDELINES AND CONSIDERATIONS:

1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.

2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.

3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged violation of the regulatory law, regulation or requirement; whether the assistance is obtainable by more appropriate means and, in particular, via existing channels for the provision of mutual assistance in criminal matters; issues of international law, comity and reciprocity; and the extent to which the resource costs involved would fall to be met by the requested party. Assistance may be given even though the circumstances which gave rise to the request for assistance do not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of essential public interest.

4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory authority in that country to use appropriate powers available to it in a domestic context.

   These could include inter alia:

   (a) gaining access to, or supplying, information;
   (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
   (c) exercising appropriate powers of investigation or inspection.

   To facilitate the exercise of the appropriate powers, the requesting authority should provide all necessary information required by the requested authority.

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory authority was entitled to obtain in the context of responding to a request for assistance.

6. Countries should consider the removal of legal impediments to the spontaneous provision (subject to appropriate safeguards) of information by a regulatory authority to a counterpart authority in another Commonwealth country where that information gives rise to a reasonable suspicion of a breach of a legal provision, regulation or requirement of that party. The decision whether or not to provide such information in any particular case would be at the sole discretion of the authority in possession of it.

REPORT TO LAW MINISTERS

REPORT OF THE MEETING OF SENIOR OFFICIALS OF COMMONWEALTH LAW MINISTRIES

KINGSTOWN, ST VINCENT AND THE GRENADINES 18 NOVEMBER 2002

1. Senior Officials of Commonwealth Law Ministries met in Kingstown, St Vincent & the Grenadines, on Monday 18 November. The Meeting was chaired by Mr Donald Piragoff, Senior General Counsel in the Department of Justice, Canada, and was attended by Senior Officials from 31 countries. The Meeting agreed recommendations to Ministers as to the agenda of the Law Ministers' Meeting and recommended that they elect the Honourable Judith Jones-Morgan, Attorney General of St Vincent &. the Grenadines to chair their Meeting. Senior Officials noted with pleasure that the Honourable Dr Ralph Gonsalves, Prime Minister and Minister for Legal Affairs of St Vincent & the Grenadines would be present for parts of the Law Ministers' Meeting, and recommended that Law Ministers should elect him as Co-Chair of their Meeting.

2. Senior Officials considered a number of Model Bills which featured on the draft agenda of the Law Ministers' Meeting. All had been prepared in response to a perceived need for draft legislation reflecting best international practice and suitable for adoption in Commonwealth jurisdictions.

3. Senior Officials recommend that Law Ministers endorse the model Bill on Electronic Transactions (LMM(02)11).

4. They similarly recommend the endorsement by Law Ministers of the model Bill on Electronic Evidence (LMM(02)12). Senior Officials suggested that the Commonwealth Secretariat add a note to clause 4 of the text of the Bill to clarify its effect, notably its preservation of applicable rules as to the standard of proof in civil and criminal matters and the admissibility or non-admissibility of hearsay evidence.

5. Senior Officials considered the model Bill on Computer and Computer Related Crime (LMM(02)17). They recognised the need to ensure that the Bill did not criminalise the manufacture or possession of software held for the legitimate purpose of testing the security of computer systems, or reverse the onus of proof in such cases. With this in mind Senior Officials recommend that Law Ministers endorse the draft model Bill with the substitution for clause 9(3) of the text as printed on page 18 of LMM(02)17 of the following:

> (3) Where a person possesses more than [to be inserted] item(s) mentioned in subparagraph (i) or (ii), a court may, having regard to all the circumstances, infer that the person possesses the item with the intent that it be used by any person for the purpose of committing an offence against section 5, 6, 7 or 8.

6. Senior Officials also considered the model Bill on the Protection of Personal Information (LMM(02)8). They recognised that Law Ministers would wish to consider this model Bill alongside those on Freedom of Information (LMM(02)6) and Privacy (LMM(02)7), which Senior Officials agreed at their November 2001 Meeting to commend to Law Ministers. On the Bill on the Protection of Personal Information, Senior Officials agreed that the Bill

needed more reflection on the balance between the protection of privacy and the legitimate needs of Governments in respect of law enforcement and national security. Senior Officials recommend that Law Ministers refer the matter for further consideration, asking the Commonwealth Secretariat to prepare an amended draft in the light of written comments from Governments to be received by a specified date, the draft to be considered at the next meeting of Senior Officials.

7. Senior Officials advise Law Ministers that they may be reconvening in the course of the week to consider making recommendations affecting the text of the draft model Bill on Freedom of Information to ensure that, taken with the related model Bills, it would satisfy the requirements for a European Union adequacy finding.

St Vincent and the Grenadines
18 November 2002

REPORT TO LAW MINISTERS' MEETING OF THE MEETING OF LAW MINISTERS AND ATTORNEYS GENERAL OF SMALL COMMONWEALTH JURISIDICTIONS

KINGSTOWN, ST VINCENT AND THE GRENADINES 18 NOVEMBER 2002

1. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions met in Kingstown, St Vincent & the Grenadines, on Monday 18 November. The Meeting was chaired by the Honourable Judith Jones-Morgan, Attorney General of St Vincent & the Grenadines, and was attended by Law Ministers or Attorneys General from 24 jurisdictions.

2. The Meeting considered a Commonwealth Draft Model Law on Competition (the text of which is to be found in LMM(02)10). This draft had already been found of value in the preparation of legislation in particular jurisdictions, and the Meeting agreed to recommend Law Ministers to endorse the Draft Model Law as a useful tool for any country considering legislating in this area.

St Vincent and the Grenadines
18 November 2002

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