

1993 Meeting of Commonwealth Law Ministers

Grand Baie, Mauritius
15-19 November 1993

Memoranda Part 1



Commonwealth Secretariat

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Preface

Commonwealth Law Ministers from 43 jurisdictions met at Grand Baie, Mauritius, from 15 to 19 November 1993. Most of the Memoranda prepared for and during that Meeting, along with the Meeting's Annotated Draft Agenda (which in fact became the Meeting's Agenda) and the Communiqué are published separately from the Minutes, in two parts which are 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 Malaysia in 1996. Previous Meetings have been in London (1966 and 1973), Lagos (1975), Winnipeg (1977), Bridgetown (1980), Colombo (1983), Harare (1986) and Christchurch (1990).

*Legal & Constitutional Affairs Division
Commonwealth Secretariat
March 1994*

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Commonwealth Law Ministers Meeting - Mauritius, 15 - 19 November 1993

Communiqué

Introductory

1 The 1993 Meeting of Law Ministers of the Commonwealth was held at the International Conference Centre, Grand Baie, Mauritius from 15 - 19 November. The Meeting, which was attended by Law Ministers, Attorneys-General, other law officers and officials from 43 countries, was chaired by the Hon Madun Dulloo M P, Attorney-General and Minister of Justice of Mauritius. The opening ceremony was addressed by His Excellency, the President of Mauritius, Cassam Uteem, The Hon Madun Dulloo and the Commonwealth Secretary-General, HE Chief Emeka Anyaoku.

2 Ministers were reminded throughout their Meeting of the importance of the legal tradition which they shared and of which they were, in a very special sense, the guardians. The history of their host country had given to its own law a distinctive flavour, and its friendly people represented a variety of traditions, religions and cultures. Ministers were impressed by the dedication of the people of Mauritius to democratic principles and to the Rule of Law, and by the way in which such a diverse population lives together in manifest harmony.

3 Tribute was paid to the scholarship of the writers of the papers before them, which the meeting found to be timely, informative and of practical utility.

The Harare Declaration

4 This was the first occasion Ministers had met since Commonwealth Heads of Government had issued their historic Harare Declaration of 1991 in which Commonwealth leaders pledged the Commonwealth and their countries to work with renewed vigour, concentrating especially on areas which included democratic processes, the rule of law, the independence of the judiciary and just and honest government, fundamental human rights, equality for women and action to combat drug trafficking. At their recent Limassol meeting Heads of Government had reaffirmed these commitments "as essential ingredients of the Commonwealth's fundamental political values".

5 For their own part, Ministers dedicated themselves to work in all practical ways, both collectively and at the national level to realise the aspirations expressed at Harare and at Limassol. They recognised their own essential role if these were to be realised.

6 Ministers highlighted the importance in this context of the relationship between national legal systems

and international law and international norms in the field of the protection of human rights; and between national institutions and supra-national bodies. The focus of their discussion was the need to embed legal values in the structures of government and administration.

7 Accountability, transparency and the maximising of public consultation were recurring themes. The Meeting was convinced that democracy, human rights, just and honest government and the Rule of Law were best assured by processes of government which were manifestly open and accountable - from electoral systems to individual government decision-making. Such transparency afforded countries their best protection against the abuse of public office and the depredations of corruption, including the machinations of money-launderers and drug traffickers. For their own part, law officers were professionally accountable, in various ways, to the courts, to Parliaments, to the profession of which many were the head, and most importantly to their consciences.

8 In all Commonwealth countries, the complete independence of the judiciary was of prime importance; its formal guarantees needed to draw support from the adherence to the tradition of judicial integrity by all judges, the quality of lawyers' contributions to public life, and free and open debate. In reaffirming their own commitment to upholding the independence of the judiciary, Ministers stressed the need for the courts themselves to be managed effectively so as to ensure that available resources were used to best effect in delivering quality services to the public. An approach which some countries had adopted was to provide judiciaries with their own budgets, thus both bolstering the independence of the courts and placing the judiciary in a position to maximise the efficiency with which the courts operate.

The Attorney-General and the Rule of Law

9 In some Commonwealth countries, the Attorney-General was in a unique position bridging a political role in government with the task of also being its principal legal advisor. In others, the Attorney-General had constitutionally-guaranteed independence akin to that of the judiciary. The challenge facing every one of them was to assert, by personal example, the traditional leading role of the office of the Attorney-General as guardian of the public interest and upholding the fundamental

rights of every citizen and, if appropriate, actively representing this cause before the courts.

10 The Meeting affirmed the pivotal function of the Attorney-General in providing advice to government as to what the law was and to ensuring to the full extent of his or her authority that government took place within a framework of law, that government and official agencies adhered to international human rights standards and also scrutinised legislation to these ends.

11 In the words of Professor John Edwards, as stated in his paper, "of no less significance, and in my opinion of even greater importance [than the degree of independence provided by statute or under the constitution], are the personal qualities of the office holder and that person's commitment to meeting the highest expectations of ordinary people in terms of personal integrity, impartiality and steadfastness in the face of pressures from whatever quarter."

12 Each Attorney-General had a special role to play in enhancing the protection of human rights. This called for the provision of training and other schemes which would ensure that all public officials had a lively awareness of their own responsibilities in ensuring that the rights of citizens were respected. Most importantly, this included members of the police.

Statement on Government under the Law

13 The Meeting recognised the growth of judicial review of administrative action as being a valuable development and that an independent, impartial and informed judiciary held a central place in the realisation of the just, honest, open and accountable government which their peoples were entitled to expect.

14 In this context, Ministers reviewed the Lusaka Statement on Government under the law prepared by the Workshop on Administrative law held in Lusaka, Zambia, in October 1992. In endorsing the Statement as a notable contribution to administrative law, they recognised that the Guiding Principles it contained were valuable examples of what would often be good practice. These principles are attached.

Extradition and the Rule of Law

15 Ministers discussed the problems associated with the violation of the principles of sovereign equality and territorial integrity of states which occurs in cases of state-sponsored abduction. In this context they also examined with concern the implications of the decision of the United States Supreme Court in the 1992 case of *United States v Alvarez-Machain*.

16 Law Ministers underlined their support for existing international law and expressed their concern at any recourse to law enforcement practices inconsistent therewith. They affirmed their belief that observance of the norms of international law was an essential part of the Rule of Law. This applied to extradition no less

than in other contexts. Ministers remained committed to the system of extradition with the safeguards developed over the years. Nevertheless the agreed to keep the possibility of amending the London Scheme under review.

17 Ministers declared that the extradition process should not be subverted by resort to state-sponsored abduction and that unlawful practices of this nature would be in clear violation of the London Scheme for the Rendition of Fugitive Offenders.

Protection of the Material Cultural Heritage

18 The need to provide better protection for the material cultural heritage has been on the agenda of Law Ministers since their Colombo meeting in 1983. At Grand Baie, Ministers brought consideration of the matter to a successful conclusion, adopting a new Commonwealth Scheme for the Protection of the Material Cultural Heritage (which they expect will become known as "The Mauritius Scheme").

19 The Scheme, which complements work done in UNIDROIT and the European Community, governs the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another country contrary to its laws. The Scheme contains practical provisions relating to the export and import of items which take place after its adoption and implementation. The Scheme does not operate retrospectively but it does not detract in any way from the possibility of Commonwealth countries entering into bilateral discussions amongst themselves in relation to the repatriation of specific items of importance for the cultural heritage of the countries concerned.

20 Law Ministers saw the new Scheme as an important step to protect items of national importance because of their historical, archaeological, cultural or spiritual significance. They agreed that Commonwealth jurisdictions should take early steps to give effect to the new Scheme in their domestic law, while acknowledging that not all countries were as yet in a position to do so.

21 Ministers accepted the generous offer made by Australia to assist the Commonwealth Secretariat in the development of model legislation which would be of assistance to a number of member countries wishing to adopt legislation giving effect to the Scheme in a timely manner.

22 They acknowledged with gratitude the work undertaken over a long period of time, by the Working Group, which was led so ably by the Hon. Justice Andreas Loizou of Cyprus.

Women and Human rights

23 The Meeting acknowledged their special responsibility as law officers to ensure that their legal systems provided appropriate protection for women and chil-

dren, particularly in respect of domestic violence and of their fundamental human rights. In so doing it recognised the role which the law could play by giving a lead to public attitudes and behaviour.

24 Ministers were particularly concerned to ensure that priority be accorded to all countries becoming party to the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989) and that they adopt the draft UN Declaration on the Elimination of violence Against Women.

25 It was also important that statute books and subsidiary legislation be reviewed to ensure that any remaining provisions that unjustifiably treated men and women differently were repealed.

Mutual Legal Assistance

26 Practical co-operation between countries in providing mutual assistance in the administration of justice has long been a priority for Law Ministers. At their meeting in Christchurch, Ministers had adopted revised texts of the three existing Commonwealth Schemes, dealing with the Rendition of Fugitive Offenders, Mutual Assistance in Criminal Matters, and the Transfer of Convicted Offenders. At Grand Baie, they were encouraged by the continued progress made towards full implementation of these Schemes in national legislation. The Meeting welcomed the steps being taken by the Commercial Crime Unit of the Commonwealth Secretariat, with the co-operation of governments of member countries, to ensure the availability of material facilitating the practical operation of the Schemes, and encouraged the Commonwealth Secretariat to promote the proposed meeting of Central Authorities and to continue the process of ensuring that the work it undertakes complements that of other international organisations concerned with related issues.

27 A number of small island states stressed the importance to their countries' security and well-being of effective mutual legal assistance arrangements as part of a wider framework to protect their integrity, particularly those States which operated as international financial centres and so were especially vulnerable to illicit practices.

Mutual Assistance between Business Regulatory Agencies

28 Ministers recalled the decision of their Christchurch meeting of 1990, taken in view of the growing internationalisation of financial markets, to extend mutual assistance in the area of business regulations. They reviewed legislative developments in a number of member countries, the emergence of a network of memoranda of understanding between business regulatory authorities, and the work of the International Organisation of Securities Commissions on mutual assistance.

Many Ministers articulated general principles and considerations to guide Commonwealth governments in assessing how best, in their own circumstances, they might develop relevant administrative procedures and legislative provisions. It was recognised that a number of delegations would require to conduct further consultations with relevant regulatory agencies on their return to their capitals. In view of the urgency of the situation and the importance of the concerns expressed, it was agreed that the delegations concerned should notify the Secretary General of any reservations and proposed amendments to the Statement they wished to enter, by 30 June 1994. All reservations and proposed amendments received should be placed before the next Senior Officials Meeting and the matter kept on the Agenda of both meetings in order further to develop the Statement in the light of experience and practice. The Statement is attached.

Money-Laundering and Financial Crime

29 Commonwealth Heads of Government at their Limassol Meeting had supported enhanced international co-operation to combat money-laundering, commending in particular the 40 recommendations of the Financial Action Task Force (FATF), and requested Law Ministers to examine how Commonwealth countries could best work together in this field. Law Ministers noted the role already being played by Commonwealth countries in the work of FATF and the Caribbean FATF.

30 They expressed their desire that this issue be addressed as a matter of urgency and their resolve, individually and collectively, to put in place comprehensive provisions criminalising money laundering in respect of the proceeds of all serious crimes, facilitating the disclosure by financial institutions of information giving rise to suspicion of money-laundering activities, enabling confiscation of the proceeds of crime, making money-laundering extraditable, and promoting international co-operation in the investigation and prosecution of money-laundering and in confiscation proceedings.

31 This would build upon work already done in the Commonwealth, the United Nations and other bodies and would require co-ordination with the work of Commonwealth Finance Ministers.

32 They further agreed to participate in a process of self-evaluation and mandated their Senior Officials to monitor, with the assistance of the Commonwealth Secretariat, the implementation of the measures referred to above, and to report to the next Law Ministers Meeting.

33 Ministers requested the Secretary-General to initiate sympathetic consideration to an appropriate allocation of Secretariat resources to ensure the effective implementation of these measures.

A Commonwealth Arbitration Assistance Service

34 Arbitration has become an important form of dispute resolution in commercial disputes and a number of international arbitration centres exist within the Commonwealth.

35 Law Ministers wished to optimise the use of these existing facilities and saw advantages in providing services of information and advice about their use and the development of arbitration law. To these ends, they approved the establishment of a Commonwealth Arbitration Assistance Service. Senior Officials were asked to settle its form and method of work at their next meeting.

Processing Legislation

36 Ministers exchanged experience in processes adopted in various jurisdictions designed to ensure that legislation was well-developed before it came to Parliaments, and was effectively scrutinised during the enactment process.

37 It was emphasised that consultation with the public and interested professional and other bodies was best undertaken at the beginning of any legislative process. Green or white papers could be published or draft bills circulated to ensure appropriate public involvement. It was suggested that in relevant instances it might be appropriate for parliamentary committees to travel outside the capital for the purposes of public hearings. It was also imperative that all legislation be scrutinised carefully to ensure compliance with international obligations and human rights norms.

Drafting

38 The Meeting recognised the vital role played by law drafters in the democratic process. 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.

39 Ministers recorded their appreciation for the Commonwealth Secretariat's legislative drafting training programme at the University of the West Indies at Cave Hill, Barbados and the hope that this valuable source of training would continue to be available to them. They also expressed gratitude for bilateral assistance from individual member countries in the area of training. Particular appreciation was paid for the provision of field experts in legislative drafting.

40 They welcomed the initiative taken by the Secretariat and the Commonwealth of Learning at Vancouver in developing a programme for the distance training of legislative drafters. This was clearly a way in which the numbers of trainees could be significantly increased and had the added benefit, crucial for small jurisdictions, that members of staff would not have to be sent abroad to study but could do so part-time and in

their home country. They pledged their strong support for the project.

41 Pleasure was also expressed at the appointment of a highly-experienced legal educator to take charge of the development of the project as it was particularly important that all member countries accord appropriate recognition.

42 They saw the materials as providing a means of enhancing the skills of those already involved in law drafting and also hoped that law faculties would take a much more active interest in including the teaching of law drafting in the courses they offer. They also saw scope for the development of regional training centres in this field.

43 While acknowledging that others could assist in helping to provide training opportunities, it was for the countries involved to ensure as best they could that the terms and conditions of service of law drafters were such as to attract new recruits and that experienced practitioners were retained in the drafting service.

44 Ministers noted, too, the importance of drafters being familiar with international human rights norms and instruments so as to ensure that the Bills they prepared were fully consistent with them. They were pleased to see that this aspect was covered appropriately in the course materials.

Computerisation of Legal Systems

45 Ministers acknowledged the potential for computers to energise the legal systems of countries (particularly where statute books had become a morass of amendments and intricate cross-references) and recognised the need to make widely available the experience and expertise already acquired. Despite high initial costs, they identified considerable long-term savings in this field by maximising the output of professional staff, eliminating the need for future law revision exercises and, by using laser printers, reduce publishing costs to the precise level of market needs.

46 To these ends they decided to establish a panel of experts as a Commonwealth Legal Computerisation Group, which would be self-funding and be serviced by the Commonwealth Secretariat. Members of the panel would be available on a bilateral basis to provide technical advice and guidance to individual member governments. The offers by Bermuda (to give access to the comprehensive software developed in support of its legal system) and by Singapore (to supply its own data base of statutes, subsidiary legislation and instruction manuals) were warmly received.

47 Ministers shared their experience in the use of computer technology in their national legal systems, notably in legislative drafting and in the development of databases of statute law, court judgments and similar material. They decided to maximise the use made of existing software and, at an appropriate time, to explore

the potential of CD-ROM publication methods, especially in the context of consolidating the legal data bases of a number of small states.

International Child Abduction

48 Law Ministers stressed the effectiveness of the Hague Convention on Civil Aspects of International Child Abduction in dealing with this widespread and distressing phenomenon. The Convention was also an important instrument for the protection of the rights of children but would only start to realise its potential when most countries had become party to it. They noted that their host country, Mauritius, had recently acceded to the Convention and that Cyprus was in the process of ratification. Ministers from countries already parties to the Hague Convention expressed the hope that other Commonwealth countries would accede as soon as possible.

The Treatment of Prisoners

49 The maintenance of standards in the treatment of prisoners and in the management of correctional institutions was a matter raising issues of human rights and to which the principles and values expressed in the Harare Declaration properly applied.

50 Law Ministers received an illustrative draft of proposed guidelines for the treatment of prisoners within the Commonwealth which took account of Commonwealth experience in the 36 years since the United Nations adopted its Standard Minimum Rules on this subject. They were conscious of acute shortages of resources in this as in other areas of public expenditure, and shared with one another some of the problems faced by the prison services in their own countries.

51 In inviting the Conference of Commonwealth Correctional Administrators to do further work in this area in close consultation with the United Nations, they asked that this address the practical realities of the economic and social situation in Commonwealth countries and for the results to be reported for consideration at a future Law Ministers Meeting. They expressed the strong wish that the development of such guidelines be much more than a drafting exercise, and instead involve an examination of practical ways in which acceptable standards might be achieved.

Enhancing the Utility of Law Ministers' Meetings

52 Ministers recognised the constructive role played by their meetings in the development and enhancement of intra-Commonwealth legal co-operation no less than in sharing the valuable lessons learned from experience.

53 They were determined to maximise the benefits of future gatherings and to take full advantage of the capacity of Senior Officials to advance the development and to monitor the implementation and workings of mutually beneficial schemes for cooperation. A

number of useful suggestions were also made as to how the format of their proceedings might be enhanced.

Review of the Activities of the Commonwealth Secretariat in the Legal Field

54 The Meeting reviewed the wide range of activities in the legal field undertaken by the Commonwealth Secretariat. The achievements of the small Legal and Constitutional Affairs Division over the years were impressive and had made possible the considerable progress the Meeting had been able to make by broadening and deepening the scope of the assistance member countries extend to each other in the legal field.

55 Ministers noted that the general pattern of the Secretariat's legal activities has always reflected, and even more so now reflects, the current mood of the Commonwealth: the need for training for development; for the sharing of information; for reform and simplification of laws and systems; for more open, responsible and accountable government; and for effective responses to current issues and concerns - all of which underlie the need for both bilateral and multi-lateral co-operation within the Commonwealth.

56 The *Commonwealth Law Bulletin* was a vital life-line for many jurisdictions, providing a fund of information of unique value, and particularly so to small states. They endorsed the independent evaluation before the Meeting, which demonstrated their own conviction that the *Bulletin* provided, and should continue to provide, a unique point of access into legislation, judicial decisions and law reform throughout the Commonwealth. They congratulated the Secretariat on producing the *Bulletin*, along with other ad hoc publications of a highly practical nature. The "accession kits" for important international conventions were particularly helpful.

57 The Meeting applauded in particular the Secretariat's work in the promotion of human rights, which was of the highest relevance and concern. Ministers looked forward to working with the Human Rights Unit (HRU) in particular in carrying forward their decisions at this Meeting and the mandate from Commonwealth leaders at Limassol. They endorsed the decision of the Commonwealth Secretary-General in re-siting the HRU within the Legal and Constitutional Affairs Division and looked forward to the priority needs of training key public servants and strengthening of human rights institutions outlined in the report of the CHOGM working party being further addressed. The hope was expressed that the proposed Programme Advisory Committee would be established soon. They welcomed the decision to establish the database of human rights judicial decisions. The inestimable value of the continuing series of high-level judicial colloquia on the domestic application of international human rights norms was being demonstrated by the contributions the collo-

quia were making to the development of human rights jurisprudence in the day-to-day business of the courts in many member countries.

58 The technical assistance and other services provided by the Secretariat was of the highest quality, and was deeply appreciated by member countries. Some Law Ministers, particularly in small states, simply could not have coped without this support and they expressed the hope that resources would allow this essential form of assistance to be continued in future years. This was particularly important if some Law Ministries were to be enabled adequately to address the priorities of good governance and development identified in the Harare Declaration of 1991.

59 The Meeting had identified a number of matters for urgent attention by the Secretariat both in the immediate future and in the longer term, and they looked forward to working with it closely over the years ahead.

60 Ministers expressed their great appreciation for the invaluable contributions made by Mr Jeremy Pope over the last 18 years to the work of the Commonwealth Secretariat and in particular over the last 14 years during which he has guided the work of the Legal Division as Director. They all wished him well in his future endeavours and hoped that his services will continued to be available to the Commonwealth in one form or another.

Other Action to Implement Decisions of the Cyprus CHOGM

61 Many of the matters referred to it by Commonwealth leaders at their Limassol Summit have been addressed above. In addition, the Meeting decided to ask their Senior Officials to monitor the progress made in respect of meeting the wishes of the Commonwealth Heads of Government regarding progress with ratifying and implementing the following **human rights conventions**: the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and the CEDAW Convention, and in adopting the draft UN Declaration on the Elimination of Violence Against Women.

62 In relation to **drug trafficking and drug abuse** they decided that:

- (i) all Commonwealth countries not yet party to the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna, should adhere to the Convention and enact the necessary domestic legislation as soon as possible;
- (ii) member states should support the UN Drug Control Programme and, if appropriate, take advantage of the advisory and assistance facilities available in the Dublin Group of donor countries;

- (iii) the Secretariat should, in collaboration with UN Drug Control Programme and other relevant bodies, continue to organise appropriate training and other activities to counter aspects of both the supply and demand for illicit drugs;

- (iv) all Commonwealth countries should adopt appropriate domestic legislation to trace, freeze and confiscate the proceeds of drug trafficking; and

- (v) all Commonwealth countries should develop bilateral and multilateral approaches to deal with illicit trafficking.

63 In relation to the proposed **International Criminal Court** they decided to:

- (i) request the Secretariat to prepare an appropriate paper, drawing attention to any issues of difficulty; and

- (ii) invite the next Meeting of Senior Officials of Law Ministries to discuss the paper and to report to the next Meeting of Law Ministers accordingly.

64 In relation to **disarmament**, the Meeting congratulated the Secretariat on its prompt preparation of an "accession kit" for the implementation of the Chemical Weapons Convention and asked Senior Officials to monitor the progress made by member governments towards implementation of it.

Next Meeting

65 The Meeting accepted with pleasure the generous invitation of the Government of Malaysia for Ministers to hold their 1996 Meeting in Kuala Lumpur. It also accepted the kind invitation of the Government of Malta to host the next Meeting of Senior Officials in about 18 months' time.

Appreciation

66 Ministers expressed their deepest gratitude to the government and people of Mauritius for the warmth of the welcome extended to them throughout their stay and their appreciation for the skill and wisdom with which their Chairman, the Hon Madun Dullo, had guided their deliberations. As they reflected on their achievements this week they were deeply conscious of the positive influence which the very special environment of Mauritius had engendered. With the adoption of the Mauritius Scheme, the name of Mauritius had entered the Commonwealth's legal lexicon, but it was also etched indelibly in their affections.

*International Conference Centre
Grand Baie
Mauritius
19 November 1993*

THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

The following statement, originally adopted by a seminar held in Lusaka, Zambia, on 15 October 1992, was endorsed by the Meeting in para. 14 of the Communiqué.

WE express our joint belief in the central place enjoyed by an independent, impartial and informed judiciary in the realisation of just, honest, open and accountable government. These are the hallmarks of the democratic society which our people are guaranteed by our Constitution, and which our people are entitled to expect.

WE believe that it is entirely consistent with best democratic practices for the actions of governments to be scrutinised by the courts at the instance of citizens, to ensure that decisions taken and administrative practices followed comply in all respects with the Constitution, with relevant statute and other law, and with best administrative practices - namely that administrative decisions be taken fairly, reasonably and according to law. In developing our jurisprudence in this area, the fundamental human rights provisions of our Constitution are of particular importance.

BY providing for judicial review of administrative action, the law provides not only a means for citizens to seek redress where they believe they have a grievance against official action, but also for them thereby actively to promote good administrative practice. In the non-judicial sphere the office of the Investigator-General also plays a most important role.

THE essential requirements of administrative law are that administrative action be confined to areas authorised by the law; that the rules of natural justice be followed; that each case be dealt with on its merits and without taking account of extraneous factors; that similar cases be treated in the same way; and that persons taking decisions should not have any personal or other interest in the outcome.

THE following principles reflect good administrative practice and in many instances are enforceable through the courts.

GUIDING PRINCIPLES

An administrative authority, when exercising a discretionary power should:

- 1 pursue only the purposes for which the power has been conferred;
- 2 be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
- 3 observe the principle of equality before the law by avoiding unfair discrimination;

4 maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;

5 take decisions within a time which is reasonable having regard to the matters at stake;

6 apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Procedure

7 Availability of guidelines: Any general administrative guidelines which govern the exercise of a discretionary power should either be made public or communicated (in an appropriate manner and to the extent necessary) to the person concerned, at his or her request, whether before or after the taking of an act concerning the person.

8 Right to be heard: In respect of any administrative act of such a nature as is likely to affect adversely his or her rights, liberties or interests, the person concerned should be entitled to put forward facts and arguments and, in appropriate cases, submit evidence which should be taken into account by the administrative authority; in appropriate cases the person concerned should be informed, in due time and in an appropriate manner, of these rights.

9 Access to information: Upon request, the person concerned should be informed, before an administrative act is taken and by appropriate means, of all factors relevant to the taking of that act.

10 Statement of reasons: Where an administrative act is of such a nature as to affect adversely the rights, liberties or interests of a person, the person concerned should be informed of the reasons on which it is based either by stating the reasons in the act itself or, upon request, by communicating them separately to the person concerned within a reasonable time.

11 Indication of remedies: Where an administrative act is given in writing and which adversely affects the rights, liberties or interests of the person concerned, it should indicate the specific remedies available to the person as well as any time-limits which may be involved.

Review

12 An act taken in exercise of a discretionary power should be subject to judicial review by a court or other competent body; however this does not exclude the possibility of a preliminary review by an administrative authority empowered to decide both on legality and on the merits;

13 Where no time limits for the taking of a decision in exercise of a discretionary power have been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so should

be open to review by a competent authority;

14 A court or other independent body which controls the exercise of a discretionary power should possess such powers of obtaining information as are necessary for the proper exercise of its functions.

Implementation

15 In their implementation, the requirements of good and efficient administration, the legitimate interests of third parties and major public interests should be given due weight, but where these requirements make it necessary to modify these principles in particular cases or specific areas of public administration, every endeavour should be made to conform with these principles and to achieve the highest possible degree of fairness.

ADMINISTRATIVE law in these and other ways provides a firm basis for the guidance of ministers of government and civil servants in the discharge of their duties. By upholding these principles, the judiciary serves the public interest, not only in specific cases but by providing both guidelines for future administration and remedies where these are appropriate and proper procedures have not been followed. There is thus a creative tension between two branches of government - the executive and the judiciary - which endures to the public benefit. While it lies to the government to make and execute policy, it rests with the judiciary to ensure that policies are both made and implemented within the parameters prescribed by our Constitution and by our country's laws, and for its decisions in these as in other matters to be respected.

HOWEVER the judiciary has a broader role than this. In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This includes ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all.

FOR such procedures to function properly it is essential that:

- the executive ensures that senior civil servants enjoy appropriate security of tenure and have a full appreciation of, and are encouraged to discharge, their own responsibilities for good administrative practice, and of the proper role of the judiciary;
- senior civil servants ensure that their own staff receive appropriate training and guidance in good administrative practice and the basic requirements of administrative law, so as to ensure that best administrative practice is followed and that the room

for individual citizens to feel aggrieved is minimised;

- the judiciary be well-versed in the judicial review of administrative action (including, if need be, the establishment of a Division within the High Court comprising specialist judges) and be adequately resourced with up-to-date legal materials, including promptly produced *Zambian law reports*;
- the legal profession be equipped both through proper training in law faculties and through continuing legal education programmes to discharge their own vital function in preparing cases that should be brought before the courts for consideration;
- the general public be informed - and be kept informed - of their rights and of fact that the law can provide redress in cases of arbitrary, discriminatory and unfair administrative action by government, and be assured of appropriate access to legal aid; and
- the legal procedures for judicial review of administrative action be reviewed, and kept under regular review, to ensure that it meets the expectations of *Zambian society* and reflects best prevailing Commonwealth practices.

SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

The following Scheme was adopted by the Meeting in para. 18 of the Communiqué

OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.

(2) The provisions of the Scheme will apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.

(3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the European Communities on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and the Regulation on the Export of Cultural Goods from Member States of the Europe Community.

DEFINITIONS

2. For the purposes of the Scheme:

- (a) "country" means:
 - (i) each sovereign and independent country with in the Commonwealth together with any dependent territories which that country designates; and
 - (ii) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.
- (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.
- (c) "country of location" means the country where an item which has been unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.
- (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which

has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which event "unlawful export" is deemed to have occurred as of the date of the breach of the condition.

ITEMS COVERED BY THE SCHEME

3. (1) The Scheme covers all items of cultural heritage classified by, and subject to export control by, the country of export.

(2) Items classified should be of national importance by virtue of one or more of the following criteria:

- (a) the close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;
- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
- (f) the archaeological significance of the item.

(3) Where a country is unable by reason of laws pursuant to other international obligations to extend protection to all such items it shall be open to other countries similarly to restrict the protection they afford to that country under this Scheme.

VALIDATION SYSTEM

4. (1) As part of the Scheme, a system of validation may be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person is enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.

(2) Such a validation certificate would constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

(3) Where an application is made for a validation certificate in respect of any item, the application should be granted or refused within six months of receipt of the application. If the application is not granted or refused within that period, the country of export should be precluded from claiming that the item has been unlawfully exported from that country.

OPERATION OF THE SCHEME

5. (1) Each country will prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.

(2) Each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export.

6. (1) Each country will designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.

(2) Each country will notify the Commonwealth Secretary-General of its central authority.

7. (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.

(2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.

(3) The request will give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by an official notification from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.

(4) Such notification will be prima facie evidence of the matters stated therein.

8. Upon receipt of a request, the country of location will take appropriate steps in accordance with its laws to secure or safeguard the item.

9. (1) The authorities in the country of location may

- (a) either give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or
- (b) may institute proceedings or advise the country of export to institute proceedings with a view to securing an order for the return of the item to the country of export.

(2) In any proceedings instituted either by the holder of the item or by the authorities in the country of location, or of export the court will determine whether the item is covered by -

- (a) the Scheme;
- (b) an export permit; or
- (c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court will order that the item be returned to the country of export.

(3) Prior to ordering the return of the item the court shall determine whether the holder of the item is

an innocent purchaser for value having exercised due care and attention in acquiring the item and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court will order that fair and reasonable compensation be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and compensation will be determined by proceedings in the country of export.

(4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise any relevant validation system under the Scheme.

10. The central authority in the country of export to which an item is returned will be required to hold the item for a period of twelve months. During this period it will be open for any person to take proceedings in the country of export to determine any question of title and compensation.

11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority will deal with the item in accordance with the law of the country of export.

12. In any proceedings in a country of location, the court will have due regard to the relevant laws of the country of export.

13. The person adjudged to have title in the item will not have any right to remove the item from the country of export otherwise than by the process of applying for and obtaining an export permit.

LIMITATION PERIOD

14. No claim for the return of an item alleged to have been unlawfully exported may be made under the Scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

CRIMINAL PROCEEDINGS

15. Each country:

- (a) will make it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme; and
- (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

COSTS

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the re-

quest of the country of export for the return of any item of cultural heritage.

(2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country will consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

STANDARD FORMS

17. In implementing the Scheme, each country will as far as is practicable use standard forms which will be settled by consultation through the Commonwealth Secretariat.

Revised Annotated Draft Agenda

Prepared by the Conference Secretary

References to papers should be read as including the papers contained in the Report of the 1992 Meeting of Senior Officials of Law Ministries, held in Singapore.

OPENING CEREMONY

A separate note on the proposed arrangements for the Opening Ceremony will be available for consideration by Senior Officials at their preliminary meeting at 4.30 p.m. on Sunday, 14 November 1993.

* * *

AGENDA ITEM ONE

COMPUTERISATION OF LEGAL SYSTEMS:

Commonwealth Experience and Opportunities

Even a few years ago, computerisation of legal systems seemed to be a concept that would only be within the reach of developed countries. Since then the cost of computer hardware has plummeted, the reliability and sheer power has soared and software programmes have become steadily more user-friendly. With legislation being drafted on word processors almost everywhere, and an increasing tendency for Supreme Court judgments to be word processed, today even small developing countries can start preparing for the day when their statute books and/or law reports will be on a data-base. For example, at least one Attorney-General from a small island state travels with his statute book contained in his portable laptop.

However the challenge is complex and the Commonwealth has considerable experience to share, some of a negative kind and which could help others avoid repeating expensive mistakes, and some of a creative kind. This item affords an opportunity for Ministers to exchange experience, to brief each other on recent developments and to explore ways in which software and expertise might be shared to good effect.

Note: A recommendation from the Senior Officials Meeting in Singapore for consideration by Ministers is that this meeting establish a self-funding Commonwealth Legal Computerisation Committee whose members would be available, on request, to provide advice to member countries.

Papers before the Meeting include:-

LMM(93)16 Development of Computerisation in the Commonwealth - a memorandum by the Commonwealth Secretariat

LMM(93)26 Computerising the Legal System - the Botswana Experience, by the Hon. P T C Skelemani, Attorney General of Botswana

LMM(93)33 An Information Systems Strategy Study in the Legal Department of the Hong Kong Government, by the Hon. J F Mathews, Attorney General of Hong Kong

LMM(93)36 The Singapore Experience in Computerisation of the legal sector, by the Attorney General of Singapore's Chambers

LMM(93)46 Computerised Legislation - a Case Study in Bermuda, By Bryan J. Nylin, technical consultant to the Computer Systems and Services Department, Ministry of Finance, Bermuda

AGENDA ITEM TWO

THE HARARE DECLARATION: THE ROLES OF THE ATTORNEY-GENERAL AND THE JUDICIARY AND THE PROTECTION OF THE RULE OF LAW

(a) The duties and accountability of Law Officers

The principal law officers of the state lie at the heart of just and honest government and of upholding the Rule of Law. They therefore give rise to a unique and often unwritten set of constitutional precepts and practices which Ministers may wish to review to ensure that their own national developments are buttressed and informed by relevant experience elsewhere in the Commonwealth. To inform their discussion, the Meeting will have before it Paper LMM(93)24 by Professor John Edwards, for many years the Commonwealth's leading authority on the role of the law officers of the state.

(b) Just and honest government under the Rule of Law

It has been the practice of the Meeting from time to time to make considered statements on relevant areas of Commonwealth legal practice in the discharge of its role in promulgating good practice. Under this sub-item the Meeting may wish to take up the proposal that this Meeting consider and endorse the "Lusaka Statement on Government Under the Law", which is set out at the end of Paper LMM(93)17.

(c) The future role of the Secretariat in advancing shared Harare objectives

The Meeting may also wish to give guidance as to particular areas in which Commonwealth action in the legal area might advance the shared objectives of the Harare Declaration.

Other papers before the Meeting include:-

LMM(93)7 The Lawyer - the Key to Sound Public Administration, by the Hon Carl Rattray

LMM(93)8 Defending the Fundamental Political Values of the Commonwealth Against Corruption, by the Independent Commission against Corruption, New South Wales

LMM(93)10 Enhancing Election Frameworks Through Law - paper by the Commonwealth Secretariat (C Dundas)

LMM(93)11 Transparency in Organising Elections - paper by the Commonwealth Secretariat (C Dundas)

LMM(93)15 Women's Rights as Human Rights - paper by the Commonwealth Secretariat (Women and Youth Affairs Division)

LMM(93)17 The Lusaka Statement on Government under the Law - A paper by Dr. Rodger Chongwe, SC, MP, Minister of local Government and Housing, Zambia with a memorandum by the Commonwealth Secretariat

LMM(93)25 The Harare Declaration: The role of the Judiciary and the Protection of the Rule of Law, by Hon Justice P Nnaemeka-Agu

LMM(93)35 Fraud, Accountability and Ethics in the Public Sector, by Alan Rose, Secretary, Attorney General of Australia's Department, presented on behalf of the Government of Australia

LMM(93)37 Country Strategies for Building Effective Integrity Systems, by Transparency International

AGENDA ITEM THREE INTRA-COMMONWEALTH MUTUAL ASSISTANCE IN LEGAL MATTERS

One of the hallmarks of the Commonwealth association is the high degree of mutual legal assistance achieved between our members and it has been a signal achievement of this forum in recent years that it has greatly extended the scope and reach of intra-Commonwealth mutual legal assistance arrangements.

(a) Review of existing Schemes for Mutual Assistance

This sub-item envisages a brief review of the status of the existing three Schemes (the London Scheme for the Rendition of Fugitive Offenders within the Commonwealth, the Harare Commonwealth Scheme for Mutual Legal Assistance in Criminal Matters and the Commonwealth Scheme for the Transfer of Convicted Offenders). After a brief resumé of the present state of play, Ministers will wish to focus in particular on any problems in implementation - whether legislative or in practice - with a view inter alia of ascertaining areas for possible assistance and/or advice.

Papers before the Meeting:-

LMM(93)21 Transfer of Convicted Offenders Scheme - a memorandum by the Commonwealth Secretariat

LMM(93)29 The Commonwealth Scheme for Mutual Assistance in Criminal Matters: Progress Towards Full Implementation, by Professor J D McClean

LMM(93)41 Implications for Commonwealth countries of European Developments in Respect of the Exercise of Jurisdiction and the Enforcement of Judgments, by Professor J D McClean

(b) Implementation of the FATF's 40 recommendations

Under this sub-item the Meetings may wish to consider how best to address implementing the recommendation made by Commonwealth Heads of Government in Cyprus in October that all Commonwealth countries implement the 40 recommendations of the Financial Action Task-Force as an important aspect of the Commonwealth's contribution to international co-operation to counter money-laundering and drug trafficking.

Paper before the Meeting:

LMM(93)14 Bank Secrecy and Mutual Assistance in Criminal Matters - a memorandum by the Commonwealth Secretariat

LMM(93)42 The Commonwealth Heads of Government Meeting at Limassol, Cyprus - a memorandum by the Commonwealth Secretariat (note in particular Annex B: "Money Laundering", a memorandum by the British Government with its Annex I, "The Financial Action Task Force" and Annex II, "Synopsis of the 40 Recommendations of the FATF on Money Laundering".)

(c) Proposed Scheme for the Protection of the Material Cultural Heritage within the Commonwealth

The Meeting has before it as Paper LMM(93)3, the recommendations of the Working Group on the Protection of the Material Cultural Heritage, and will have the report of the Senior Officials Meeting held earlier this week. The matter has been under consideration since the 1983 Meeting in Sri Lanka. The Paper recommends a revised draft Scheme for adoption as a Commonwealth Scheme for implementation by those Commonwealth governments who see a need for collective action in this area of mutual cooperation.

Papers also before the Meeting:-

LMM(93)47 Protection of Cultural Property Within the Commonwealth - A Paper presented by the Government of New Zealand

(d) Proposed Commonwealth Arbitration Assistance Service

(i) The Meeting has before it papers by Mr Sharad Rao (former Director of Public prosecutions, Kenya) and Dr Barry Sen (former Secretary-General of the Asia Africa Legal Consultative Committee) (LMM(93)27 and 28 respectively) and a proposal (at pages 210-211 of the report of the 1992 Meeting of Senior Officials of Commonwealth Law Ministries) that the Meeting establish a framework to facilitate an inexpensive yet effective system of dispute resolution for commercial disputes utilising existing resources, expertise and facilities. The draft report of the Working Group established by the Meeting of Senior Officials on a possible Commonwealth Arbitration Assistance Service appears as paper number LMM(93)38.

(ii) Also contained in the papers mentioned, but in view of its policy implications reserved for

consideration by this forum, is a proposal to equip the Commonwealth to facilitate the resolution of intra-state disputes by arbitration or mediation in addition to existing mechanisms for dispute resolution which may have the advantage of adding means of resolution which, in particular circumstances, member countries might choose to use rather than becoming involved in more public confrontations. It is envisaged that the Meeting would restrict itself to a preliminary consideration of the merits of the suggestion, with a view to referring the matter for endorsement to the next Commonwealth Heads of Government Meeting (1995) before the concept was examined in detail.

(d) International Child Abduction by a Parent or Guardian

The implementation and workings of The Hague Convention on the International Abduction of Children by a Parent or Child received attention at the Singapore Meeting of Senior Officials. This item provides an opportunity for delegations briefly to review the present position. Paper LMM(93)6 - Progress in Dealing with International Child Abduction, by Professor J D McClean - is before the Meeting.

AGENDA ITEM FOUR

MUTUAL ASSISTANCE AS BETWEEN BUSINESS REGULATORY AGENCIES

This item gives the Meeting an opportunity to consider the adoption of an outline framework for cooperation as between Commonwealth business regulatory agencies. The proposal was discussed by Senior Officials at Singapore and a draft, the product of consultation, has been widely circulated. Not all Law Ministers have responsibilities in this area, but the consensus appears to be that a statement may be beneficial in view of the close inter-relationship between such assistance and the provision of formal mutual legal assistance under the Harare Scheme.

Papers before the Meeting:-

LMM(93)22 Mutual Assistance Between Business Regulatory Agencies - a memorandum by the Commonwealth Secretariat

LMM(93)23 Proposed Statement on Mutual Assistance Between Business Regulatory Agencies, prepared by the Commonwealth Secretariat

LMM(93)45 Mutual Assistance Between Business Regulatory Agencies: The International Dimension - a paper by the Commonwealth Secretariat (W. Gilmore)

AGENDA ITEM FIVE

RECENT DEVELOPMENTS IN EXTRADITION

While Commonwealth extradition arrangements per se will have been discussed under Draft Agenda Item Three, this item is proposed in the light of recent developments in international extradition practice, and in particular a decision of the United States' Supreme Court in *United States v Alvarez-Machain* (noted at [1992] Commonwealth Law Bulletin 1081). The Meeting may wish to consider its reaction to suggestions that formal extradition arrangements do not prohibit international abductions in contravention

of international law and may wish to affirm the Rule of Law as paramount in this, as in other areas.

Papers before the Meeting:-

LMM(93)12 State-sponsored abduction - paper by Dr William Gilmore

LMM(93)48 Recent Developments in Extradition - a paper prepared by the Government of Canada

AGENDA ITEM SIX

DISTANCE TRAINING FOR LEGISLATIVE DRAFTERS

This item will enable the Meeting to be briefed in detail on the programme being developed by the Secretariat jointly with the Commonwealth of Learning and for delegations to feed in their own insights and inputs. Paper LMM(93)5 by the Commonwealth of Learning is before the Meeting and the Secretariat will have the pilot modules available for inspection by delegations throughout the week.

Other papers before the meeting:-

LMM(93)30 An Appraisal of the Pilot Module - Memorandum by the Commonwealth Secretariat

LMM(93)31 Proposals from the course developers

LMM(93)32 Report on the evaluation of the pilot module

AGENDA ITEM SEVEN

THE PROCESSING OF LEGISLATION

Many law officers share responsibility for the preparation of legislation and the Meeting has, in the past, discussed such matters as drafting in plain English. It is proposed that rather than revisit the discussions of previous Meetings, delegations will wish to examine ways (rather than the words and their style) in which legislation is prepared so as to ensure that clearly presented and intelligible Bills are placed before parliament - Bills that require a minimum of amendment stemming from inadequacies in the involvement of the wider public in their formulation and that are handled effectively and expeditiously once they are in parliament. In sharing experience as to how these various aspects are handled, Ministers may wish to consider such matters as the process of consultation both within and outside government, the involvement of "outsiders" in relevant aspects of the process, and relevant parliamentary procedures. To assist in the discussion, Sir William Dale has prepared Paper LMM(93)19.

AGENDA ITEM EIGHT

PROPOSED GUIDELINES FOR THE TREATMENT OF PRISONERS WITHIN THE COMMONWEALTH

This short item emanates from the 1992 Conference of Commonwealth Correctional Administrators, which has sought the guidance of Law Ministers as to the desirability of the Conference enumerating guidelines for the treatment of prisoners in Commonwealth penal

institutions. These are not seen as an additional set of "rules" but as a means of carrying forward the Harare objectives in the context of the treatment of prisoners, and in lending impetus to a creative and positive response to the criticism occasionally levelled by human rights organisations. The Guidelines are in paper LMM(93)9.

AGENDA ITEM NINE

ENHANCING THE PRACTICAL UTILITY OF FUTURE LAW MINISTERS' MEETINGS

This Item was given preliminary consideration by Senior Officials at Singapore and their conclusions for discussion by the Meeting are contained in Paper LMM(93)13. [Note: The title of this paper as distributed is, however, incorrect and should in fact read "Final Report of Senior Officials on enhancing the utility and format of future Law Ministers' Meetings"].

The item provides an opportunity for delegates to provide guidance as to how this forum might be rendered even more productive and effective than it has already proved to be, and ensure that full advantage is taken of its potential to maximise intra-Commonwealth legal cooperation and consultation of a highly practical kind. In view of the growing complexities of modern life and the need for lawyers to be able to deal effectively with problems involving other disciplines, there is also a suggestion that in future Law Ministers' Meetings there should be at least one item which involves multi-disciplinary dimensions.

Other papers before the Meeting:-

LMM(93)18 Paper by Dileep Kamat on International Law Project on Treaty Succession

LMM(93)18A International Treaty Succession - a memorandum by the Commonwealth Secretariat

LMM(93)34 Small Jurisdictions and International Law Problems and Prospects: A Preliminary enquiry, by Mr L D Keke, Presidential Counsel, Nauru (which notably contains a section on treaty succession)

LMM(93)39 Implementation of multilateral conventions by national legislation - a paper by Sir Kenneth Keith, President of the New Zealand Law Commission

LMM(93)40 The Law, Interdisciplinarity and the Environment, by Sir Kenneth Stuart

AGENDA ITEM TEN

REVIEW OF THE ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

This regular item on the agenda for Law Ministers provides an opportunity for Ministers to react as both "suppliers" and "consumers" of some of the services the Secretariat provides, including technical assistance funded through the Commonwealth Fund for Technical Assistance.

Papers before the Meeting:-

LMM(93)4 Review of Activities of the Commonwealth Secretariat in the legal field

LMM(93)43 Review of Activities of the Commonwealth Human Rights Unit

LMM(93)20 Report of the preliminary meeting of Solicitors General, Cyprus 1993, with memorandum by the Commonwealth Secretariat

AGENDA ITEM ELEVEN

FOLLOW-UP TO CHOGM AND ANY OTHER BUSINESS

Ministers have before them paper number LMM(93)42, a memorandum by the Commonwealth Secretariat on the Commonwealth Heads of Government Meeting at Limassol, Cyprus 21-25 October 1993. Heads of Government specifically referred some matters to Law Ministers for consideration which do not fall under the heads of the draft agenda for the present Meeting circulated before the conclusion of CHOGM. These areas are highlighted in the Commonwealth Secretariat's memorandum and the present agenda item enables Ministers to consider them and to take appropriate steps.

Also before the Meeting:-

LMM(93)44 Illustrative Model Legislation for the Incorporation of the Chemical Weapons Convention into Domestic Law - prepared by the Commonwealth Secretariat

Consideration of the Communique.

Venue of next Meeting

CLOSE

Legislative Drafting Policy and Legislative Development

A Distance Learning Programme in Legislative Drafting

A Paper by the Commonwealth of Learning

Good governance requires good laws and good laws demand good drafting which in turn requires good drafters. The joint Commonwealth Secretariat/Commonwealth of Learning initiative to develop independent study materials for trainee drafters is designed to address this important Commonwealth-wide need directly and in a cost effective way.

In May 1991, Jeremy Pope, Director of the Secretariat's Legal Division pointed out in a letter to the President of COL, that Commonwealth countries "almost without exception, suffer from a shortage of able and capable lawyers to draft their legislation, both statute and subsidiary". Legislative drafting has had little, if any, place in undergraduate law degree curricula or in professional training, and in many jurisdictions, new recruits to government drafting offices have been expected to learn the technical and legal skills on the job with variable levels of support from their more experienced colleagues.

The established way of addressing this problem has been to send trainees to residential courses. In 1986 CFTC funded training was centred on the University of the West Indies (Cave Hill) where Certificate (5 months) Diploma (7 months) and Masters (1 year) courses have been conducted. By the end of the 1991 academic year some 384 drafters had been trained under the Commonwealth legislative drafting programme since 1974 whilst other well established training courses have been provided in London by the Royal Institute of Public Administration and on the Government Legal Officers Course at the Institute of Advanced Legal Studies, and in Canada at the University of Ottawa (Slade 1992).

Nevertheless, residential courses have been consistently oversubscribed and are costly, they have taken trainees away from jurisdictions where their services were urgently needed and ironically "it tends to be the larger countries (arguably those of lesser need) which are able to release staff to attend" (Pope 1991). For all these reasons it seemed appropriate to offer additional opportunities to enable drafters to receive their training in their home locations rather than providing only for them to travel away to study. Although those requiring training are scattered through many Commonwealth countries, there is a Common Law base linking them. It is, therefore, practical to plan a generic course designed specifically for independent study in the jurisdiction where the

drafting will be undertaken, with provision for local mentor or group support where these can be made available.

Early in 1992 Comsec Legal Division and COL decided jointly to support development of a distance education training course and, as a first step, an expert group comprising the major current trainers was convened to establish a Curriculum and to advise on its implementation. One important criterion was that the course should be accessible to prospective trainees anywhere in the Commonwealth and this effectively determined that print, the medium with which lawyers are in any case most professionally comfortable, would provide the core of the teaching/learning resources. A Report on this Phase of the project was presented by Neroni Slade, Deputy Director of Comsec Legal Division to the meeting of Senior Officials of Commonwealth Law Ministries in Singapore (March/April 1992) and received with enthusiasm. The Officials cautioned against assuming the availability in smaller jurisdictions of trained drafters to provide trainees with professional supervision, thus reinforcing the need for guided independent study at a distance: they also encouraged the use of audio-visual aids insofar as these would not disadvantage the more geographically isolated. These suggestions have led to the incorporation in the course of audiocassettes in which the student is guided through print material in advance, and adoption of a course design which places central emphasis on involving learners in frequent drafting tasks and in self assessed activities and exercises as a matter of routine.

Contracts for the planning and development of the distance training course were established with Professor Keith Patchett (one of the current trainers in legislative drafting) who, as course Coordinator is responsible for the educational structure of the course as a whole and for the legislative drafting content in particular, and with the TDA Consulting Group Ltd. of Kew, England, who provide the specialist instructional and graphic design necessary in the development of a distance education course.

When completed the distance training course will comprise 6 print modules and a course reader with audio support: provision has also been made for the later addition of an optional computer assisted learning module for those with access to the required hardware. A pilot module was successfully field tested in Barbados in July 1993 and at the time of writing is undergoing evalua-

tion and revision to serve as a design prototype for the other modules. The curriculum established by the Project Advisory Group is the approximate equivalent of a 3 month full-time course (in which there are 360-400 study hours, of which some 110 are contact or face to face teaching hours); drafters employed full time and using only their own hours for study can be expected to take a year or more whilst newly appointed lawyers given substantial work release could complete the programme in 3 to 6 months.

The full distance training course is scheduled for completion by the middle of 1994: it can then be made available in hard copy format for individual trainee enrolment, and on disk for other educational applications. In distance education substantial front-end fixed costs are incurred in course design and development; once the materials are completed, these costs are recouped from enrolments. In the present case the fixed costs of course development will amount to approximately £100,000 borne equally as a foundation grant by Comsec through CFTC, and by COL. Estimates of potential demand from trainees in Commonwealth legislative drafting offices indicate a possible 100 enrolments per year for 4-5 years, always provided that the course is endorsed and trainees financially supported by their Governments. In addition interest has already been shown in the course from several Commonwealth institutions of higher education.

It must be recognised, however, that the fixed costs of course design represent only one component in the total cost of the training, especially if the trainees are to receive interactive teaching/learning support. The production and delivery of multiple hard copy print and audio sets, the exchange of an essential minimum number of drafting exercises with a distant tutor and, where possible, also local support tuition all represent variable cost elements which are not susceptible to economies of scale and which may indeed provide some constraint due to their heavy dependence on highly specialised professional skills already in short supply. Provision must also be made for institutional costs of

overall course management, up-dating and development. Best estimates of operational costs at this stage however indicate that the total cost of distance training will amount to approximately £3000-4000, rather less than half the cost of a student attending an overseas residential course.

Consideration is now being given to identifying a central institutional base, and probably also some supporting regional bases, from which the training course can be administered. The central institution, which will have experience in conducting outreach training in legal-related studies, will be responsible for enrolling trainees, delivering course materials and handling the interchange of drafting exercises between students and tutors. It is envisaged that trainees will be able to commence the independent study-based course at any time of the calendar year either when they commence their drafting duties or recognise the need for refresher training, and not have to wait for some fixed starting point in an academic calendar. Whilst it will be a major aim of the course to offer trainees examples of the best standards of legislative writing found in Commonwealth practice, this will be balanced by specifically requiring them to familiarise themselves at all stages with actual drafting practice in their own jurisdiction. The central institution will also advise the Commonwealth Secretariat/Commonwealth of Learning on the award of certificates of satisfactory course completion.

Ministers are respectfully asked to note, and to endorse, this first example of a Commonwealth-wide training course in continuing professional distance education.

References:

- Pope, J., 1991: Letter to President of COL dated 17 May, 1991.
- Slade, N., 1992: Distance Training for Legislative Drafters: A Progress Report for the Meeting of Senior Officials of Commonwealth Law Ministers - Commonwealth Secretariat.

The Legislative Process - A Memorandum for Commonwealth Law Ministers

by Sir William Dale

The Legislative Process

At their Conference in 1977 the Law Ministers had before them a Memorandum from the Commonwealth Secretariat (LMM(77)12 with Annex) summarising the results of an extensive comparative study of legislative methods. The study represented "a search for intelligibility and simplicity in legislation". This search has continued. The intention of the present memorandum is to enable Law Ministers to keep abreast of developments in this field in Commonwealth countries and elsewhere, particularly in regard to the legislative processes. It will be divided into:

1. the Governmental stage in the process;
2. the Parliamentary stage;
3. the saving of legislative time; and
4. the quality of the legislation.

The general demand today is for legislation to be expressed in terms which the ordinary person can understand - meaning terms which the non-lawyer, the "user", can understand. This is reasonable, considering the extent to which Legislatures seek not only to regulate the social and economic life and institutions of a country, and to tax us, but to govern our lives as individuals as well. The demand for intelligibility is made not only by "user" associations such as Consumer Councils, and by Plain English Societies, and the like. As long ago as 1969 the English and Scottish Law Commissions said that a statute should be drafted so that it "can be understood, as readily as its subject matter allows, by all affected by it" (Law Com. No. 21; Scot. Law Com. No. 11). Similar language was used in the New Zealand Law Commission Act of 1985. In 1975 the Renton Committee issued its Report on the Preparation of Legislation (Cmnd. 6053) which was directed to achieving "simplicity and clarity in statute law". The Statute Law Society had already been founded in the United Kingdom with the main object of making statutes "very readily intelligible". And now comes the Report by a Commission appointed by the Hansard Society for Parliamentary Government, to enquire into the legislative process, and "to examine how Government and Parliament produce legislation, and to assess whether the system is in need of overhaul and change" (November 1992, Hansard Society, Sheffield Street, London WC2A 2EX).

Part 1 - The Governmental Stage

It seems fairly obvious that, for laws to be readily understood by laymen as well as lawyers, it is desirable for

laymen to have a say in the drafting of them. The prevailing practice in Commonwealth countries, largely common law countries, is for the Government's draftsmen, highly professionalised lawyers, to draft the Bills; and, in most countries, for the Government then to send them, with little or no intermediate processing, to Parliament for debate and enactment. In civil law countries, on the other hand, laymen usually have a hand in the drafting from the start, sometimes even they are the originating draftsmen. Amongst the factors which make a legislative product simpler and clearer in the civil law systems than in the common law systems, the lay input into the initial drafting is perhaps the most cogent of all.

This has been recognised in Canada, where there is a legislative editing unit in the Federal Department of Justice, consisting of specialists in English and French, not lawyers. (Canada is fortunate, from the point of view of obtaining plainer legislation, in having two working languages, rendering necessary a disciplined thinking which is bound to influence exactness of expression and clarity. In the Federal Department of Justice, for example, all Bills are drafted separately in English and French, and the texts then collated. They are not translated). (For a Canadian account, see *Statute Law Review*, Vol. 12, No. 1, p.3).

Where, as in our common law systems in general, the drafting is done by highly specialised lawyers, a lay influence might be brought to bear either before the draft Bill has left the draftsmen's office (as has been done in Canada), or, subsequently, by some body independent of the draftsmen (as in the civil law systems - see below). The Hansard Commission does not give express consideration to the place in the drafting process which might be taken by laymen. But it concluded (para.192) that "the somewhat Olympian position" of the professional draftsmen might "pose a problem", and that to deal with the "danger of complacency" it might be "a good thing for someone to look critically at drafting ... to keep an eye on Parliamentary Counsel". It turned down the "radical idea" (put forward in para.23 (a) of the Annex to LMM(77)12 written by the writer of the present Memorandum) that there should be a body, such as a Law Commission, to scrutinise draft Bills, and it merely recommended some closer attention by the Legislation Committee of the Cabinet. Otherwise it fell back on the recommendation that ministerial responsibility for the work of the drafting office, and "for oversight of drafting methods employed, and scrutiny of drafting of all Government Bills" should be assigned to the Attorney General.

But that would be no new thing for Commonwealth Governments in general, since the usual practice is for draftsmen to be under the control of the Attorney General or Minister of Justice. In any case it may be doubted, given the extent of the responsibilities normally carried by an Attorney General (which of course relate to *legal* questions), whether this recommendation will fall on fertile ground, or take the matter far enough. Unless there is a body, independent of the draftsmen, at least of sufficient authority to make an impact, experience shows that the draftsmen will have their way. In most civil law countries a draft Bill is referred for scrutiny to a body such as the Conseil d'Etat in France and many other civil law countries, or to a body such as the Law Council (or "Council on Legislation") in the Nordic countries. These bodies do more than seek to clarify the wording of a Bill; besides ensuring that the text is clear, precise and concise, they try to make sure that a Bill is based on sound legal principles and procedures. They function both as a kind of brake on the administrative excesses of a Government Department, and as a purifier of legal issues. It is important to bear in mind that these bodies, though quasi-independent (which is their merit as critics) form part of the Government machinery; and the Government may decline to accept their advice (see, for France, Bernard Ducamin in *Preparation and Accessibility of the Written Law in France*, a report of the proceedings of the Statute Law Society's Conference at Fontevraud in September 1991, obtainable from the Secretary to the Society, c/o Fox & Gibbons, 2 Old Burlington Street, London W1X 2QA.) The Hansard Society itself emphasised "the Government's prime responsibility to seek to get a Bill right while the Bill is being prepared and drafted, not leaving it to be done by some substantial amendments of its own [*a fortiori* amendments by others] when the Bill is before Parliament".

Part 2 - The Parliamentary Stage

When a Bill arrives at the Parliamentary stage, the procedure may be, roughly speaking, either to refer it to a Parliamentary Committee for detailed consideration before it is debated in the House, or it may go direct to the House for debate. The former course is characteristic of the civil law countries, the latter of countries adopting United Kingdom Parliamentary procedures as a model. But recently Commonwealth countries have begun to recognise the merits of the Committee procedure, and to make some use of it. In Canada, a Bill is often referred by the Senate to a Standing Committee, which suggests amendments, before Second Reading, and provision has been made for a similar procedure in the House of Commons. These Committees may receive briefs and hear witnesses, including ministers, officials, interest groups and individuals. In the Australian Senate there is a Standing Committee for the scrutiny of Bills, and it examines all Bills. The House of Represent-

atives has made provision for the establishment of Select Committees for the purpose, but the procedure is not yet used. In New Zealand (there is only one Chamber, the House of Representatives) there has been for some years a growing tendency to refer Bills to Select Committees, and a Standing Order now provides for the referral of every Government Bill, which is not a Money Bill, or of urgency, to a Select Committee after First Reading. The Committee usually invites submissions from the public, and there are oral hearings (attended by the draftsmen) at which witnesses are questioned. (See, for an account of The New Zealand Experience, *Statute Law Review*, Vol. 12, No. 3, 1991, p.165). In India, Bills are frequently referred to Joint Committees of both Houses of Parliament for detailed examination. Further, there was introduced in March of this year a system of Standing Committees covering the functions of all Government Departments, and Bills will be referred to them as appropriate.

In the United Kingdom a House of Lords Committee (the "Jellicoe Committee") on The Committee Work of the House has reported (HL 35-1 of 1991-92) in favour of the consideration of "a limited amount of legislation off the floor [of the House] to improve the quality of legislation and save some time on the floor". The Hansard Commission has now gone much further than this. It came to the following "broad judgments" (para. 316):

- Parliament could play a greater part by pre-legislative inquiry in the preparation of legislation.
- Both Houses could make better use of inquiry techniques, as used in select committees, to establish direct links with outside experts and affected interests, to get information and to probe the details of legislation.
- In debates on Bills, particularly in committee, there has been too much emphasis on policy issues and inadequate attention to the practicality of what is proposed.

The principal recommendation is that "in most cases the more complex Bills - even if controversial - should be referred to a select committee immediately after their presentation to the House, i.e. to "first reading committees" (para. 339). "The conclusion that the time has come to make it possible to receive direct evidence on Bills in committee flows overwhelmingly from our own evidence". (para. 348).

Regarding France, and other countries both inside and outside the Commonwealth, a list of the considerable material supplied to the Commission by the Legislatures is contained in Appendix 3 of its Report (page 364). In France, the draft is considered in detail by one of the permanent committees of the Assembly, or of the Senate, as the case may be. There are six of these committees in either House, and every member of the House finds a place on one of them, according to interest and

political grouping. There are committees for finance, foreign affairs, laws, defence, cultural affairs and social affairs. The committee appoints a rapporteur, who consults the Ministry and outside bodies concerned with the subject, and suggests amendments. The committee then discusses the rapporteur's report and the proposed amendments, and, acting through its rapporteur, issues a report covering the amended draft. The report is printed and published. It is not until then that the House debates the Bill, in the form recommended by its committee, and on the basis of the latter's report.

In Germany the processes in the Federal Parliament, and the procedure in the committees, are similar to that in France. The members of the committees sit round a table, and discuss with Ministers and civil servants. Members of Parliament tend to concentrate their efforts in regard to Bills on the committee work. In Sweden, too, Bills must be referred to specialising committees of the Riksdag, of which there are 16, corresponding more or less with the Ministries. Similar procedures to that of France exist in Italy, Belgium and the Netherlands.

Part 3 - Saving of Legislative Time

The sittings of a legislative body take up a large proportion of the working time of its members, many or most of whom have other demanding occupations to follow, or interests to pursue. Many members will have long distances to travel in order to attend its sittings. Pressure on the time of the members will vary from one country to another, but it is evident that the need is acute in some countries. If a large body has much, perhaps too much, work to get through, an obvious remedy is to devolve some of it on committees, which will examine the problems in detail, sift the material, and propose solutions to the main body. Such a procedure is mere commonsense, an example of elementary organisation of business, generally adopted by bodies outside Parliament, and by the Parliaments of the civil law countries. It will result in better legislation, and save the time of members of a legislature as a whole. *The Economist* of 5 March 1977 reported that, while the House of Commons sat for 1,528 hours during the year, the German Bundestag sat on an average for 313 hours, and the French Assembly for 510. These figures must relate to the total time of the sittings, and therefore to much besides legislative business. (The Hansard Commission reported that nearly one third of the time of the House of Commons was occupied by legislative business, including the consideration of secondary legislation - para. 309). It would have been useful to be able to obtain figures comparing the time spent on legislation by the full House with that spent by (adopting the Hansard Commission's phrase) "First reading committees", in the legislatures which have them. This has not been possible, however, and a few statistics only can be given.

(a) *The Inter-Parliamentary Union* (place du Petit-Saconnex, B.P. 438, 1211 Geneva 19) compiled in 1986 a

table showing separately the number of Bills introduced into, and passed by, the Parliaments of 83 countries during the 5 years 1978-1982 (including private members' Bills, but these are omitted for present purposes). The statistics are not easy to understand. In a number of countries more legislation was passed than was introduced; and in a few countries no legislation was introduced at all, but nevertheless, it was passed. Neither is it clear whether the figures give the number of Bills passed each year, or the total number passed in the five years; nor does the table refer to committee work.

(b) *France* - During the years 1978-1992 the French National Assembly sat for an average period of 522 hours in a year, which is very near to the *Economist's* figure. For the year 1992 alone the figure given for the time taken on legislative debates is higher than the average - 593 hours - and this is to be compared with the total time taken in the six Standing Committees of 479 hours, making a total of 1072 hours. The French Legislature enacts much less legislation than does the United Kingdom Parliament (e.g. for the year 1984 about 213,000 words as against the 978,520 words contributed to the United Kingdom statute book). It is clear therefore that the French give very careful consideration to the terms of their legislation. (Consolidation Acts are included in the United Kingdom figure).

(c) *Germany* - In the year 1974 the German Bundestag (sitting for 15 hours a week) passed 99 Acts, and in 1975 it passed 79 Acts, as against 58 and 83 by the United Kingdom Parliament. (Later figures for Germany are 73 Acts in 1991, and 116 in 1992). The work done by the Committees in Germany has already been mentioned. The time taken as between the full House and the committees varies in accordance with the nature of the Bill. The deliberations of a committee may last only a few minutes, particularly in the case of uncontroversial Bills; but several hours, or several meetings, may be needed for some Bills. In the full House, a first reading and then a second reading can each last between 30 minutes and several hours, depending on the agreement reached by the steering body. In the case of politically uncontroversial Bills, the first and second readings may take place without debate. As a rule a third reading directly follows the second one, and comprises only the final vote and no debate. During the years 1987-1990 the total calendar time between the tabling and the passage of a Bill in the Bundestag was 150 days on average.

But one scarcely needs statistics to show that the time of the full House of Parliament will be saved if there is preliminary work by an appropriate committee. The Hansard Commission says "Prior examination by a first reading committee could reduce the need for long second reading debates in many cases. We also believe that Second Reading Committees could more frequently be used for Bills on which a division is not expected"

(para.343). This is, of course, not the same thing as saying that the *total* time spent by a legislature on a Bill will be reduced. It may well be longer (as in France), and one hopes that it often will be longer, and result in better legislation.

New Zealand experience shows that "the [total] time taken to pass the Bill is usually increased" and there may be some minor disadvantages in the process, but "Select Committees are a crucial bastion of democracy in our legislative process" (Statute Law review, cited in para. 6 above). In New Zealand the whole house consists of 97 members, while the size of the committees apparently varies between 33 members for the largest, and 6 for the smallest.

It hardly needs to be said that there are other ways of saving the time of a legislature besides the Committee system. One possible way is to limit, by the Constitution, the subjects on which it may legislate. This is, of course, one of the results flowing from a federal system of government. But it may also happen in a unitary state, as in France. Article 34 of the French Constitution lists two categories of subjects: the first consisting of subjects such as (for example) civil rights and fundamental guarantees, nationality, criminal law and procedure, electoral law, and nationalisation, on which the legislature must legislate in detail; the second consisting of subjects such as (for example) education, civil and commercial obligations, and social security, regarding which Parliament is to determine the fundamental principles only. Matters thus outside the domain of Parliament are (a) subjects not mentioned at all in Article 34 (for example, economic matters, customs, prices and the social field in general), and (b) matters of detail on subjects within the second category above. These are (by Article 37) to be legislated for by decree or regulation made by the Executive. Any demarcation difficulties which may arise out of this separation of powers may be referred to the Constitutional Council, which can rule on the validity of a proposed Bill before enactment by Parliament.

This is not of course an example of delegated legislation, but of a division of power made by the Constitution. In the field of delegated, or secondary, legislation proper the Hansard Commission has much to say (paras. 364 to 387); but the subject lies outside the scope of this Memorandum.

Part 4 - The quality of the Legislation

A highly placed judge recently told the Statute Law Society that the difficulty he often had in construing a provision of an Act of Parliament was to know what it was "getting at": even to a judge, the meaning was obscure. Lord Donaldson, when Master of the Rolls, said in *Merkur Island Shipping Corporation v Laughton* ([1983] 2 W.L.R.45, 778 (H.L.)): "When formulating policy, ministers, of whatever political persuasion,

should at all times be asking themselves and asking parliamentary counsel: is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed?" His view was endorsed by the House of Lords. The Renton Committee recommended that "encouragement should be given to the use of statements of principle, that is to say, the formulation of broad general rules". The Hansard Commission says "Ministers, civil servants and in particular Parliamentary Counsel should do all they can to eliminate unnecessary and complicated detail in the Bills for which they are responsible" (para. 233). It is a question here of the legislative style. A draft Bill has its origin in a state of facts which may have been long in evolving, perhaps of considerable intricacy, and it is the fruit of a long process of development and consideration: a social or economic mischief becoming acute, cognisance of it by a Government Department, a flow of papers, minutes, meetings within the Department, the injection of a political view, comprehensive instructions to the draftsman, more meetings at which the Department will be nervously anxious that every little point it can think of is covered. And at the end of it all the draftsman must produce a legislative instrument, adequate in law to convince the lawyers, to be acceptable to the legislature, and enforceable by the courts. But although his draft may be quite intelligible to himself, and perhaps to some of those involved in the proceedings up to then, and even to a few members of Parliament interested in the subject, the draftsman should remember that the members of the public have not been a party to these proceedings, or even listening to them. They do not find the Act at all "readily intelligible". Here a lay view would surely help the draftsman towards achieving a broader legislative style, nearer to that of the civil law countries, but without loss of precision (remembering that precision is not the same thing as particularity). A simplification of the "common law" legislative style is needed.

In the Annex are set out, by way of illustration, extracts from legislation, examples 1 and 2 from the United Kingdom, example 3 from Austria. The "Free Redrafts" in 1 and 2 represent attempts by the writer to arrive at a style acceptable as legislatively sound, but less complex than the current style. The Courses in Legislative Drafting directed by him at the Institute of Advanced Legal Studies take the participants through a course of training in the elements of drafting in the common law style, but the students have before them the aim of clearer legislation in the 'Free Redraft' style.

Plain English versions of the Timeshare Act have been drafted by Mr. Martin Cutts, of 'Words at Work' (69 Bings Road, Whaley Bridge, Stockport, Cheshire SK12 7ND). They will be considered, with observations by the Parliamentary Draftsman, in a forthcoming issue of

ANNEX

Example 1

Guard Dogs Act 1975, s. 1(1):

1(1) A person shall not use or permit the use of a guard dog at any premises unless a person ("the handler") who is capable of controlling the dog is present on the premises and the dog is under the control of the handler at all times when it is being so used except while it is secured so that it is not at liberty to go freely about the premises.

There is an obvious ambiguity. If it had been spotted before the Act has been passed the Parliamentary draftsman would have redrafted as follows, depending on the intention.

REDRAFT A

- 1(1) A person shall not use or permit the use of a guard dog at any premises unless -
- (a) a person ("the handler") who is capable of controlling the dog is present on the premises; and
 - (b) except while it is secured so that it is not at liberty to go freely about the premises, the dog is under the control of the handler at all times when it is being so used.

REDRAFT B

- 1(1) A person shall not use or permit the use of a guard dog at any premises unless at any time when it is being so used -
- (a) a person ("the handler") who is capable of controlling the dog is present on the premises and has it under his control; or
 - (b) the dog is secured so that it is not at liberty to go freely about the premises.

Assuming redraft B expresses the intention, the following free redraft is suggested:

A person shall not use or permit the use of a guard dog at any premises unless it is tied up or under the control of a handler.

(See Timeshare Act 1992 insert)

FREE REDRAFT

TIMESHARE ACT

Timeshare Agreements

1. A person entering into an agreement to take a timeshare right (a "timeshare agreement") may cancel the agreement in the circumstances stated in this Act.

A "timeshare right" is a right to use living accommodation, wholly or partly for leisure purposes, for intermittent periods of not more than a month over a period of at least three years, under arrangements which provide for other persons participating in them to have similar rights. The accommodation may be in the United Kingdom or elsewhere.

A person taking or offering to take the accommodation is a "timesharer", and a person providing or offering to provide it the "supplier".

Notice of right to cancel timeshare agreement

2. (1) A person must not as supplier, acting in the course of a business, enter into a timeshare agreement with a timesharer not acting in the course of a business, unless the timesharer has received a document setting out the terms or substance of the agreement, and a notice of his right to cancel it. The notice must conform with the requirements in Schedule 1.

(2) A person contravening subsection (1) is guilty

Example 3

The following is an example of an Act of a civil law country, Austria, first six sections only, reprinted from *Commercial Laws of Europe*, by kind permission of the European Law Centre in London (South Quay Plaza, 183 Marsh Wall, London E14 9FT).

Federal Act of 21 January 1998 on liability for a defective production (Product Liability Act)

The Nationalrat has passed the following Act:

Liability

Section 1

(1) If as a result of a defect in a product a person is killed or suffers personal injury or his health is damaged or if an item of corporeal property other than that product is damaged, then

1. the enterprise which produced it and put it into circulation

2. the domestic enterprise which imported it into Austria for the purpose of marketing it and put it into circulation here shall be liable to make good the damage.

(2) If the producer or, in the case of imported products, the importer (subsection (1)2) cannot be identified then every enterprise which has put the product into circulation shall be liable in accordance with subsection (1)

unless it informs the injured person within a reasonable time of the identity of the producer or, in the case of imports, of the importer or of the person who supplied it with the product.

Section 2

In the case of damage to an item of property the obligation to indemnify applies only to such part thereof as exceeds 5,000 schillings.

Producer

Section 3

The producer (section 1(1)1) is anyone who has produced the finished product, any raw material or a component part, and any person who, by putting his name, trade mark or other distinguishing feature on the product, holds himself out as its producer.

Product

Section 4

A product is any movable corporeal object, even though incorporated into another movable object or into immovable property, and includes energy. It does not include any natural produce of agriculture or forestry (that is, of the soil, stock-farming or fisheries) or game,

so long as they have not undergone any initial processing.

Defects

Section 5

(1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

1. the presentation of the product;
2. the use to which it could reasonably be expected that the product would be put;
3. the time when the product was put into circulation

(2) A product shall not be considered defective merely for the reason that a better product is subsequently put into circulation.

Putting into circulation

Section 6

A product is put into circulation as soon as an enterprise, no matter in what capacity, has transferred it to another person so as to put it at his disposal or give him the use thereof. Despatch to a purchaser is sufficient.

Timeshare Act 1992

1992 CHAPTER 35

An Act to provide for rights to cancel certain agreements about
timeshare accommodation. [16th March 1992]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) In this Act—

Application of
Act.

- (a) “timeshare accommodation” means any living accommodation, in the United Kingdom or elsewhere, used or intended to be used, wholly or partly, for leisure purposes by a class of persons (referred to below in this section as “timeshare users”) all of whom have rights to use, or participate in arrangements under which they may use, that accommodation, or accommodation within a pool of accommodation to which that accommodation belongs, for intermittent periods of short duration, and
- (b) “timeshare rights” means rights by virtue of which a person becomes or will become a timeshare user, being rights exercisable during a period of not less than three years.

(2) For the purposes of subsection (1)(a) above—

- (a) “accommodation” means accommodation in a building or in a caravan (as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960), and 1960 c. 62.
- (b) a period of not more than one month, or such other period as may be prescribed, is a period of short duration.

(3) Subsection (1)(b) above does not apply to a person's rights—

- (a) as the owner of any shares or securities,
- (b) under a contract of employment (as defined in section 153 of the Employment Protection (Consolidation) Act 1978) or a policy of insurance, or 1978 c. 44.
- (c) by virtue of his taking part in a collective investment scheme (as defined in section 75 of the Financial Services Act 1986), 1986 c. 60.

or to such rights as may be prescribed.

(4) In this Act “timeshare agreement” means, subject to subsection (6) below, an agreement under which timeshare rights are conferred or purport to be conferred on any person and in this Act, in relation to a timeshare agreement—

- (a) references to the offeree are to the person on whom timeshare rights are conferred, or purport to be conferred, and
- (b) references to the offeror are to the other party to the agreement, and, in relation to any time before the agreement is entered into, references in this Act to the offeree or the offeror are to the persons who become the offeree and offeror when it is entered into.

Obligation to give notice of right to cancel timeshare agreement.

2.—(1) A person must not in the course of a business enter into a timeshare agreement to which this Act applies as offeror unless the offeree has received, together with a document setting out the terms of the agreement or the substance of those terms, notice of his right to cancel the agreement.

(2) A notice under this section must state—

- (a) that the offeree is entitled to give notice of cancellation of the agreement to the offeror at any time on or before the date specified in the notice, being a day falling not less than fourteen days after the day on which the agreement is entered into, and
- (b) that if the offeree gives such a notice to the offeror on or before that date he will have no further rights or obligations under the agreement, but will have the right to recover any sums paid under or in contemplation of the agreement.

(3) A person who contravenes this section is guilty of an offence and liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum, and
- (b) on conviction on indictment, to a fine.

does

4.—(1) Section 2 of this Act ~~not~~ apply where, in entering into the agreement, the offeree is acting in the course of a business.

Provisions supplementary to sections 2 and 3.

(2) A notice under section 2 must be accompanied by a blank notice of cancellation and any notice under section 2 of this Act or blank notice of cancellation must—

- (a) be in such form as may be prescribed, and
- (b) comply with such requirements (whether as to type, size, colour or disposition of lettering, quality or colour of paper, or otherwise) as may be prescribed for securing that the notice is prominent and easily legible.

(3) An agreement is not invalidated by reason of a contravention of section 2.

Commonwealth Distance Training Course in Legislative Drafting: An Appraisal of the Pilot Module

A Memorandum by the Commonwealth Secretariat

1. For the information of Ministers, attached and entitled "Proposals From the Course Developers" is an analysis of the evaluation of the pilot module for the Commonwealth Distance Training Course in Legislative Drafting, prepared by the course developers after the module had been field tested at the training course presently under way in Barbados. The conclusions of the developers were carefully considered and endorsed by the Advisory Group when it met by tele-conference on 29 September 1993. Also attached is the evaluation itself.
2. The documents are distributed to governments in view of the keen interest in the undertaking expressed by Senior Officials when they met in Singapore last year. It is also important that the course enjoy the confidence and respect of Law Ministers, as it has potential not only for underpinning any national arrangements for training but also for reaching the level of local government - an area of drafting need which the Commonwealth has not yet had the resources to attempt to reach.
3. It is hoped that the finalised course will attract the support of Law Ministers and that, where appropriate, some recognition (in the form of salary increments or otherwise) will be extended to those who complete it successfully. The concept involves not the mere completion of a set course, but completion to an assessed and monitored international standard and successful completion will be marked by an appropriate award.
4. It is as yet too soon to say how the final course will be "marketed". Clearly there will be a continuing role for Commonwealth funding, but it is the expectation of the partners involved in the course's development that other institutions (e.g. regional developments banks, the World Bank, UNDP and others) will be prepared to fund "scholarships" for named individuals taking part in the course. There will be a host institution selected in open competition which will handle the course in the first instance, with the expectation being that once the bugs have been worked out of the operation it will lend itself to being placed in several host institutions, and in all regions of the Commonwealth. The hope is that a diversity of funding sources will render the course self-supporting. The expectation is that the fees involved are likely to be only about 15 per cent of the cost of a six months' face-to-face course.
5. Once the course is successfully up and running, consideration will be given in the light of experience to its being extended to cover additional drafting areas and at higher attainment levels. The possibility of materials being developed for computer-assisted drafting (which in a few years' time will be available to a number of member countries) will be kept under consideration. Naturally, further follow-up action will depend to a certain extent on the level of take up of the initial course as well as the availability of further development funding.

*Legal Division
Marlborough House
London SW1
October 1993*

Commonwealth Distance Training Course in Legislative Drafting: Proposals from the Course Developers

INTRODUCTION

1. This paper sets out the conclusions and proposals of the Course Developers (Professor Keith Patchett and John Hookway of TDA Consulting Group Ltd) arising from their review of the questions raised by the testing of the pilot module of the Distance Training Course in Barbados in July. (These questions are set out at pages 23-27 of the report on the Evaluation of the Pilot Module) [LMM(93)32]. The paper is designed to provide a basis for the discussions of the Advisory Group and is arranged to follow the order of the meeting Agenda.

I. COURSE CONTENT

Soundness of overall approach

2. The pilot testing gives support for the way in which the topics are covered and presented, for the integration of activities and exercises with the course work and for the use of Drafting Projects. We conclude that, in its essentials, the approach adopted provides an acceptable balance between the theory and practice and is capable of providing trainees with the basic knowledge and skills in an acceptable way of learning.

Coverage of topics selected

3. The pilot responses support the conclusion that the coverage and treatment of the topics studied were of an acceptable quality, depth and length. If these topics are to be studied in accordance with the general course approach, there is little room for substantial reduction in coverage or length. A number of improvements in detail and presentation are possible, and are to be looked for as a result of the content review to be undertaken with the help of another subject specialist, Roger Rose.

Level of difficulty

4. The module did present difficulties for those new to the subject and was thought likely to do so by those with some background in the subject. The latter group appear not to have been discouraged by the demands the pilot made upon them.

5. In assessing the degree of difficulty, it must be noted that the pilot materials were drawn from what are likely to be the middle sections of the full course and that the newcomers, none of whom have yet qualified as lawyers, had undertaken any foundation work in the subject, of the kind that will be given in the early modules. The pilot supports the view that materials such as these can be mastered by persons with full legal training if sufficient time is allowed.

6. We conclude, therefore, that those coming new to the subject should be able to undertake a course using materials of this level of difficulty, provided that:

- the first modules enable the trainees to acquire a solid understanding of the foundations of the topic and to become familiar with basic concepts and techniques;- sufficient study time is provided for.

Length of modules

7. The testing suggests that the pilot module was considerably longer than a single course module as conceived in the original planning. That called for 6 modules each requiring some 60 study hours (the equivalent of 15 contact hours and 45 hours of personal study). The full requirements of the pilot module cannot be met in the time.

8. Although some of the more experienced participants claimed to have completed the module in 60 hours, several took longer or did not finish. Some of the activities were not undertaken and some of the later Drafting Projects were not given sufficient time. The newcomers had more serious time problems. On the best estimate, the pilot module, in terms of study time, seems to have been the equivalent of 1½ modules.

9. On that calculation, 60 hours of study per module may seem to be a reasonable allowance. But the pilot suggests that this figure should be treated as the minimum time needed. Only the most able and consistently motivated trainee can be expected to achieve the minimum target throughout the programme. If trainees are to pace themselves according to their personal needs and circumstances (one of the reputed advantages of distance learning), we believe that it would be safer to plan a 6 module course on the basis of a range of 60 to 90 hours per module.

Syllabus coverage

10. The syllabus with which we are working has a more restricted coverage than that discussed by the Advisory Group. Principally for resource reasons, it has been limited to 6 modules (rather than 8), with a consequential reduction in topics. (The revised syllabus is set out in the Appendix to this paper).

11. The pilot module was intended to comprise the equivalent of one module in terms of subject coverage (Interpretation: ½ module; Preliminary and Final Provisions: ½ module). In the event, the length of the materials (as well as the necessary study time) suggests

that a full module is required for Preliminary and Final Provisions, a figure, as we have suggested, that cannot be significantly reduced.

12. This experience strongly suggests that other areas of the syllabus may prove in the writing to be longer than originally thought. Until the writing is under way, it is difficult to predict which topics may be affected and by how much. If the present syllabus is treated in the manner of the pilot materials, it is likely to call for more than the planned 6 modules.

13. That outcome would have serious implications for the course:

- trainees would be faced with a daunting set of course materials;
- study time would exceed considerably that considered to be desirable for this course;
- preparation of the materials would require a marked extension of the timetable;
- production costs would be significantly larger.

14. We conclude that a reduction of the syllabus content is necessary if the study time is to be kept within the proposed limits and the same standard of treatment we considered to be appropriate for the pilot module is to be maintained. We propose the following:

(1) deletion of topics

The following topics should be deleted from the syllabus (as set out in the Appendix):

- 37: Financial provisions
- 40: Statutory Authorities and corporations
- 41: Licensing and registration
- 42: Legislation implementing treaties.

These amount to about ½ module.

Once trainees have the basics of the general subject and have acquired a technique for independent study, learning about these topics from eg, Thornton should be within their competence.

(2) shorter treatment

Certain topics of a more descriptive or procedural nature should be capable of shorter treatment. These are to be found in the first parts of the syllabus:

- 1: History of parliamentary drafting
- 2: The function of legislation in the common law tradition
- 3: Legislative drafting in common law systems
- 4: The role and responsibilities of Legislative Counsel
- 5: Types of legislative instruments in common law systems
- 6: The structure of legislative instruments
- 8: Objectives in the preparation of written law

9: The organisation and operation of a Government drafting service

10: The relationship between the client Department and Legislative Counsel

14: Stages in the legislative process

15: The role of Legislative Counsel in relation to the legislative process

Again, it should be possible to confine these to ½ module, especially if greater use is made of published sources as the course material.

15. The consequences of these changes would be:

- the syllabus could be reconstituted into 5 modules;
- the minimum study period would need to be set at 75 hours (with a range of 75- 100 hours per module (ie, the equivalent of 30-40 hours per week of full-time study for each of 12 weeks).

II. COURSE TREATMENT

Use and frequency of Boxes

16. In developing the box technique for the purposes of the pilot module, we tried several other arrangements, on the lines suggested by the pilot testers, before selecting the present approach. We favour the continuation of the present scheme, as:

- the activities and exercises give variety to the mode of study, as well as opportunities for immediate exercises and self-testing and encouragement to acquire knowledge of local practice;
- the trainees should be encouraged to integrate their study of the course text with actually doing and discovering things relevant to their drafting and to their understanding of the preparation of legislation;
- inclusion of the boxes into a different binder from the course book is necessary if the trainee is not to feel overburdened by the apparent size of a section;
- the different objectives of Exercise and Activity Boxes justifies the continued distinction between them;
- the frequency and use of boxes must be dictated by the subject matter and not by any pre-determined requirements.

17. At the same time, we recognise that greater emphasis must be given in the advice offered to the capacity for the individual trainees to organise the study process to suit their own preferences. The loose-leaf format enables them to re-arrange their materials as they wish and to choose when to undertake the work required in the Boxes.

Organisation of materials

18. The suggestions of the trainees on the arrangement of the materials arose, in the main, from the inconvenience they experienced in moving from one binder to another, and from one place to another in the same binder, in the course of the same study period. We are satisfied that to a considerable extent this inconvenience (some of which can be overcome by trainees rearranging the materials for themselves) is outweighed by the advantages. At the same time, we do see difficulties in having the Answer Boxes and Suggested Answers in the same binder as the Exercises and the Projects.

19. We have concluded that the course will be more easily handled if it comprises an Introductory Booklet and 4 Binders.

Introductory Booklet:

This would include the kinds of material at present in the first 15 pages of the Workbook, but expanded to include more detailed guidance on the various features of the course. For example it should include illustrative examples of the activities set, including the Drafting Projects.

Binder 1: Course text

Binder 2: Activity Boxes; Exercise Boxes; Drafting Projects

Binder 3: Answer Boxes; Suggested Answers

Binder 4: Course materials and precedents, locally acquired materials

20. This number of binders would better differentiate the various types of course materials. It would largely eliminate the need to refer to more than one place in the same binder at any one time. Binder 3 would also contain the material to be distributed by external moderators (paragraphs 40-41 below).

Supporting materials

21. The materials provided in the pilot module comprised articles, statutory material specifically developed for the learning (Model Interpretation Act) and general statutory precedents. The pilot participants favoured a general extension of these. We have considered two possibilities:

- (1) a general Course Reader containing a wide range of materials relating to legislative drafting (including judicial precedents) designed principally to supplement the course text;
- (2) a selection of materials tailored for use with the course.

22. We conclude that provision of selected materials is to be preferred. The selection would be designed to provide materials that are directly concerned with the study, either by way of illustration or to provide an alternative perspective, where that is valuable, or for use

in the exercises or projects. The reasons for referring to that material would be made evident in the course text, and trainees would be encouraged to draw ideas from them in elaboration of their current study.

Course textbook

23. We agree with the comments of the participants favouring a course text. There are a number of advantages in stipulating a published textbook as a required source:

- it would provide a second different or confirmatory perspective;
- it would constitute an alternative type of reading of a more conventional kind, to supplement the course text;
- certain matters already appropriately treated in the text book could be relied upon, rather than going over the same ground again in the course text (eg, discursive and descriptive sections);
- where appropriate, the course could build upon or draw on matter in the textbook, thereby providing greater variety of material.

We propose, therefore, that a course text book be prescribed and supplied as one of the course materials.

24. There are three possible texts: Driedger's Composition of Legislation, Thornton's and Vincent Crabbe's new text. In our view, Vincent Crabbe's text best fulfils the requirements for a textbook that complements the course. In comparison with the others, it contains fuller coverage and discussion of general issues in the first part of the syllabus and is more in keeping with the structure of the course. Much that is found in the Driedger and Thornton will be replicated in the course. Although they contain numerous examples, illustrations and references of value to drafters, Vincent Crabbe's book is more accessible and instructive for our purposes. In particular, it is best suited to supporting those parts of the syllabus that we have proposed should be slimmed down.

Audio-materials

25. The evidence of the pilot testing is that audio-materials were a useful and practical support for the Drafting Projects. We conclude, however, that audio support should not be standard for all Projects; it should be used selectively for those which will most benefit from it, which, in most instances, will be the later Projects that do not go for external moderation. It is conceivable that it could be useful in the development of instructions for some of those Projects.

26. In line with the suggestion of the pilot participants, we also conclude that, in principle, use be made of audio materials to support the course work, in addition to those used for the Drafting Projects. There are places in which such material could be useful and would provide

variety in discussion or in explaining or illustrating particular matters.

27. There is, however, provision for only 4 audio tapes. The major expense of these is in the recording process. Experience in preparing tapes for the pilot module suggests that it is unnecessary to use studio recording. An acceptable product can be provided adopting the method used for the pilot; the major expense would lie in editing out minor infelicities. We are satisfied that 4 tapes of 90 minutes each can be prepared without any financial implications.

28. This total of 6 hours of audio-support offers an opportunity for extended use of this type of material. We propose that audio-materials should be used also to support the subject-matter of the course, in cases where it is suited to that purpose.

III. DRAFTING PROJECTS AND ASSESSMENT

Number of Drafting Projects

29. The Drafting Projects are planned to be the central feature of the course. It is intended that:

- the earlier Projects will have a narrower compass and be less demanding than the later;
- they will constitute a series of building blocks, the later Projects depending on, and reinforcing, the earlier;
- they will enable the trainees to develop their skills systematically through a series of Projects which cover more ground to greater depth as they proceed, to the point where they can undertake significant drafting tasks.

30. The trainees' capacity to complete the Projects satisfactorily will be the principal indicator of progress and of the acquisition of the skills to do the job. The Projects must, then, be of a frequency, cover a sufficient area of the course and give experience in a wide enough range of matters, to permit such judgments to be made.

31. The planning assumption was for 20 projects, all of which would be externally reviewed. The pilot contained 6 Drafting Projects of varying length, weight and complexity; each was designed to be self-assessed. If the pilot were to be followed for a course of 6 modules, there would be 36 Drafting Projects (ie, the equivalent of 3 per week on a full-time course). This is unrealistic and not intended. The principal aims of the pilot Projects were to test the suitability of these Projects and to determine the extent to which self-assessment by the trainees is feasible.

32. Our conclusions are that:

- the equivalent of 2 Projects a week over 12 weeks full-time is the maximum that should be set;

- self-assessment is feasible, under certain conditions;
- only a proportion of the Projects should be subjected to self-assessment; the remainder must be reviewed externally.

33. External review is essential to the scheme, as both the trainees and their Governments need the reassurance that the trainees work is to a good standard and reflects acceptable progress on the course. Accordingly, external review becomes more important as a trainee moves through the more testing Projects later in the course.

34. The pilot suggests that such review is not essential for every Project, however desirable it may be. We conclude that external review should be required, as a minimum for the final Project in each Module and for one other in each of the last 3 modules. If the course is limited to 5 modules, external review will take place for a minimum of 8 Projects. The remainder should be designed for self-assessment. Depending on the length and complexity (and this will have to be determined in the course of writing the remaining modules), we recommend that there should be a maximum of 12-16 self-assessed Projects, making a total of 20-24 Drafting Projects for the full Course.

Type of Drafting Projects

35. The pilot testing suggests that the kinds of Drafting Projects used there (which ranged from the short and straightforward to the longer and more demanding) were on the right lines and could be used at the appropriate places in the course. There were, however, shortcomings in the work submitted:

- too frequently the instructions were analysed rather superficially;
- the drafts were not carefully scrutinised for drafting or grammatical errors or by reference to the instructions;
- the trainees did not revise, and may not have adequately reconsidered, their drafts after studying the Suggested Answers and commentaries.

36. We propose that the following procedure be required for Drafting Projects (to be explained in the Introductory Booklet) to meet these shortcomings:

- (1) trainees be asked, as a first stage, in the preparation of their Project to work and write out, after studying the instructions, the topics and questions that will need to be dealt with in their draft. (In the very first Projects, these questions would be given at the end of the instructions to illustrate the technique);
- (2) in the mid-range Projects, trainees be asked to compare and revise their plan of questions and

topics with a check-list provided (with the Suggested Answer materials); in the later Projects, they would be expected to work independently in the finalisation of their legislative plan;

- (3) trainees be asked to produce a first draft of their Project from their revised plan;
- (4) in completing that draft, they would be expected to scrutinise it for errors, using a check list which they have evolved, under guidance, in the course of studying the earlier modules on syntax, style and structure;
- (5) on completion of the first draft, trainees be asked to reconsider it by reference to a series of questions provided (with the Suggested Answer materials);
- (6) the trainees be asked to prepare a revised draft of their Project to take account of matters suggested by their consideration of these questions;
- (7) they be asked to compare this second draft only with the Suggested Answer and the commentary on it.

IV. COURSE SUPPORT

37. The potential value of support from persons outside the course has been recognised by the Advisory Group and the pilot participants. This could take two forms:

- mentor support during the study of the course;
- support through the moderation of Drafting Projects.

Mentor support

38. Although there are advantages to be gained from access to a subject supervisor, on the evidence of the pilot this is not a necessity. The course is capable of being studied independently. We conclude that the course should continue to be written on the premise that this kind of support will not be available.

Moderator support

39. For the Drafting Projects, some external moderation is essential. At the same time, we believe that the course should be written on the assumption that such support may not always be locally available.

40. Where such local support can be provided, it would be open to the trainee to submit all the Drafting projects for moderation to a local assessor. In that case, the Suggested Answers and related materials would be kept by the moderator and be made available to the trainee how and when the moderator thinks appropriate. These materials would provide valuable support to the moderator in knowing what the Course Developers have in mind,

and would reduce the burden of preparation for the moderator.

41. Where no local support is available, trainees would undertake their own review of those Projects which are designated as suitable for self-assessment and would be provided with the Suggested Answers and materials, as for the pilot. They would be required to submit their work on the other Projects to an external moderator, by fax or post. The Suggested Answers and materials for those Projects would be distributed by the external moderator, when the draft is returned with the moderator's comments. (Arrangements for such a system have yet to be formulated by CoL and ComSec).

V. TIMETABLE

42. Experience from the pilot module suggests that preparation of the modules, Drafting Projects and associated materials takes longer than was planned. Unlike many courses of this size, responsibility for course content and the physical production of the final drafts (prior to publication) rests with one person.

43. Although we have recommended some reduction of the syllabus, the overall size of the programme and the approach we have adopted (with modifications now proposed) make this a formidable task. The late beginning of the project and the delayed completion of the piloting, and the course content reviews by Roger Rose also have timetable implications. Completion of the Project cannot be looked for earlier than the second half of 1994.

14 September 1994

APPENDIX

LEGISLATIVE DRAFTING SYLLABUS

Introduction *(full module = 15 hours)*

1. History of parliamentary drafting
2. The function of legislation in the common law tradition
3. Legislative drafting in common law systems
4. The role and responsibilities of Legislative Counsel
5. Types of legislative instruments in common law systems
6. The structure of legislative instruments
7. Judicial interpretation of legislation and its upon legislative drafting
8. Objectives in the preparation of written law - conciseness, certainty, comprehensive-ness, comprehensibility, clarity

The drafting process *(full module = 15 hours)*

9. The organisation and operation of a Government drafting service - constraints from the legislative process
10. The relationship between the client Department and Legislative Counsel
11. The preparatory stages: policy analysis and evaluation
12. The importance of drafting instructions, preparation and what to do about defective instructions
13. The drafting process - analysis, research, consultation, legislative plans, composition and scrutiny
14. Stages in the legislative process
15. The role of Legislative Counsel in relation to the legislative process

Legislative syntax *(full module = 15 hours)*

16. Principles of legislative expression
17. Composing in plain English
18. Basic legislative syntax - subjects, predicates, verbs, modifiers, sentences, etc
19. Punctuation

Legislative style

20. Common law styles - precision, particularity, ellipsis
21. Indeterminate terms

22. Practices to avoid or that require special care
- the proviso; "and" and "or"; singulars and plurals; male and female; time, distance and numbers; etc
23. Referential legislation

Legislative form and arrangement *(half module = 6 hours)*

24. Structure and arrangement of provisions
25. Dividing legislation - sections, subsections, paragraphing, Parts, Schedules, etc
26. Linking legislative provisions
27. Legislative apparatus - marginal notes, headings, tables, arrangement of sections, etc
28. Devising a legislative plan

Drafting preliminary and final provisions *(half module = 9 hours)*

29. Long and short titles, preambles, enacting formulae
30. Commencement clauses and duration provisions
31. Application provisions - extra-territorial legislation
32. Purpose clauses
33. Saving and transitional provisions
- retroactive and retrospective provisions
34. Repeal provisions
35. Schedules

Drafting substantive provisions *(1½ module = 22 hours)*

6. Amendment provisions - textual and non-textual amendment
37. Financial provisions - appropriation and tax legislation
38. Delegation of the legislative power
39. Penal provisions, evidence, liability, procedure
40. Statutory authorities and corporations
41. Licensing and registration
42. Legislation implementing treaties

Drafting secondary legislation

43. Preparatory procedures: constraints deriving from judicial review

- 44. Parliamentary scrutiny
- 45. Form and substantive provisions

Rules of interpretation and Interpretation Act

(half module = 8 hours)

- 46. Interpretation clauses and rules of interpretation
- 47. Working under Interpretation legislation

Constitutional, international and human rights constraints

- 48. Domestic application of international human rights norms
- 49. Constitutional constraints -
 - division of the legislative function; separation of powers;
 - judicial review of legislation; special legislative procedures;
 - in particular, compliance with human rights provisions, etc

**Commonwealth Distance Training Course in Legislative Drafting:
Report on the Evaluation of the Pilot Module**

by Professor K W Patchett

EVALUATION OF THE PILOT MODULE

1. INTRODUCTION

Under a scheme instituted by the Commonwealth of Learning and the Commonwealth Secretariat in 1992, the responsibility for developing a Distance Training Course in Legislative Drafting was undertaken by Professor Keith Patchett, as subject specialist, and John Hookway of TDA Consulting Group Ltd, the design consultants. A first, pilot module of the course was developed in the early months of 1993, with a view to testing the approach, contents and materials adopted by the course developers. This Report contains an account of the pilot testing and the results obtained.

Pilot testing scheme

The testing of the pilot module took place at the University of the West Indies between 5 July and 16 July 1993, with the generous co-operation of Professor Crabbe, who released 8 of his course and recruited 4 others for the purpose. The pilot was deliberately structured to replicate, as far as possible, the conditions under which distance training will normally be conducted. In consequence:

- (1) each participant was supplied with the complete pilot module materials at the outset, with only so much oral introduction as was needed to introduce the testers and to give details of the local arrangements;
- (2) each participant was, therefore, expected to ascertain from the materials provided how to work with them and generally how to approach the study of the module;
- (3) contact was maintained with the group throughout the test period, by one short formal meeting after 3 days and by occasional informal and individual meetings in the law library, where Professor Patchett was available every day; the sole purpose (which was made clear at the start) was to monitor their passage through the materials, so that adjustments could be made, if necessary, to personal timetables in order that all parts of the module would be worked upon by someone;
- (4) no work was submitted by the participants during the course of the test; they were expected, in the way the instructions indicated, to use the materials to evaluate their own progress; no external tuition was provided;
- (5) participants were left to work, by themselves, at their individual pace and as, where and when it best suited them.

The 12 participants agreed to devote the equivalent of 6 hours per day for 10 days over the pilot period of 12 days: 60 hours in total. Professor Crabbe, who selected those taking part in the pilot, generously arranged to excuse those on his course from their normal work assignments to allow them to fulfil this schedule. As an incentive, CoL agreed to pay each participant US\$4 per hour worked, up to the agreed maximum of 60 hours. Participants were asked to keep detailed timetables (on the forms provided) both for this purpose and to enable themselves to keep track of, and the course developers to evaluate, their progress.

No adjustments were in fact made to individual work programmes, as it became evident that a number would complete the whole module. Several (in the main, those without previous experience of drafting) found the work particularly demanding, and, during the test period, it could be seen that they would not finish all the module. But

they made it clear that they wanted to determine their own pace of study and to do as much as they could.

In the event, 7 of the 12 did not complete the module (3 of the 8 on Professor Crabbe's course and the 4 who were not), although all put in the stipulated time. In some instances, additional time was worked, either out of interest or in order to complete the topic in hand (although no additional payment was on offer).

Evaluation

At the end of the test period, the pilot module was evaluated and the progress of the participants assessed by -

- (1) a pre-pilot, an in-course and a post-pilot questionnaire (see Annexes 1, 2 and 3), which provided information about participants, the extent of their relevant experience, their attitudes towards distance learning before and after the testing and their evaluation of the training provided by the pilot;
- (2) a short pre-pilot test involving relatively straight-forward drafting questions, which was replicated after the pilot was completed;
- (3) submission by each participant of any 2 of their answers to the Drafting Projects they had undertaken;
- (4) a general round-up meeting at the conclusion of the pilot at which the post-pilot questionnaire was completed and their experience on the pilot was discussed with Professor Patchett.

Aims of the pilot testing

It was apparent from the early stages of designing that, if the pilot testing was to be conducted in only one location, only a very small group could be involved. It was, therefore, impractical to attempt any statistically significant method of evaluating the results. Necessarily, the results obtained reflect the subjective responses of the participants, who come from a range of jurisdictions and are of differing ability and experience; there is very little similarity between any two of the 12 participants. With such small numbers, personal characteristics, prejudices and working conditions may acquire a significance in the respect of the responses which would be ironed out in a larger evaluation. The assessments made by this group must be viewed in a broad sense only.

The pilot was designed to expose the materials and the approach decided upon by the course developers to actual use by a group which included persons with a genuine interest in acquiring skills in legislative drafting. A major aim was to determine whether trainees of the kind likely to be admitted to the course could feel comfortable with a wholly unfamiliar approach to learning and would be able, and interested, to conduct their studies in the particular ways worked out by the course developers. The pilot also provided an opportunity to acquire information about such matters as study times in relation to the topics as presented in the module, which would be relevant in determining module lengths and coverage. It did not offer any way by which this distance training can be compared with other forms of training or other possible distance learning approaches, nor of measuring the degree of success that the final course might have in inculcating new skills and knowledge.

The pilot module was made up of representative topics mainly from the middle part of a full course, rather than the first module of study. Further, it did not permit a serious demonstration of the

building block approach that the full course will embody, in particular in the incremental development of the Drafting Projects, in terms of their progressive demands and of a constant process of reinforcing earlier work.

2. PARTICIPANTS' PROFILES

(1) Number, sex, age and origin

12 persons took part in the pilot testing (8 men and 4 women). The majority are students on Professor Crabbe's current LL.M. drafting course ("drafters"); the others are recent UWI law graduates (2) or current UWI undergraduates (1 reading law; the other reading Physics) ("non-drafters"). Their origins, sex and ages (in parenthesis) are as follows:

<u>Origins</u>	Drafters		Non-drafters	
	M (age)	F (age)	M (age)	F (age)
Barbados	1 (28)	1 (48)	1 (21)	
The Gambia	1 (30)			
Jamaica	1 (30)	1 (24)	1 (30)	1 (23)
Nigeria	1 (31)			
Pakistan	1 (30)			
St Vincent			1 (22)	
Zambia		1 (31)		
	5	3	3	1

The average age of the drafters is 31; that of the non-drafters 26.

(2) Legal qualifications and experience

The table on the next page sets out the qualifications, experience and previous training in legislative drafting.

Drafters

Although all have law degrees, only 5 of the 8 are qualified lawyers (of 4 to 7 years standing). The others have recently obtained their first degree in law (one an LL.M. in International Law from Kiev). All are currently in the middle of Professor Crabbe's 12 month course, having started in November 1992.

The lawyers (5) have professional legal experience, in the main as Government lawyers, 3 having worked in drafting for between 1 and 4 years; the other 2 have no practical drafting experience. Of the 3 without professional qualifications, 2 had some public service, but no drafting, experience. The third has spent 1 year in a drafting office.

Non-drafters

2 have law degrees just obtained. The other 2 have recently completed their second year as an under-graduate, 1 as a law student and 1 in Physics (not a student of English as had been intended).

	Law Degree (with date and class, if known)	Non-law Degree (with date)	Admission as lawyer	Private sector legal experience	Public sector experience		Legislative drafting training (prior to UWI)
					Public service	Drafting service	
Drafters							
Participant 1	LLB 1987 - 2(2)		1989		3 years (Crown Counsel)		3 months 1988
Participant 2	LLB 1986	BA 1982	1986	1 year	3 years (Judge) 1 year (Ministry)		
Participant 3	LLB 1988 - 2(1)		1988		2 years (State Counsel)	2 years	5 months 1989
Participant 4	LLB 1992 - 2(2)						
Participant 5	LLM 1991	Teaching Dip 1985				1 year	
Participant 6	LLB 1985 - 2 Dip in Intern Law 1991		1986		5 years (State Counsel)	1 year	3 months 1990 2 months 1991
Participant 7	LLB 1992 - Pass	B Soc 1975			5 years (Admin officer)		
Participant 8	LLB 1985 - 3		1986	1 year		4 years	5 months 1989
Non-Drafters							
Participant 9	undergraduate 2 years				4 months (Court clerk)		
Participant 10	LLB 1993						
Participant 11	LLB 1993	BA 1989					
Participant 12	undergraduate 2 years						

(3) Drafting training

Drafters

4 of this group have received earlier training in legislative drafting, including one on the UWI course 5 years ago. These, and one other, have also received some general training in legal writing as part of their professional training.

Non-drafters

None has received any form of training in drafting of any kind.

(4) Distance training

None of the participants has received any form of distance training, nor had any direct experience of what might be involved.

(5) Languages

All have English as their first (8) or fluent second (4) language. The latter group had a non-European first language (Urdu, Fulani, Bemba, Efik) and usually some competence in other languages (eg, Arabic, French or a second indigenous language). Most of those with English as their first language (a group that includes all the non-drafters) had no competence in another; but one had French and Spanish and another Russian.

(6) Career intentions

Drafters

As might be expected, all stated that they were committed to careers in legislative drafting. Participation in the pilot did not affect their intentions. Before the pilot all believed that they would make good legislative drafters; after it, one was less certain.

Non-drafters

Before the pilot, no one intended to become a drafter. After it, 2 stated that they were now "uncertain"; one of these stated orally that this was a possibility that he would now seriously consider. Before the pilot, 3 were quite uncertain whether they could become good drafters; 1 was confident in that respect. After it, 2 were sure that they could be good drafters; 1 (the non-law student) was sure that he could not.

3. PARTICIPANTS' ATTITUDES AND KNOWLEDGE

(1) Attitudes towards drafting

Drafters

All 8 saw legislative drafting in very positive terms, as intellectually challenging and broadening, socially important and calling for wide-ranging legal knowledge. Its practice was said by all to be satisfying in its own right, even though it does not receive its due recognition from other lawyers and the general public. These views, particularly the latter, were reiterated in the post-pilot questionnaire.

Non-drafters

Views were more mixed before the pilot. All saw this as necessary work, and for one intellectually stimulating work; but there was a tendency to represent it as abstract, dull and boring. Similarly its practice was perceived by 2 as important, but it was represented as "grey and bureaucratic" or as a job for those "going places" in public legal service. After the pilot, all were rather more positive, stating their greater awareness of its central role in law-making and that it was interesting and worthwhile, but all emphasised the complexity and demanding nature of the work.

(2) Attitudes towards study

Drafters

The preponderance put forward seminars as their preferred form of study, though some favoured lectures with working on one's own, writing essays and a degree of personal supervision.

Non-drafters

Most put lectures first, followed by working from texts and materials. None selected seminar teaching (which they may not have experienced).

(3) Attitudes towards distance learning

Drafters

Before the pilot, almost all expressed concern about the absence of contact with a teacher able to respond to their work. There was a recognition of the demands that this form of training makes upon the trainee and some fear that it might extend the training time. After the pilot, all accepted that distance training was feasible, but they emphasised the need for a positive attitude in the trainees. Several repeated that a supervisor was desirable, since learning without opportunity for discussion was tough and less productive.

Their pre-pilot perception of a distance training course was of a regular two-way correspondence and interaction with a distant supervisor, working with detailed materials and on frequent assignments. After the pilot, most of the group felt that the pilot matched or surpassed their expectations of a distance training course. One was surprised by the ease with which the subject could be elicited; another felt that the approach was well coordinated and thought out, usefully building on existing legal knowledge. However, one expressed disappointment that the course resembled a correspondence course, making no provision for training links via satellite of the kind being pioneered by UWI.

Before the pilot, most felt that this could be a feasible method of studying the basics of the subject, though some scepticism was also expressed. This view was stated more positively in the evaluation; the scepticism had largely disappeared. But one thought that it would work best for someone who already has had some exposure to the subject; 2 others re-emphasised the benefits which would accrue from building in arrangements for immediate support from a supervisor. Another emphasised that the present module would need to be preceded by some training in the basics of legislative writing.

Non-drafters

As might be expected, before the pilot, there was considerable uncertainty, as this group knew little about the nature of legislative drafting generally. Some scepticism was again expressed about this form of training, but it was not discounted as a training method. In fact, all felt that teaching the basics should be feasible if sound materials were provided. The matter of regular links with a supervisor was not raised.

After the pilot, this group felt that the approach used offered a feasible and workable way (in one case, an interesting and enjoyable way) of learning the basics, though it would involve harder work than in the classroom. One participant emphasised the need, in his view, for supporting textbook materials.

They repeated that they had had few informed expectations; but they found no difficulties in the use of this form of distance training for legislative drafting. But the language used in the pilot might, it was said, be simplified. At the same time, for the course to be practicable, participants must have good English and a sound legal back-ground (and preferably should not be newcomers to drafting). By preference, some supervisor support should be provided.

(4) Current knowledge

Drafters

All have studied legislation and its interpretation, primarily in their current programme. They assessed their competence as:

	Very good		good		fair		poor	
	Pre	Post	Pre	Post	Pre	Post	Pre	Post
	1	1	3	5	2	2		
form, structure and application of legislation								
statutory interpretation	1	2	4	4	1	2		

Note: not all the pre-pilot questionnaires contained responses on this matter.

The extent to which they have previously worked with legislation was stated to be as follows:

A great deal	Regularly	Occasionally	Rarely	Not at all
1	4	2		1

The numbers of those who have had some previous experience of drafting particular types of instrument is as follows:

	whole part		in course of employ- ment	as part of training	alone	super- vised
A Bill	5	3	4	8	5	4
Any regulations or rules	6	3	4	7	5	4
Any other statutory instrument	5	3	4	5	5	3
A Government order	3	3	4	3	4	2

The numbers who had studied the subjects in the pilot module, and their assessment of their knowledge of those subjects are as follows:

knowledge	very good		good		fair		poor	
	Pre	Post	Pre	Post	Pre	Post	Pre	Post
your local Interpret- ation Act	3	2	3	5	2	1		
the drafting of preliminary provisions for a Bill	2	1	3	5	2	2		
the drafting of final provisions for a Bill	1	1	4	4	2	3		

Each participant in this group assessed his or her present knowledge of, and capacity in, legislative drafting to be the same both before and after the pilot, as follows:

	very good	good	fair	poor	none
Present knowledge of legislative drafting	1	4	3		
Present capacity to draft legislation	1	3	4		

Non-drafters

As is to be expected, none in this group had very much relevant knowledge before the pilot. One claimed a fair knowledge of statutory interpretation; another to have used legislation a great deal, yet another to have used it regularly. None had done any drafting or had previously studied the specific pilot topics. All stated that their knowledge of the subject and their capacity in drafting legislation was "none".

On completion of the pilot, this group responded to these questions with the following assessments:

	Very good	good	fair	poor
form, structure and application of legislation	Post	Post	Post	Post
		2	1	1
statutory interpretation		2	1	1

Post-pilot	knowledge			
	very good	good	fair	poor
your local Interpretation Act	1		2	1
the drafting of preliminary provisions for a Bill		1	2	1
the drafting of final provisions for a Bill			1	1

post-pilot	very good	good	fair	poor	none
Present knowledge of legislative drafting			1	3	
Present capacity to draft legislation			1	3	

4. PRE- AND POST-PILOT DRAFTING TESTS

Each of the participants was asked to answer 5 short questions on drafting matters both before and after studying the pilot module. Both tests were done independently and without recourse to any materials. The principal purpose was to discover whether improvement could be seen which might be attributable to the study. Any judgment on this must be subjective, especially as the tests may not have received the attention required. They were included as part of the questionnaires and may not have been given the necessary time and concentration. As some answers were not fully in point, it is also possible that the requirements of the questions may not have been drawn clearly enough nor their importance in the pilot testing sufficiently emphasised.

Drafters

None of this group produced completely satisfactory answers to all the questions either before or after the pilot; participants seem to have been content to give rather quick-fire answers. It might have been expected that the post-pilot answers would reflect the way in which some of the points had been dealt with in the pilot module; but there was not very much evidence of this. Indeed, the responses

of two respondents in their post-pilot tests were almost identical with those in their pre-pilot tests (including the same weaknesses). The remainder certainly showed some improvement, though in one or two cases this was marginal; but even these repeated or failed to eradicate all their earlier short-comings.

Non-drafters

Not surprisingly, the pre-pilot answers from this group were uninformed and contained many defects; few satisfactory answers were offered. The post-pilot answers were, overall, rather better in these respects. Certain questions touching on matters in the later Parts of the pilot module were not attempted in the post-pilot test by those who had not reached the relevant point in their study, although they had offered some answer in their pre-pilot tests. This may suggest a greater awareness that some specialist knowledge was called for, which they had not yet acquired.

Nonetheless, though there were flaws in the post-pilot replies, their work on this occasion was closer in quality to that of the drafters. There were, then, some indications that the participants had learned some basic matters from their study of the pilot.

Overall

It is difficult to draw clear or dependable conclusions from this evidence. It cannot be claimed that, following study of the pilot module, marked improvements were shown across the whole group. Some of the recurring shortcomings may have occurred for intellectual reasons, rather than from want of know-how, or from the circumstances of the testing. But it was not an unreasonable hope that, if the course had made a significant impact, the post-pilot tests would have reached a somewhat higher standard in comparison with the pre-pilot test, at least in the case of the drafters. On the other hand, the improved grasp shown by the non-drafters may be taken as some positive indicator that in two weeks they had gained new knowledge. It is, of course, impossible to establish whether other methods of learning or a different distance approach might have been more successful.

5. DRAFTING PROJECTS

Each of the participants was asked, mid-way through their study time, to submit at its conclusion any two of their drafts, of their choice, on the Drafting Projects. The work submitted was as follows:

	Drafters	Non-drafters
Project 1 (correction of drafting errors)	5	4
Project 2 (Interpretation Act application)	4	4
Project 3 (analysis of "harmful waste")	3	
Project 4 (re-draft of "harmful waste")		1

Project 5 (Captive Animals Bill)	3	
Project 6 (Methylated Spirit Bill)	1	

Note: Not all the Projects were completed by all the participants; one non-drafter submitted 3 drafts.

The participants did not indicate whether their submitted drafts had been written before or after they had considered the suggested answers. In the round-up meeting, all stressed that they had not looked at those answers when producing their first drafts. Internal evidence suggests that the drafts submitted were those first drafts.

Drafters

Overall, the work done on these Projects was to a good standard. It is, of course, impossible to ascertain whether these results were achieved entirely through their earlier training and experience or whether, and to what extent, their study of the pilot contributed. There were, however, surprising deficiencies in a number of the answers to Drafting Project 1 (which most regarded as without difficulty). These suggested that the issues had not been carefully analysed nor scrutinised. Generally the drafts on Projects 2 and 3 were on the right lines, though similar shortcomings were evident. The few who undertook Projects 5 and 6 also produced sensible first drafts, which began to come to terms with most of the matters calling for attention. All would have benefited from revision.

In so far as the pilot tested the Projects as useful training exercises, it appears that they worked well for their intended purpose and will be suitable for the middle stages in the full course.

Non-drafters

As might be expected, this group restricted itself to the first two Drafting projects, except for one participant who offered a draft to Project 4, in addition to those. It is not unreasonable that the later Projects presented problems for this group, which has received no training in legislative expression and syntax, and most of whom did not reach the later Sections of the pilot module.

Within the limited range of the Projects undertaken, their work in overall terms was promising. The drafting style was in most cases poor but the issues were analysed and dealt with quite well. Few of the flaws found in the drafters' work on Project 1 occurred here.

Again, it seems fair to conclude that these early Projects are of a kind that can be used in the early stages of the full course.

6. PARTICIPANTS' EVALUATION

(1) Course work

The next table shows the point reached by each of the participants in their study of the course materials.

	PART I			PART II				PART III			
	1	2	Pr	1	2	3	Pr	1	2	3	Pr
Drafters											
Participant 1											
Participant 2											
Participant 3											
Participant 4											
Participant 5											
Participant 6											
Participant 7											
Participant 8											
Non-drafters											
Participant 9											
Participant 10											
Participant 11											
Participant 12											

Drafters

All but one the drafters reached the end of the Course Book; one did not complete Section 3 of the last Part. 3 were unable to complete the last Drafting Project fully, and one of these did not finish Drafting Project 5 too. Want of time and the increasing demands of the later projects were the explanations given.

Non-drafters

None in this group completed the pilot. The main casualties were Part III and the last two Drafting Projects, again for lack of time. One law-student reached and completed Section 2 in Part II, largely for domestic reasons which he said interfered with his ability to concentrate on the work for reasonable periods. The non-law student, hardly surprisingly, reached no farther than Section 1 of Part II, which he explained by his lack of legal knowledge.

(2) Overall assessment

Participants were invited to assess the effectiveness of the programme both in the final questionnaire and in relation to the individual sections as these were completed, using a scale of 1(excellent), 2(good), 3(adequate), 4(good in parts) and 5(poor).

Full course

Drafters

Achievement of stated objectives overall					Ease of use					Topic coverage					Aid to learning drafting skills and techniques					Overall interest				
1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2	6				1	4	3			3	3	1	1		3	3	1	1		4	4			

scale: 1(just right), 2(too much/many) and 3(too little/few)

Non-drafters

Achievement of stated objectives overall					Ease of use					Topic coverage					Aid to learning drafting skills and techniques					Overall interest				
1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
	2	1	1			1	2	1		1	1	1	1			3			1	1	2		1	

Note: The lowest grades were given by the non-law student.

Individual sections of the course

Drafters

Section	Achievement of objectives (as stated in the Preview pages)					Ease of use					Topic coverage					Aid to learning drafting skills and techniques				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
PART I Section 1 (Interpretation)	2	5	1				4	2	2		3	3	2			2	3	3		
Section 2 (Interpretation Act)	5	3				3	2	3			6	1	1			5	1	2		
PART II Section 1 (Preliminary provisions)	4	4				1	4	3			3	4	1			2	4	2		
Section 2 (Interpretation provisions)	5	3				1	4	2	1		4	3	1			4	3	1		
Section 3 (Application provisions)	5	3				1	5	2			3	4	1			4	3	1		
PART III Section 1 (Final provisions)	4	4				2	2	4			3	4	1			2	3	2		
Section 2 (Repeals)	3	4	1			1	2	4			3	3	1	1		2	3	3		
Section 3 (Retrospective provisions)	4	4				3	3	2			4	2	1			5	2	1		

Non-drafters

Section	Achievement of objectives (as stated in the Preview pages)					Ease of use					Topic coverage					Aid to learning drafting skills and techniques				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
PART I Section 1 (Interpretation)	1	2	1			2			2		3	2				1	2		1	
Section 2 (Interpretation Act)		3		1		1	1		2		1	2	1			2	1		1	
PART II Section 1 (Preliminary provisions)	1	2				2	1					3				1	2			
Section 2 (Interpretation provisions)	1	1	1			2			1		2	1				1	1	1		
Section 3 (Application provisions)	2					2					2					2				
PART III Section 1 (Final provisions)		1						1					1				1			
Section 2 (Repeals)		1				1						1					1			
Section 3 (Retrospective provisions)		1				1						1				1				

Note: This part of the questionnaire was not completed to the point which some of the participants reached according to their personal time-tables.

(3) Course Book

Participants were asked whether any sections of the Course Book were more or less useful than others. No adverse comments were registered by either group. On the contrary, several stated explicitly that they had found all parts of value. But both in the questionnaire replies and in the round-up discussions favourable reference was made to Part I, Section 2, on using Interpretation legislation, which all recognised as central to all their work.

Reference was also made by the drafters to ideas with which they were not familiar (eg, purpose clauses, road-maps, etc). One non-drafter preferred Parts II and III because they were "more practical"; she specifically liked the linking and inter-dependence of the materials in these Parts.

They were asked also to evaluate specific features of the Course, both overall, at the end of the pilot and of the individual sections as they were completed, using a scale of 1(just right), 2(too much/many) and 3(too little/few).

Drafters

scale: 1(just right), 2(too much/many) and 3(too little/few)

Non-drafters

scale: 1(just right), 2(too much/many) and 3(too little/few)

Individual sections of the course

Section-by-Section evaluation by the non-drafters was not done as satisfactorily as might have been wished. Obviously those who did not complete the course could not comment upon the later Sections, but some of the earlier ones, which were undertaken, did not receive assessment from all. This clearly reduces the value of this set of returns. The Tables on following two pages contain the results of these evaluations.

Drafters

Section	Complexity of topic			Length of section			Example Boxes			Activity Boxes			Exercise Boxes		
	1	2	3	1	2	3	Number	Frequency	Number	Frequency	Number	Frequency	Number	Frequency	Number
PART I Section 1 (Interpret-action)	8			8			6	2		6	2	1	7	1	3
Section 2 (Interpret-action Act)	8			4	3	1	6	2		5	2	1	7	1	1
PART II Section 1 (Prelim. provisions)	8			7	1		8			7	1	1	6	2	2
Section 2 (Interpret-action provisions)	8			8			8			7	1	6	6	2	2
Section 3 (Application)	8			8			8			6	2	5	6	2	2
PART III Section 1 (Final provisions)	7		1	7		1	7	1		5	3	5	7	1	2
Section 2 (Repeals)	6		2	6			6	2		6		2	6	2	3
Section 3 (Retrospective provisions)	7		1	8			7	1		5	3	5	7	3	1

scale: 1(just right), 2(too much/many) and 3(too little/few)

Non-drafters

Section	Complexity of topic			Length of section			Example Boxes			Activity Boxes			Exercise Boxes		
	1	2	3	1	2	3	1	2	3	1	2	3	1	2	3
PART I Section 1 (Interpret-action)	2	2		2			3			3			1		3
Section 2 (Interpret-action Act)	1	2		1	2		3			1	2		2	2	1
PART II Section 1 (Prelim. provisions)	2				2		2			1	1		2	2	
Section 2 (Interpret-action provisions)	2	1		2			3			2		1	2	2	1
Section 3 (Application)	2			2			2			2			2	2	
PART III Section 1 (Final provisions)	1				2		1					1	1	1	
Section 2 (Repeals)	1				1		1					3	1	1	
Section 3 (Retrospective provisions)	1					1	1					1	1	1	

scale: 1(just right), 2(too much/many) and 3(too little/few)

(4) System of Boxes

The participants were also asked to assess the extent to which the use of the Boxes in the Course and Work Books achieved their objectives. These were stated to be :

Example Boxes: to illustrate significant drafting points or specific difficulties that drafters need to recognise and overcome;

Activity Boxes: to encourage you to find out about particular drafting practices in your own jurisdiction;

Exercise Boxes: to enable you to test your new knowledge and to practise particular drafting techniques.

The following assessments were provided, using the scale of 1(very successful), 2(successful) and 3(not successful):

	<u>Drafters</u>			<u>Non-drafters</u>		
	1	2	3	1	2	3
Example Boxes	6	2		1	2	
Activity Boxes	6	2			3	1
Exercise Boxes	6	2		2	1	1

To the question whether the system of Boxes in the pilot made learning easier or harder, all the drafters and the majority of the non-drafters reported that they found the learning was made easier. One commented, however, that they did not provide the trainee with any opportunity to give reasons or to make his or her own analysis.

Among the non-drafters, the non-law student indicated that the Activity and Exercise Boxes made his task harder. One of this group also recorded that the Activity Boxes in Part I made his work rather harder.

(5) Materials

All but the non-law student claimed to have had access to their own legislation when undertaking the various activities. (The Law Library of the University of the West Indies has a wide-ranging collection). At the same time, none of the drafters collected any legislative material for inclusion in their Workbook, as envisaged in the Course and recommended in the Workbook. Curiously, the non-drafters, including the non-law student, gathered a small quantity of this material, usually the local Interpretation Act or in one case the local Constitution. It is probable that the drafters already had such material for the purposes of Professor Crabbe's course.

In answer to questions about the utility of the documents provided, participants generally found these useful, particularly so in the

case of the Model Interpretation Act. They evaluated these materials as follows, using a scale of 1(very helpful), 2(helpful) and 3(not helpful):

	<u>Drafters</u>			<u>Non-drafters</u>		
	1	2	3	1	2	3
Document 1 (Wilson article)	3	3	1	2		2
Document 2 (Driedger article)	6	1			2	1
Document 3 (Model Interpretation Act)	8			3		1
Documents 4-13 (legislative precedents)	4	3			3	1

There was general support for the provision of additional materials of the kinds supplied, particularly from the drafters. Only one thought that enough had been included: the non-law student felt that there was too much if the course were to be used by members of the general public.

Particular suggestions were invited; these favoured more articles, especially by Driedger, and a wider selection of legislative precedents. Also mentioned were selected judgments (eg, *Pepper v. Hart*, which is referred to in the Course) and extracts from appropriate textbooks. The value of text book support was mentioned in several responses.

(6) Drafting Projects

Participants were asked, at the end of various sections of the Course, to undertake 6 Drafting Projects. These were of increasing length and difficulty as the course proceeded. The group was asked to evaluate their difficulty, using a scale of 1(too difficult), 2(demanding), 3(straight-forward), and 4(easy).

	<u>Drafters</u>				<u>Non-drafters</u>			
	1	2	3	4	1	2	3	4
Project 1 (correction of drafting errors)			7	1			2	1
Project 2 (Interpretation Act application)		2	5	1			2	1
Project 3 (analysis of "harmful waste")		5	2	1		3		

Project 4 (re-draft of "harmful waste")		5	3			1		1
Project 5 (Captive Animals Bill)		5	2	1		1		1
Project 6 (Methylated Spirit Bill)	3	2	1		1			

Note: Not all the Projects were completed by all the participants.

When asked to indicate which of the Drafting Projects had resulted in satisfactory drafts, in the main the earlier, less demanding Projects were identified. Two of the drafters felt that they had done satisfactory work on Project 5 and only one on Project 6. All insisted, both in their questionnaires and in the round-up meeting, that this had been achieved without resort to the suggested answers. There was no indication that further attempts were made to revise any of the Project drafts which proved to be less satisfactory, **after** the suggested answers and comments had been studied, as recommended in the Workbook.

The group was asked to evaluate the devices provided to enable them to assess their performance in relation to the Drafting Projects, using a scale of 1(very helpful), 2(helpful) and 3(not helpful).

Drafters

Non-drafters

	1	2	3	1	2	3
Introductory audio-advice	5	3			4	
Audio-comments with the Suggested Answers	5	3		1	2	1
Notes to the Suggested Answers	5	3		2	1	1

The substantial majority of both drafters and non-drafters stated that they had received enough support for the Drafting Projects to enable the work to be undertaken independently. Although no one expressed a contrary opinion, two of the group suggested that the instructions might be improved (without explaining how) and one that more detail and explanation would have enhanced the comments. Two repeated their belief that support from a consultant for their work was to be preferred.

Specific suggestions were invited for making independent work more effective. The following were offered:

1. more precise instructions;
2. slower progress from straight-forward drafts to more complex tasks (though the special circumstances of the pilot were acknowledged);
3. more use of audio support;

4. provision of "names of resource materials used" (this was not amplified);
5. dispense with suggested answers (no reasons were offered).

(7) General comments

The questionnaire contained 3 questions designed to elicit general comments about the course and suggestions for changes and improvements. Some of the responses were premised upon a misconception about the pilot module. It was taken by some to be the module that would begin the Course, although the Workbook had explained (perhaps insufficiently) that the pilot was drawn from various parts of the programme and was not intended to be the first module. In consequence, some of the comments were misplaced, such as that the course should not begin in such an intensive way and that there should be a basic introduction to legislative composition and syntax (both of which are planned). Similarly the comments of the non-law student were not always directly in point. He saw himself as representing non-lawyers and stated strongly that there would need to be a great deal more explanation of the legal background if members of the public were to take the course (which, as the Workbook indicates, is not planned).

(a) overall comments

In other respects, however, the comments were valuable and positively supportive to this initiative. Such remarks were made as, "the content is excellent"; "the programme will work well if it follows these lines"; "it is well organised, flows well and has regular break points where one could take a rest or feel as if they had accomplished something"; "a student would not feel at all as if he is 'on his own'".

But concern was expressed that it might prove less easy for those without previous exposure to drafting; several repeated their feeling that some supervision might prove to be needed for this group. One of these, whilst stating a preference for face-to-face instruction, felt that the course would usefully meet the needs of those who are not in a position to receive that form of training.

(b) comments on format

Several took the view that little change needed to be made in the present format. The principal suggestion for change concerned the use of a Course Book and a Workbook. A number suggested amalgamating all the material into a single volume to eliminate, as one put it "jumping around from one section to another". Alternatively, the exercises and activities could be combined and put at the end of each section, with the answers in the Workbook.

One non-drafter questioned whether the "point-by-point" instruction by itself would be as effective as asking the trainee to read in addition textbook matter to reinforce the course material. He felt that the present format had given him only the "skeleton".

(c) detailed proposals

1. instructions should be "more clearly placed" and "more adequate" (though it was not made clear whether any particular instructions were in mind);

2. questions asked (presumably in the Exercise Boxes) should be written "more simply and directly" and "without grammatical errors", as in some cases "what was required was not immediately apparent";
3. "less cross-references as regards the order in which the questions are formulated", as this may confuse the inexperienced (again, the exact application of this comment is not explained);
4. "the Workbook should be enlarged to allow the trainee to raise more issues and formulate the answers in accordance with those issues";
5. some case-law on interpretation should be provided and knowledge of it tested;
6. "some Sections are too long" (though these were not identified); more detail should be added to some Sections (these are not specified);
7. the ability to conduct research should be tested;
8. more reading, by reference to a designated text, should be provided for and emphasised in the general instructions;
9. the use of audio-materials could usefully be extended to support the course content, as well as the exercises;
10. some indication should be given in the Introduction as whether a certificate or diploma will be awarded.

7. CONCLUSIONS AND QUESTIONS OUTSTANDING

In general terms, the pilot testing appears to have been a success, both as an effective and productive test, but more importantly in endorsing the pilot module and the underlying training approach and in providing information which will help its improvement. It is noteworthy, and significant, that the participants coped immediately and well with a form of training of which none had any previous experience.

It seems fair to conclude from the experience and responses of the pilot group that this method of distance training, in its essentials, is practicable, will be acceptable to trainees and has a good chance of producing reasonable results in providing training in the basics of legislative drafting. The overall scheme of the programme, the methodology followed and the kinds of materials provided (both written and audio) appear to be appropriate and effective for their intended purposes.

At the same time the evaluation raises a number of questions that the course developers, in particular, need to consider.

(1) length of modules

The pilot module appears to have been too long both in terms of material and length of study time. On the planning assumptions of 6 modules of approximately equal length to be studied over 12 weeks of full time study (in which there are some 360 to 400 study hours), it should be possible to complete a module in 2 weeks comprising 60 hours of study. Those on the pilot who already had some experience and training in drafting found it difficult, in some cases impossible, to complete the pilot module in that time. It must then be

expected that those who come to the course without that background would have greater time problems. This is borne out by the responses of the non-drafters. Although they were generally somewhat less legally experienced than the intended target group, most were a good way from completing the course.

Account must also be taken of the fact that participants did not carry out certain of the Activities concerned with gathering local materials and practice.

It may be concluded that the size of the pilot module was in excess of the one-sixth of the course as envisaged for a module by the Planning Group, even if the contents may have comprised no more than one-sixth of their proposed syllabus.

Questions

1. Are any parts of the pilot module superfluous or unnecessarily long ?

2. Can the topics covered in the pilot material be treated more shortly without diminishing the effectiveness of the treatment?

Participants in the pilot were inclined to think not; if anything, the group felt that additional matter, eg, in the form of Exercise and Activity Boxes, was desirable.

3. If, in terms of the agreed curriculum, the material in the pilot module represents more than one module, as seems the case, what proportion of the 6 modules does it represent (eg: $1\frac{1}{2}$ modules) ?

4. In terms of study time, does the pilot support the planning assumption that trainees can complete a module in 60 study hours ?

5. Given the extent of the material required to cover the topics in the pilot and the experience about study time, should the syllabus be re-examined with a view to reducing its coverage or dealing with some other matters more shortly and therefore differently ? If so, which ?

(2) Difficulty of the course

The responses do not suggest that overall the participants found the subjects dealt with in the pilot too difficult. But concern was expressed by them that new-comers might have greater problems than the test group. But it needs to be emphasised that the pilot group was plunged into what will be the middle of the course, without the benefit of systematically laid foundations of the kind planned for the full course. When trainees reach this point they will be familiar both with the essentials of legislative expression and syntax and with the approach used in the course (with which the testers had to come to terms). Experience on training courses suggests that more demanding matters can be assimilated if the ground work has been adequately prepared. Nonetheless, these comments too may indicate that more time may be needed for this material, rather than any attempt made to remove any of the complexities of the subject.

Questions

1. As evidenced by the pilot material, does the course ask too much of trainees who will have relatively little exposure to the subject before starting the course ?

2. If this is treated as a representative module, should more time be allowed for the study of the modules ? If so what are the implications for the syllabus coverage ?

(3) Independent study and external support

The group concluded from their experience on the course that independent study of legislative drafting is feasible, if the kind of materials and support used in the pilot is provided throughout (with some suggested improvements). They also seem to have accepted that their own assessment of their work is practicable and can be effective, at least for some of the less demanding of their drafts.

At the same time, the responses showed a preference for working with local support from a supervisor and for external comments and guidance on their drafts. On the evidence of their work, it is hard not to conclude that comments from an experienced trainer in drafting would be of value to the trainees in focusing their efforts on matters that require attention. In most cases, for example, their Drafting Projects fell short in terms of analysis and scrutiny, features that an external moderator can be expected to emphasise.

Questions

1. On the evidence of the pilot, should the course be written on the assumption that trainees will not have local supervision for their general study ?
2. Are there any changes that need to be made to the course work, in the form taken by the pilot module, to make independent study more practicable ?
3. At the same time, if such support can be provided, should this be encouraged ?
4. If so, what support needs to be offered to the supervisors ? Will they need some materials over and above those provided for the trainees ?
5. Should the comments and suggested answers for the Drafting Projects be made available to the supervisors, instead of to the trainees ?
6. Is it safe to proceed on the assumption that trainees, if need be, can be relied upon to self-assess many of their own drafts ?
7. What proportion of these Projects should be looked at and commented upon by an external supervisor somewhere ?
8. Should there be guidelines on the frequency and level of difficulty of Drafting Projects that go for external evaluation ?

(4) Course structure and format

The general assessment by the pilot group of the course structure and format, as represented by the pilot module, is favourable. They appear to have been happy with the device of boxes for illustrating, testing and applying the matters explained in the Course Book, though more of these were commonly suggested.

The main reservations related to the provision of both a Course Book and a Workbook, which necessitated recourse at frequent intervals to two sets of materials (or three, where answers had to be checked). Various suggestions were made for incorporating, or amalgamating, material from the Workbook with that in the Course

Book, though the implications for these in respect of the whole course, which will contain a further five modules, were not considered.

Questions

1. Should any of the material in the Workbook be placed instead in the Course Book ? If so, which ?
2. Should each module be self-contained, so that the related Boxes (other than the Answer Boxes) are combined with the explanatory material in that module ?
3. Should these Boxes be placed at the end of a Section in a module, when presumably they would be worked on, rather than integrated into the text of the Course Book ?
4. Should the distinction between Activity Boxes and Exercise Boxes be abandoned ?
5. Should the frequency of the Boxes be increased as generally favoured (given that that will increase the study time) ?

(5) Drafting Projects

The six Drafting Projects may be taken as representative of the kinds of exercises that are envisaged for the early and middle parts of the course. The group was probably asked to undertake some work that was rather more demanding than should be expected at a first effort on a course of this kind. Overall, they coped reasonably well.

The aim for the full course is to build and extend the drafting projects gradually throughout the programme. They would become more demanding as the course proceeds, but would cover also matter already studied in earlier modules, by way of reinforcement.

Questions

1. Is the number of Drafting Projects adopted for the pilot module the right number, or too many, for each of the modules (in that it makes a total of 36) ?
2. Should this number of the shorter Projects be confined to the earlier modules, and a smaller, and decreasing number, covering more ground, be used in each of the later modules ?
3. Are the kinds of Drafting Projects used in the pilot suitable for use with the materials to which they relate ?
4. Are the support materials provided with respect to the Suggested Drafts adequate ?
5. Should audio-materials be used more or less frequently ?
6. Where trainees are asked to self-assess, should Suggested Answers be dispensed with, as some suggested ?

(6) Course materials

The evaluation was generally supportive of the kinds of materials provided (both printed and audio). The suggestion was commonly made that additional materials of these kinds would be useful. The use of a textbook and the extended use of audio-materials were also recommended.

Questions

1. Is there a case for providing additional materials (ie, a larger number and a wider range than used in the pilot) ?
2. Should materials provided be limited to those that are actually drawn upon or need to be studied closely for the purposes of the course, rather than general reference or precedent material that may have future reference value ?
3. Should a course textbook be designated ?
4. Would it be useful to select one which may obviate the need to include similar material in the Course Book ?
5. Is Vincent Crabbe's new text appears the one best suited for this purpose ?
6. Should audio-materials be used in connection with the course text, as well as in relation to the Drafting Projects ?

(7) Generally

It is clear from the comments of the participants that some presentational matters need attention (eg, the way questions are asked and instructions given; simplification of writing). Arrangements have been made by CoL that will enable the text both of the pilot and future modules to be read and commented upon by an experienced drafter to eliminate infelicities and generally to improve the style and content. There are grounds for thinking that Part I, Section 1 (on interpretation), which was the first to be written, is the least satisfactory in this respect. At the same time, the responses of the pilot group suggest that overall the text is soundly written and accessible.

APPENDIX I

**COMMONWEALTH DISTANCE TRAINING COURSE IN
LEGISLATIVE DRAFTING**

PRE-PILOT QUESTIONNAIRE

**Please complete this Questionnaire before you
start on the Pilot Module.**

Your answers will enable us, at the end of the piloting, to assess the effectiveness of the Course. To do that, we need to have some information about -

- your professional background;
- your legal experience;
- your present knowledge of legislative drafting.

We are also asking some questions that will help us -

- to compare your perceptions and reactions to this approach to training;
- to assess the progress you make as a result of working on the Pilot Module.

**PART I
PERSONAL PROFILE**

1. Name:

2. Age:

3. Sex:

4. Nationality:

5. Home country:

6. First Language:

7. Other
languages
that you -

very well

easily

with
difficulty

speak

write

read

8. Present
post

post

where

how long

9. Degrees or
diplomas

class

date

university/
college

10. Professional
qualifications

date

awarding institution

LEGAL EXPERIENCE

11. Professional legal posts before the present **where** **year**

12. Kinds of legal practice undertaken **public or private sector ?** **year**

13. Have you any experience of - **Y/N** **in what capacity ?** **year**

drafting legal documents

legislative drafting

14. Have you had any training in - **type^{1.}** **where** **year** **how long**

drafting legal documents

legislative drafting

^{1.} course; part/course; in-service, etc.

DISTANCE TRAINING EXPERIENCE

15. Give details of any distance training course¹ you have taken:

¹.
eg, correspondence course

PART II PERSONAL PERCEPTIONS

Write 3 lines at the most in answering questions in this Part.

	yes	no	don't know
16. Do you intend to become a legislative drafter ?			

	yes	no	uncertain
17. Do you believe that you would make a good legislative drafter ?			

18. Describe your attitude towards the work of legislative drafting

(eg, do you think that it is interesting or boring, or socially important, or worthwhile, or insufficiently demanding intellectually, offering no challenge as a lawyer, etc ?).

19. How do you appraise the profession of legislative drafter ?

(eg, do you think that it receives adequate recognition by other lawyers, or the public, involves satisfying work, or it is a stepping stone to more interesting work in the public sector, or is a dead end, etc ?).

20. What is your preferred method of study ?

(eg, do you prefer lectures, seminars, personal tuition, writing essays, working on your own from text and source materials, working with a fellow student, cramming before examinations, etc ?).

21. What do you think about studying entirely from a distance training programme ?

22. Describe what you expect a distance training course in legislative drafting will involve and whether you believe that it is feasible to learn the basics of the subject in this way.

SUBJECT KNOWLEDGE

1. Legislation

23.

Previous study of -	type of study	year of study	how long	knowledge			
				very good	good	fair	poor
the form, structure and application of legislation							
statutory interpretation							

24.

	a great deal	regul- arly	occas- ionally	rarely	not at all
Have you worked with legislation -					

2. Legislative drafting

25. Have you ever
drafted:

	whole or part	in course of employ- ment	as part of training	alone or super- vised
a Bill				
any regulations or rules				
any other statutory instrument				
a Government order				

26. Previous study of -	type of study ¹ .	year	how long	knowledge			
				very good	good	fair	poor
your local Interpretation Act							
the drafting of preliminary provisions for a Bill							
the drafting of final provisions for a Bill							

¹. eg, University, Law School, special course, personal, etc.

	very good	good	fair	poor	none
27. Assess your present knowledge of legislative drafting					
28. Assess your present capacity to draft legislation					

PART III
PRE-PILOT TEST

Answer the following questions in the spaces provided, in no more than 3 minutes each. You should not need more than 3 lines of text for any answer. Attempt an answer even if you are uncertain as to an answer.

1. Draft a clause for inclusion in a Bill which will have the effect of bringing the Bill into force on whichever of the following dates happens first:

October 1st of this year;
the day when the Dogs Act 1993 is brought into operation.

2. In what ways might a purpose/objects clause in a Bill perform a different function from the long title ?

3. How would you describe the following clause ?

This Act does not affect or derogate from the Dogs Act 1993.

4. What, if any, is the difference in effect of the following ?

This Act applies to aircraft registered in Barbados.

This Act does not apply to aircraft registered in countries outside Barbados.

5. The following definition is to be found in a *Wild Life Protection Bill*:

"wild animal" means an animal which is or was (before it was killed or taken) living wild;

- 5.1 Tick or cross if you think that this definition does or does not extend to the following, and in the spaces provided say why:

(a) birds		
(b) fish		
(c) turtles		
(d) snakes		
(e) the eggs of any of the above		

- 5.2 Re-draft the definition so that there is no doubt that all these items are within the definition:

**PLEASE HAVE YOUR COMPLETED QUESTIONNAIRE
READY FOR COLLECTION AT THE BEGINNING
OF THE PILOT**

APPENDIX II
PILOT QUESTIONS

1. Using a scale of 1(excellent), 2(good), 3(adequate), 4(good in parts) and 5(poor), evaluate the following features of each of the Sections in the **Course Book**:

Section	Achievement of objectives (as stated in the Preview pages)	Ease of use	Topic coverage	Aid to learning drafting skills and techniques
PART I Section 1 (Interpretation)				
Section 2 (Interpretation Act)				
PART II Section 1 (Preliminary provisions)				
Section 2 (Interpretation provisions)				
Section 3 (Application provisions)				
PART III Section 1 (Final provisions)				
Section 2 (Repeals)				
Section 3 (Retrospective provisions)				

2. Using a scale of 1(just right), 2(too much/many) and 3(too little/few), evaluate the following features of **each** Section of the Course:

Section	Complex-ity of topic	Length of Sect-ion	Example Boxes		Activity Boxes		Exercise Boxes	
			Number	Frequ-ency	Number	Frequ-ency	Number	Frequ-ency
PART I Section 1 (Interpretat-ion)								
Section 2 (Interpretat-ion Act)								
PART II Section 1 (Preliminary provisions)								
Section 2 (Interpretat-ion provisions)								
Section 3 (Application provisions)								
PART III Section 1 (Final provisions)								
Section 2 (Repeals)								
Section 3 (Retrospective provisions)								

3. Using a scale of 1(too difficult), 2(demanding), 3(straight-forward),and 4(easy), evaluate **each** of the **Drafting Projects**.

Project 1 (correction of drafting errors)	
Project 2 (Interpretation Act application)	
Project 3 (analysis of "harmful waste")	
Project 4 (re-draft of "harmful waste")	
Project 5 (Captive Animals Bill)	
Project 6 (Methylated Spirit Bill)	

APPENDIX III

**COMMONWEALTH DISTANCE TRAINING COURSE IN
LEGISLATIVE DRAFTING**

POST-PILOT QUESTIONNAIRE

**Please complete this Questionnaire at the end of the
Pilot Module.**

Please enter your name:

We need your name in order to bring the Pre-pilot and the Post-pilot Questionnaires together. All your comments will be treated by the Course developers as given to them in confidence for the assessment and improvement of the Course. In reporting the results of the Pilot, none will be attributed to a named individual.

Your answers will enable us, at the end of the piloting, to assess the effectiveness of the Course. To do that, we need -

- to ask some questions about your reactions to this form of training;
- your comments and criticisms of the material in the Course.

We are repeating some of the questions in the Pre-pilot Questionnaire -

- to find out how far your views may have altered as a result of taking part in the piloting;
- to assess the progress you have made as a result of working on the Pilot Module.

If you would like to be informed when the full Course is ready, please enter your address:

PART I

PERSONAL PERCEPTIONS

Write 3 lines at the most in answering questions in this Part.

	yes	no	don't know
1. Do you intend to become a legislative drafter ?			
-
	yes	no	uncertain
2. Do you believe that you would make a good legislative drafter ?			
3. Describe your attitude towards the work of legislative drafting
4. How do you appraise the profession of legislative drafter ?
5. What do you think about studying entirely from a distance training programme ?
6. Did the pilot meet your expectations about a distance training course in legislative drafting ?

7. To what extent do you think that it is feasible to learn the basics of legislative drafting in this way ?

PART II

SUBJECT KNOWLEDGE

1. Legislation

8. Assess your knowledge of -

the form, structure and application of legislation

statutory interpretation

very good	good	fair	poor

2. Legislative drafting

9. Assess your knowledge of -

your local Interpretation Act

the drafting of preliminary provisions for a Bill

the drafting of final provisions for a Bill

very good	good	fair	poor

10. Assess your present knowledge of legislative drafting

11. Assess your present capacity to draft legislation

very good	good	fair	poor	none

PART III

TEST

You provided answers to the following questions before the pilot began. Answer them again, in the spaces provided, in no more than 3 minutes each. You should not need more than 3 lines of text for any answer. Attempt an answer even if you are uncertain as to what it should be.

1. Draft a clause for inclusion in a Bill which will have the effect of bringing the Bill into force on whichever of the following dates happens first:

October 1st of this year;
the day when the Dogs Act 1993 is brought into operation.

2. In what ways might a purpose/objects clause in a Bill perform a different function from the long title ?

3. How would you describe the following clause ?

This Act does not affect or derogate from the Dogs Act 1993.

4. What, if any, is the difference in effect of the following ?

This Act applies to aircraft registered in Barbados.

This Act does not apply to aircraft registered in countries outside Barbados.

5. The following definition is to be found in a *Wild Life Protection Bill*:

"wild animal" means an animal which is or was (before it was killed or taken) living wild;.

- 5.1 Tick or cross if you think that this definition does or does not extend to the following, and in the spaces provided say why:

(a) birds		
(b) fish		
(c) turtles		
(d) snakes		
(e) the eggs of any of the above		

- 5.2 Re-draft the definition so that there is no doubt that all these items are within the definition:

**PART IV
PILOT MODULE EVALUATION**

I. Course work

1. (a) Were you able to complete the whole Pilot ?
- (b) If not, what **Sections/Drafting Projects** did you not complete ?
- (c) If did not finish, please give your reasons (eg, insufficient time, too difficult, lost interest).

2. Using a scale of 1(excellent), 2(good), 3(adequate), 4(good in parts) and 5(poor), evaluate the following features of the Course:

Achievement of stated objectives overall	Ease of use	Topic coverage	Aid to learning drafting skills and techniques	Overall interest

3. Were any of the Sections in the **Course Book** more useful or less useful than others ? Please indicate which, and very briefly why that was so.

4. Using a scale of 1(just right), 2(too much/many) and 3(too little/few), evaluate the following features of the Course:

Complexity of subject	Length of Sections	Example Boxes		Activity Boxes		Exercise Boxes	
		Number	Frequency	Number	Frequency	Number	Frequency

5. Did you have access to your own legislation, when undertaking the various Activities ?

Yes	No

6. The objectives of the Boxes were as follows:

Example Boxes: to illustrate significant drafting points or specific difficulties that drafters need to recognise and overcome;

Activity Boxes: to encourage you to find out about particular drafting practices in your own jurisdiction;

Exercise Boxes: to enable you to test your new knowledge and to practise particular drafting techniques.

Using the scale of 1(very successful), 2(successful) and 3(not successful), evaluate the success of the Boxes in fulfilling their objectives.

Example Boxes	
Activity Boxes	
Exercise Boxes	

7. Did you find that using the Boxes made learning the topic easier or harder ?

	easier	harder
Example Boxes		
Activity Boxes		
Exercise Boxes		

II. Materials

8. Using a scale of 1(very helpful), 2(helpful) and 3(not helpful), evaluate the usefulness to your work of the following **Documents** provided in the **Materials Book**:

Document 1 (Wilson article)	
Document 2 (Driedger article)	
Document 3 (Model Interpret- action Act)	
Documents 4-13 (legislative precedents)	

9. Would you have liked more or fewer materials of these kinds ? Please make suggestions for additional or different kinds of materials.

10. List any local materials you collected for inclusion in the **Materials Book**.

III. Drafting Projects

11. For which of the six **Drafting Projects** do you feel that you produced satisfactory drafts ? Did you achieve those results before or after you had compared your work with the **Suggested Answer** ?

12. Using a scale of 1(very helpful), 2(helpful) and 3(not helpful), evaluate the usefulness to your work on the projects of the audio-commentaries and the Notes to the **Suggested Answers**.

Introductory audio-advice	
Audio-comments with the Suggested Answers	
Notes to the Suggested Answers	

13. On completing a **Project**, did you feel that you had received enough support from the instructions, the **Suggested Answer** and the audio-comment and notes ? Was enough provided to enable you to learn **independently**, without personal tuition, all that you could expect to learn from the **Project** ?

14. Have you any other comments upon the **Drafting Projects** that will make independent study more effective ?

IV. General comments

15. What changes would you make in the content or approach of this Course on the basis of your work on this Pilot Module ?

16. What improvements would you make in the presentation or organisation of the **Course Book** or the **Workbook** ? How might the instructions for using the materials and the general advice about undertaking independent study be improved ?

17. Please make any other observations about the Course which would contribute to its success.

**THANK YOU VERY MUCH FOR HELPING US, BY UNDERTAKING THE
PILOT AND BY COMPLETING THIS QUESTIONNAIRE.**

Steps to Effective Policy and Legislative Development:

Policy Development and Consultation

Paper submitted by Canada

POLICY DEVELOPMENT

- The normal steps whereby policy becomes law are charted. Detailed information about each step is contained in Chapters 6 through Chapter 11, inclusive:

WORKPLAN APPROVED BY A.G. AND ADM (AND DM IN SOME CASES). RESEARCH, ANALYSIS AND CONSULTATION UNDERTAKEN. POLICY OPTIONS DEVELOPED.

POLICY OPTIONS ARE PRESENTED TO MINISTER VIA SENIOR MANAGEMENT. MINISTER DECIDES PREFERRED OPTION.

MINISTER SEEKS APPROVAL OF PREFERRED POLICY OPTIONS FROM CABINET VIA MEMORANDUM PROCESS (MEMORANDUM TO CABINET).

CABINET DECIDES THE GOVERNMENT'S POLICY AND ISSUES THE AUTHORITY TO DRAFT LEGISLATION; RECORD OF DECISION (RD).

TREASURY BOARD APPROVAL REQUIRED IF MONEY OR HUMAN RESOURCES NEEDED. ANY REGULATION WITH FINANCIAL ASPECTS ALSO NEEDS TB POLICY APPROVAL. TB SUBMISSION IS MADE.

BILL IS DRAFTED BY JUSTICE LEGISLATION BRANCH IN CONSULTATION WITH DIRECTORATE OFFICER, IN ACCORDANCE WITH THE CABINET AUTHORITY.

BILL INTRODUCED, GIVEN FIRST AND SECOND READING IN HOUSE AND REFERRED TO A COMMITTEE FOR STUDY.

AFTER STUDY AND REPORT TO HOUSE BY COMMITTEE, BILL IS GIVEN THIRD READING.

BILL IS SENT TO SENATE FOR SIMILAR PROCESS.

BILL IS GIVEN ROYAL ASSENT AND IS BROUGHT INTO FORCE, BECOMING LAW.

INTERNAL APPROVAL REGULATIONS: COORDINATION BY REGULATORY AFFAIRS; PCO(J) APPROVAL; PRE-PUBLICATION; REVISION, IF NECESSARY; SUBMISSION FOR MINISTER'S OR COMMITTEE OF COUNCIL APPROVAL (AS APPROPRIATE); PUBLICATION IN PART II OF CANADA GAZETTE

POLICY DEVELOPMENT

Preliminary Analysis

Officers may be asked to start work at any stage during policy development on a particular issue. Officers are encouraged, as well, to identify new and emerging issues and to bring them to the attention of their manager.

- Normally, identifying and analyzing the problem is the first part of policy development. Doing some preliminary analysis and research helps to clarify an issue and delineate the scope of the work needed to develop a policy response.
- The following sources may identify work already done, or being done, on the issue:
 - ◆ Departmental files;
 - ◆ Justice opinion retrieval service;
 - ◆ Literature;
 - ◆ Case law;
 - ◆ Available research;
 - ◆ Existing recommendations or work in progress of the Law Reform Commission of Canada, Uniform Law Conference and Canadian Bar Association or other groups;
 - ◆ Briefs produced by interest groups;
 - ◆ Information about existing or proposed solutions obtained from colleagues in other jurisdictions;
 - ◆ Previous Memoranda to Cabinet on the issue;
 - ◆ Colleagues in other directorates or sectors within the Department, or other Ministries or Agencies within the Government.

POLICY DEVELOPMENT

Workplan

The next step is the development of a workplan. The workplan should be approved by the Senior General Counsel and Assistant Deputy Minister. Your supervisor will advise you whether the Deputy Minister needs to approve your particular workplan.

- It is a vital planning tool.
- It helps the Directorate set priorities and manage its workload so it can indicate to the Deputy Minister and Minister when policy proposals will be ready for their review.

A workplan should briefly describe, as appropriate :

- The issue and its background.
- What work has been done by the Department or needs to be done in each of the following areas:
 - ◆ research;
 - ◆ analysis;
 - ◆ policy development;
 - ◆ legislative development;
 - ◆ program development;
 - ◆ regulatory development;
 - ◆ consultation;
 - ◆ implementation; and
 - ◆ monitoring and impact assessment.

POLICY DEVELOPMENT

Workplan

- The role other Departmental sectors, federal departments, provinces, territories, individuals or groups should or could play in each area listed above.
- Whether it is appropriate to strike a working group to carry out any of the tasks. If so, what is the proposed membership and mandate of such a group.
- Realistic dates by which each significant task will be done.
- Whether any contracted services are needed.
- A policy development workplan is useful and should be used when officers work alone or as part of a team.
- A checklist designed to help officers develop a workplan is found in the next section of this chapter. *The checklist is not exhaustive. It is not written in stone. It is not meant to replace common sense or creativity.* However, it can be used as a quick reference to help officers and management plan the policy development process.
- All the questions in the *Checklist* should be answered before the Memorandum to Cabinet is drafted.

POLICY DEVELOPMENT

Checklist

- ▣ What is the problem?
- ▣ What is the background of the problem?
- ▣ Who is affected by the problem?
- ▣ What expectations about its solution do affected persons have?
- ▣ Are there *Charter* considerations?
- ▣ Does statistical data on the problem exist?
- ▣ Does empirical research exist?
- ▣ Who has an interest in the solution?
- ▣ Who should be consulted to help formulate a solution?
- ▣ Have party members, Members of Parliament, Provincial Ministers or other such people made public commitments or comments on this issue which must be considered?
- ▣ What possible solutions exist?
- ▣ How have others solved the problem?
- ▣ What are the implications of doing nothing?
- ▣ What criteria should be used to select and rate solutions in order of preference.
- ▣ What action is needed to effect the best solution? Does it require unilateral federal action or steps taken in concert with others?
- ▣ What will it cost the federal, provincial or territorial government to implement the solution?

POLICY DEVELOPMENT

Documents

The following descriptions indicate the general contents of certain types of documents which may need to be prepared during the policy development process.

■ DISCUSSION PAPER ("GREEN PAPER")

It generally discusses the issue and reviews possible solutions. It does not outline how the government intends to respond. It serves as a basis for consultation. If published, it is often described as a "green paper".

■ OPTIONS PAPER

It sets out the problem and provides a detailed discussion of the options available to address the issue. The arguments in favour of and against each option are set out. The results of any consultation are described.

Senior management will indicate whether the document should indicate which option the Deputy Minister recommends to the Minister.

■ POSITION PAPER ("WHITE PAPER")

Occasionally, the government will decide to indicate its policy position on a particular subject or issue in a document commonly described as a "white paper". This may indicate legislative proposals in statute language but without the formal requirements of a bill. "White papers" are normally "tabled" in the House of Commons or Senate prior to their general release.

CONSULTATION

General

- Generally, officers of the Directorate can consult openly with other officers of the Department as needed to advance a file. Sometimes, Legal Services officers will be constrained in what information they can provide due to solicitor-client considerations vis-à-vis their client departments. Sometimes, solicitor-client considerations or similar discretion will constrain what information Directorate officers can provide to officers of other departments; the client of the Directorate is the Minister of Justice. Consultations outside the government will be more or less open depending upon several factors including the nature of the group being consulted, the sensitivity of the issue and the stage in the policy development process at which the consultations are held.
- Consultation is an important aspect of the work done by Directorate officers.
- Planning can contribute to the success of any consultation.
- Directorate officers and support staff should ensure that:
 - ◆ physical accommodation for consultation is adequate, and where possible, booked in advance and confirmed in writing;
 - ◆ translators are present where necessary and feasible (Secretary of State - 996-3346). Generally, translators are provided if requested by the participants or considered important to the success of the project. Translation is always available for senior level meetings, such as of the Deputy Ministers;
 - ◆ authority to extend hospitality during consultations has been received from the Assistant Deputy Minister, prior to the consultations, and hospitality expenditures claims are completed and submitted after the consultations.
- Where possible, agendas and documents to be used as the basis for consultation should be circulated in sufficient time to allow participants time to prepare for discussion.

CONSULTATION

General

- Directorate officers should ensure that where consultations are held for the purpose of formulating possible policy options (for presentation to the Deputy or Minister), the participants are aware that officers formulate policy proposals and do not "make" policy. Directorate officers can convey this point by using phrases such as "... your views will be conveyed to senior management of the Department and the Minister ...".
- In consultations with groups outside the government, officers should not indicate what recommendations have been or will be made to the Deputy Minister or Minister, the fact that policy proposals have been put to the Minister or the time-frame for presenting proposals, nor the decision of the Minister or of Cabinet (unless already public or special approval is obtained).

CONSULTATION

Departmental Legal Services Sector

- Where a difference of legal opinion between a Departmental Legal Services officer and a Directorate officer cannot be resolved, senior management should be advised. Then, discussions can take place to reconcile opposing legal views so that the Department of Justice does not give conflicting advice.
- Senior management should also be advised when the matter involves: a matter of national or international importance; a sensitive issue likely to attract a significant degree of public attention; a novel course of legal action is being considered; where a proposed course of action conflicts with the Attorney General's duty to uphold the letter and spirit of the law.
- *Canadian Government Programs and Sciences* provides detailed information about other federal departments and agencies. It is published by CCH Canadian Limited. It is located in the Reference Section of the Library.

CONSULTATION

Departmental Legal Services Sector

- The Justice Department delivers legal services to federal departments and agencies through the Departmental Legal Services Sector. Officers of that Sector provide a full range of in-house legal services and policy advice to client departments.
- Directorate officers should be familiar enough with the general mandate of each federal government department to determine if that department's interests, legislation, programs or policies may be affected by Directorate policy initiatives. Direct consultation among officers of the Directorate and Departmental Legal Services is encouraged.
- Officers of the Departmental Legal Services Sector are free to exchange information, including background information, when they are consulting with Directorate or other officers on matters of common concern. However, Departmental Legal Services officers cannot disclose background information when there is a statutory prohibition against disclosure, when an apparent conflict of interest between the client department and another government department exists, or where the client department has specifically requested that disclosure not be made. Departmental Legal Services officers are in a solicitor-client relationship with respect to their client departments.
- Occasionally, it may be necessary to seek a formal legal opinion on how Directorate policy initiatives may or do affect another department's policies, programs, or legislation. The legal opinion should be sought from counsel providing legal services to the department that is responsible for administering the statute or matter in question.
- Differences may arise as a result of differing policy objectives of government departments, or differing legal opinions among Directorate and Departmental Legal Services officers.
- Departmental Legal Services officers have a duty to preserve the confidentiality of the solicitor-client relationship. All officers have a duty to resolve legal conflict as expeditiously as possible.

CONSULTATION

Key Associations

- At some stage during the policy development process, it may be useful to consult with particular associations to obtain their views.
- The External Liaison Unit, of the Corporate Management Sector, coordinates liaison with key national associations. The personnel of this Unit put Directorate officers in contact with the appropriate persons in the following organizations :
 - ◆ Canadian Association of Chiefs of Police;
 - ◆ Canadian Bar Association;
 - ◆ Canadian Judicial Council (Chief Justices of the Superior Courts across the country);
 - ◆ Canadian Judges Conference (most of the judges appointed under Section 96 of the *Constitution Act, 1867*);
 - ◆ National Associations Active in Criminal Justice.
- It is essential that consultation with the Canadian Judicial Council, the Canadian Judges Conference and the Association of Provincial Court Judges be undertaken when a policy proposal being developed affects the administration of the courts.
- When the assistance of the External Liaison Unit is needed, a memorandum to that effect should be prepared for the signature of the General Counsel (Criminal) or Senior Counsel (Family) or Sentencing Project Director.
- Consultation will often be necessary with other organizations and interest groups. This is usually arranged directly by the Directorate, after approval by Senior Management.

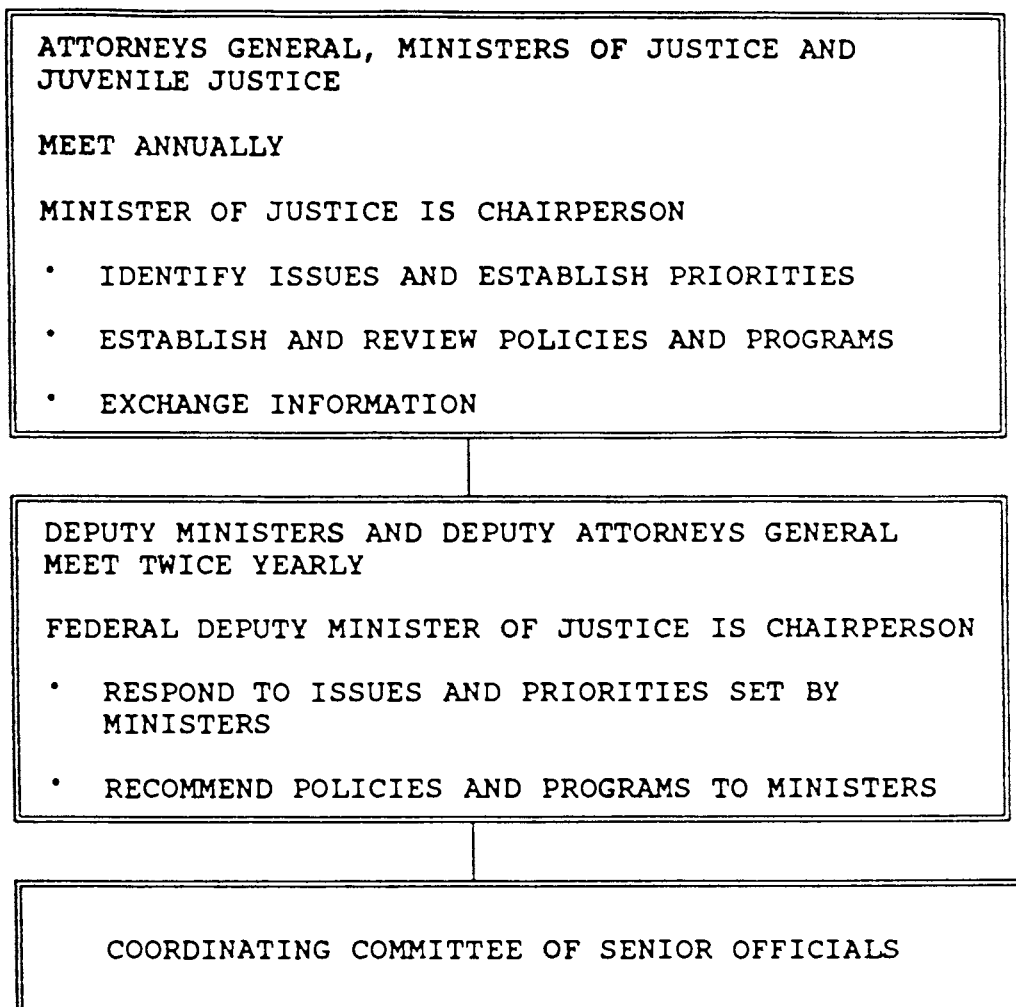
CONSULTATION

Federal-Provincial-Territorial

- The federal government is responsible for legislation in many areas that directly impact on provincial and territorial services and facilities. Consultation among federal, provincial and territorial officials is an integral and essential part of most policy initiatives of the Directorate.
- Directorate officers foster working relationships with provincial and territorial counterparts that recognize the priorities, restraints and capacities of each government.
- Directorate officers anticipate concerns, issues and trends so that pro-active strategies can be devised to deal with such matters.
- Ministers of Justice and Attorneys General meet to establish priorities, policies and programs, and, to provide direction to their Deputies and senior officials.
- Federal, provincial and territorial Deputy Ministers of Justice and Deputy Attorneys General meet to coordinate and consult. These meetings allow them to provide timely advice to Ministers and guidance to senior officials regarding policies and programs.
- Talking points, briefing notes, face sheets, information notes, status reports, or conference documents may be needed for these meetings. See the format section for instructions.
- Preparations for meetings of the federal, provincial and territorial Deputy Ministers of Justice are the responsibility of the federal/provincial/territorial Coordinating Committee of Senior Officials (CCSO), chaired by the Assistant Deputy Minister, Policy, Programs and Research Sector.

CONSULTATION

Federal-Provincial-Territorial



CONSULTATION

Uniform Law Conference

- The Uniform Law Conference (ULC) is an independent organization set up to promote uniformity of legislation on civil and criminal matters.
- It has a Uniform Law Section (civil), a Criminal Law Section and a Legislative Drafting Section.
- Its membership includes federal, provincial and territorial government officials, academics, practitioners, and members of Law Reform Commissions. It does not answer to any government or other authority but has close links to the Canadian Bar Association which sponsored its formation.
- Members of the ULC and the Canadian Bar Association may bring matters to the ULC for consideration.
- Governments are not bound by the recommendations, resolutions or model statutes of the conference.
- Delegates to the ULC are selected from the Criminal and Family Law Policy Directorate and other offices by the Department.
- The ULC affords the Directorate an opportunity to obtain the views of its diverse members on criminal and family law issues. When the Directorate is developing criminal or family law policy, it may consider the resolutions adopted by the ULC.
- The Directorate may submit criminal and family law issues for ULC consideration provided the Deputy Minister has approved the submission.
- Ask the Secretary of the ULC Criminal Law Section or the Secretary of the ULC Uniform Law Section to place the approved item on the ULC agenda.
- Any document submitted to the ULC for discussion by Directorate officers must be approved by the Deputy Minister.
- The conference usually meets the week before the annual August meeting of the Canadian Bar Association.

MEMORANDUM TO CABINET

General

- A Memorandum to Cabinet (MC) is primarily an advocacy document. The Minister uses it to present Cabinet with an overview of the issue, options to deal with it, the recommended solution, its cost and the principle arguments in support of the recommended solution. It also analyzes the background of the issue, the factors considered in arriving at the possible options and the cost of implementing each option.
- Rules on format, length, notice and submission deadlines are set out in the Privy Council Office publication, *Memorandum to Cabinet - A Drafter's Guide*. They must be followed when drafting a Memorandum to Cabinet.
- Officers should read the Drafter's Guide early in the workplan development stage. Consult it often.
- Support staff must follow the rules regarding format, margins, spacing, paper size, pitch and typeface. These are also set out in *Memorandum to Cabinet - A Drafter's Guide*.
- Pay particular attention to the description of the proposed legislation as it will be used as the basis for the drafting authority issued by Cabinet.
- Officers usually review the Communications portion of the Memorandum to Cabinet, prepared by Communications and Public Affairs, to ensure that the substance and effect of the policy proposal are accurately reflected.
- In some rare cases, you may consider requesting authority in the Memorandum to Cabinet to consult on a draft bill.
- When the draft Memorandum to Cabinet is reasonably advanced, send a copy of it to Translation.
- The Department's Cabinet Liaison Officer works with PCO and Directorate counsel to ensure that consideration of the MC by Cabinet and its Committees goes smoothly.

MEMORANDUM TO CABINET

General

- The Cabinet Liaison Officer is part of the Executive Services Secretariat of the Department's Corporate Services Directorate.
- The Cabinet Liaison Officer is a key player. Consult the Cabinet Liaison Officer for guidance as you draft the Memorandum to Cabinet.
- When the Memorandum to Cabinet is approved by senior management and signed off by the Minister(s), it will be sent to one of Cabinet's policy committees for consideration (usually Justice and Legal Affairs). The Communications Plan will be reviewed by the Communications Committee or may be approved by the Chairman of the Policy Committee.
- Presently, there is an ad hoc Cabinet Committee on Justice and Legal Affairs which reviews the Minister's legislative initiatives. The Minister of Justice is the Chairperson. Initiatives which intersect with other those of other Departments may also be discussed at Cabinet's Human Resources, Income Support and Health Committee.
- The Memorandum to Cabinet is sent to the Operations Committee if there are major policy issues needing resolution or resource implications. It is then listed on a Cabinet or Priorities and Planning Agenda, for discussion.
- Keep in touch with the Cabinet Liaison Officer during the process. Officers may be required to prepare additional material such as talking points or briefing notes for the Minister to use at Cabinet Committee and elsewhere.

LEGISLATIVE PROCESS

Drafting Bills

- Usually, the Legislation Section of the Department will not start drafting a bill until Cabinet has issued its Record of Decision.
- When the Record of Decision is issued, write a memorandum to the Chief Legislative Counsel for the signature of the Directorate Senior General Counsel. The memorandum should ask that drafters be assigned.
- Officers meet with drafters to provide oral or written drafting instructions. The role of the Directorate officers and drafters is to ensure the bill conforms to the Cabinet approved policy. The legislative drafters are also responsible for the quality of drafting itself. As well, they must ensure it conforms to the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms*. This process requires a dynamic interaction between the involved officers, with each being respectful of the others roles and knowledge.
- The draft legislation is prepared by a team of one anglophone and one francophone drafter, and must be reviewed by an anglophone and a francophone Directorate officer.
- It is important to note that the french and english version of a bill or statute have equal standing in law. Further, they are drafted as original versions; one is not a translation of the other.
- If issues arise and their resolution is not covered by the drafting authority given by Cabinet, it may be necessary to seek additional Cabinet authority through another Memorandum to Cabinet.
- Legislation and House Planning (LHP) is the present Cabinet Committee charged with planning the introduction of government legislation in the House. If it is not meeting, Cabinet or Priorities and Planning (P&P) can delegate authority to the Chairperson of LHP to approve the bill on the Committee's behalf.

LEGISLATIVE PROCESS

Drafting Bills

- Presently, when there is a page proof of the bill ready, a copy of the print goes through the Privy Council Office to LHP Secretariat. When a close to final version of the bill is ready, officers should contact PCO or the Department's Cabinet Liaison Officer to ask whether LHP is meeting. If LHP is not meeting, the LHP Secretariat, which knows the status of the draft bill, will seek delegated authority.
- If LHP is meeting, officers should prepare a bilingual summary of the bill's contents for the Committee Members. Officers should also prepare briefing notes and talking points for the Minister to use when the bill is presented to LHP or P&P.
- Consult the Department's Cabinet Liaison officer and the Minister's staff to determine the schedule for the bill's introduction.

LEGISLATIVE PROCESS

Passing Bills

- *Before* the Minister introduces any bill in the House, a Legislation Briefing Book must be prepared.
- The columns of text on the left hand, below, set out the legislative process. The text in the right hand column indicates the work done in the Directorate. The material identified in the right hand column with an ♦ must be prepared and inserted in the Legislation Briefing Book *before* the bill is introduced.
- The other notes in the right hand column indicate material which may be required as legislation progresses.
- See the format section for details about the Legislation Briefing Book.

FIRST READING

Bill introduced. First reading takes place without amendment or debate.

Bilingual press release and any other explanatory material for public consumption is released.♦

Bill is placed on Order paper for Second Reading.

Bilingual, comprehensive Questions and Answers which cover all aspects of the Bill are used by the Minister to reply to media questions.♦

Bilingual lists of recommended witnesses or departmental officials who should appear before Committee are given to the Minister.♦

Bilingual list of departmental officials who will accompany Minister to Committee are given to Minister.♦

LEGISLATIVE PROCESS

Passing Bills

Minister usually sends letter to his provincial colleagues advising of Bill's introduction.

SECOND READING

The principle and object of the Bill are debated and either accepted or rejected. If accepted, the Bill is referred to a Committee for study. The clauses of the Bill are not discussed in detail in the House at this time. No amendment may be made to the Bill at this stage. However, an amendment to refer the subject matter of the Bill to a Committee may be introduced before the principle of the Bill is approved.

At least three short bilingual speech modules are needed. Each covers a different point of the Bill. These are used by MPs to support the initiatives identified in the Bill.♦

COMMITTEE HEARINGS

A Legislative Committee is appointed on an ad hoc basis to examine the bill. A Committee is usually authorized to send for persons, papers and records it wishes. During Committee's study of the Bill, the Minister or the Minister's Parliamentary Secretary speaks. Outside witnesses may be heard.

Bilingual Opening Statement of Minister to Committee presents Bill's purpose and contents.♦

LEGISLATIVE PROCESS

Passing Bills

Each clause of the Bill is studied in detail. Committee may amend the Bill so long as changes do not affect the main principles of the Bill as agreed to at Second Reading. Departmental officers may be called to appear before the Committee. See details on officer's role before Committee at page 51.

Reference will be made to the bilingual Clause by Clause Analysis. This sets out the present law, the proposed amendment, the effect of the amendment and reasons for the change.♦

Officers monitor the Bill's progress through Committee. They provide notes on witness statements or analyze witness presentations to help identify potential problems and recommend solutions.

Department or Minister may require bilingual amendments to the Bill (to be developed with Legislation Branch).

REPORT STATE

Committee reports the Bill back to the House, as is or with amendments.

Bilingual responses to amendments proposed by MP's may have to be prepared.♦

At Report stage, the House reviews the Bill. Further amendments may be proposed-including ones discussed but not recommended in Committee or those aimed at restoring the original text. The Speaker may select and group proposed amendments to avoid possible pointless repetition. The Speaker also rules on whether each motion to amend should be dealt with separately or as part of a group.

LEGISLATIVE PROCESS

Passing Bills

THIRD READING

After Report stage, a motion is moved that the Bill (with any amendments) be concurred in. If there are no amendments, reporting becomes a formality and Report and Third Reading stages take place on the same day. An amendment to refer the Bill back to the Committee for further consideration of a clause(s) may be made. If there are no amendments the Bill is read a Third time and passed.

Bilingual summary note identifying issues that have arisen since introduction may need to be prepared. Bilingual Minister's speech summarizing the debates and including the rationale for any amendments made since introduction may be needed. An updated bilingual Communications Plan may be needed.

SENATE STAGE

The Bill is then sent to the Senate, where procedures for passage are similar to those in the House. If the Senate passes the Bill without amendment, it is not returned to the House. If the Senate amends the Bill it is sent back to the House for consideration of the Senate amendments only (further amendments cannot be made in the House at this stage, unless consequential on the Senate's amendments). If the House agrees to the amendments the Bill is returned to the Senate for Royal Assent. If the House does not agree to the amendments, and an impasse is reached, members of both Chambers may meet to resolve the impasse.

Material required varies depending on the procedure. Senator introducing Bill has to be briefed. Officers should be ready to provide the same materials for the Senate processes as are outlined for the House of Commons process.

LEGISLATIVE PROCESS

Passing Bills

Royal Assent is required for any Bill to become law. It is given to a Bill passed in exactly the same form by the House of Commons and the Senate. A Bill comes into effect on the day of Assent unless the Bill says otherwise. A Bill can state a certain day upon which it will come into force. It can also state it will come into force on a day to be fixed by Order of the Governor-in-Council. Parts of Bills may be brought into force at different times.

Orders-in-Council or Regulations may have to be prepared. Implementation tasks may have to be undertaken.

- When the House recesses (or takes a long adjournment) all proceedings remain alive.
- Prorogation ends a session of Parliament but does not dissolve it. Prorogation, like dissolution, abolishes all pending legislation and quashes further Committee activity. The bills are said to have "Died on the Order Paper".
- If there is unanimous consent, bills can be introduced in the new session at the same stage they had reached in the old. Committee work can be revived in a similar manner.
- Dissolution (automatic after a five year term) terminates the Parliament and is followed by a general election.

LEGISLATIVE PROCESS

Passing Bills

THE FOLLOWING MATTERS REGARDING IMPLEMENTATION OF THE LAW
MAY HAVE TO BE ADDRESSED:

- On which dates could the Act come into force fully or partially?
- Should consultation on possible dates of coming into force be held?
- Are the required training or resources in place for implementation?
- If the Act is to come into force by Order-in-Council, is the Order-in-Council ready? Follow the rules in *Directives on Submissions to the Governor-in-Council and Statutory Instruments*, produced by the Assistant Clerk of the Privy Council.
- How will the provincial and territorial governments be notified of the coming into force?

LEGISLATIVE PROCESS

Appearances Before Committees

- Officers may have to appear before a Parliamentary Committee examining a bill. Officers have a duty to appear if informally asked by the Clerk of the Committee or formally by summons.
- When you receive an invitation or summons, immediately contact your supervisor so that the Assistant Deputy Minister can inform the Minister's office.
- Departmental officers provide legal advice to the government of Canada. Departmental officers do not provide legal advice to Parliament or its Committee's because to do so would place them in a conflict of interest.
- An officer's task before the Parliamentary Committee is to provide explanations on the *legal aspects* of a government bill and to explain the *adopted government policy* as represented in the bill. It is not, however, an officer's task to *defend* policy or to discuss alternative policies.

OFFICERS MUST NOT:

- Defend policy.
- Engage in debate as to policy alternatives.
- Speculate on related legal issues.
- Provide legal advice.
- Disclose that a legal opinion or advice has been given to the government on a matter.
- Quote from a legal opinion that has been given to the government.

LEGISLATIVE PROCESS

Appearances Before Committees

- Before taking an oath, officers should seek the Chairperson's understanding on the need to avoid questions that would put them in conflict with their duty to their Minister and their oath of office.
- Committees rarely ask persons appearing before them to provide information under oath. Hearings are usually conducted in a relaxed and congenial atmosphere. Although oaths are rare, officers should be prepared to take them after making the following observations to the Committee in a courteous and co-operative manner:
 - ♦ inform the Committee that counsel appears on behalf of the Minister of Justice to convey factual information the Minister could not be expected to personally provide;
 - ♦ indicate that if the Committee is concerned about the truthfulness of the answers to be given on the Minister's behalf, the Committee might prefer to question the Minister directly.

REGULATIONS

Types and Powers

There are four types of regulations. They are:

- Regular Governor-in-Council (GIC) regulations.
- Ministerial regulations.
- GIC or ministerial regulations involving Treasury Board.
- Regulations respecting transactions undertaken by Crown Corporations.

The difference between GIC and ministerial regulations depends on the authority provided in the relevant statute, whether the regulation-making power resides with the Governor-in-Council or the Minister. Regulations involving Treasury Board are those with financial implications.

The proposed power to make regulations should not be unnecessarily wide. Cabinet directives on *The Preparation of Legislation* (April, 1981) state that the following powers cannot be included in proposed legislation unless specifically authorized by Cabinet:

- Power to make regulations that might substantially affect personal rights and liberties.
- Power to make regulations involving important matters of policy or principle.
- Power to amend or add to the enabling act or other acts by way of regulation.
- Power to make regulations excluding the ordinary jurisdiction of the courts.
- Power to make specific regulations having a retrospective effect.
- Power to subdelegate regulation-making authority.
- Power to impose, by regulation, a charge on the public revenue or on the public, other than fees for services.

REGULATIONS

Types and Powers

- Power to fix by regulation, rather than by the statute itself, the penalties for breach of a regulation.

REGULATIONS

Federal Regulatory Plan

- There is a federal regulatory process counsel must follow. The policy was developed to make the regulatory process more efficient, to improve public access to and involvement in the regulatory process and to subject it to greater ministerial control.
- Each year the Department must forecast the regulatory initiatives it will introduce in the next calendar year. These forecasts are published annually in the Federal Regulatory Plan. It is usually published in December. The Plan gives the public early notice of the intention to regulate in the next year.
- Privatization and Regulatory Affairs usually requests input into the Federal Regulatory Plan at the beginning of the summer for the coming calendar year.
- The Executive Services Branch of the Corporate Services Directorate coordinates the preparation of a reply for the Department.

REGULATIONS

Drafting and Processing

- The regulatory process involves the following steps:
 - ♦ planning and public notice in the annual Federal Regulatory Plan;
 - ♦ submitting the regulations and documentation to the Deputy Minister, who in turn submits them to the Office of Privatization and Regulatory Affairs (which reviews and approves the RIAS);
 - ♦ simultaneous review and approval of the regulation by PCO(J);
 - ♦ submitting the regulation to the Minister responsible for Regulatory Affairs for approval by the Special Committee of Council for pre-publication;
 - ♦ pre-publication in Part I of the Canada Gazette and revision if necessary after public comments received;
 - ♦ submitting the regulation to the Minister responsible for Regulatory Affairs for final approval by Special Committee of Council;
 - ♦ registration and publication in Part II of the Canada Gazette.
- Draft regulations following the rules in the *Manual on the Drafting of Regulations* in English, produced by PCO(J).
- Process Regulations using the rules in *Federal Regulatory Process - Documents and Guidelines*, produced by Office of Privatization and Regulatory Affairs, and *Directives on Submissions to the Governor-in-Council and Statutory Instruments*, produced by the Assistant Clerk of the Privy Council.

SUBMISSIONS TO TREASURY BOARD

Process

- Treasury Board is a committee of Ministers with statutory responsibility for:
 - ◆ expenditure management;
 - ◆ administrative policy;
 - ◆ organization of the public service;
 - ◆ financial management;
 - ◆ personnel management.
- Treasury Board Secretariat officers analyze the submissions and inform the Department of the recommendations they will make to Treasury Board.
- As neither Ministers nor senior departmental officials normally appear before the Board to support their submissions, Treasury Board Submissions are advocacy documents.
- A Treasury Board Submission will be required if an initiative :
 - ◆ requires more personnel to implement policy, manage programs or do research;
 - ◆ needs money for grants or contributions to support the legislative initiative;
 - ◆ requires money to plan, implement, administer or evaluate the legislation or program;
 - ◆ will involve a fee or other money paid to or collected from the federal government.
- Early and continuing consultation with officials of other departments is important, if the resources of more than one department or agency are involved.
- The Department's Director of Strategic Resourcing Section (Corporate Management Policy, Systems and Services Directorate) coordinates the preparation of all Treasury Board submissions. This Director must be consulted about costing, content and format of Treasury Board Submissions.

Public Communications Policy of the Department of Justice

Paper submitted by Canada

1. PURPOSE

The purpose of this policy is to outline the responsibilities of departmental spokespersons in communicating with the public, Members of Parliament and the Senate, and the news media. The roles of the Minister's Office, the Deputy Minister, Sector Heads, the Director General of Communications and Consultation, as well as spokespersons in the regions, and in Legal Services Units are set out here.

2. BACKGROUND

The Government Communications Policy (Chapter 480, Administrative Policy Manual, July 1988) states:

"4. Institutions are to take an assertive approach to communications, particularly with respect to media relations. Communications are expected to be assertive in the advice and support provided to ministers, deputy ministers and program managers.

12.7.2 Designated spokespersons are restricted to discussing matters of fact or already-approved government policy in an open on-the-record basis.

Off-the-record background briefings or interviews are only permitted in exceptional circumstances and are subject to prior ministerial approval. All speculation and questions on proposed policy should be referred to the Minister."

A directive from the Prime Minister in 1984 (see Addendum I) established policy guidelines for communications with the public.

These guidelines continue to apply, in particular, the directive that all discussions or interviews with the media are to be considered "on-the-record" (that is, intended for publication or broadcast) and are to be "for attribution" by name to the spokesperson. This includes background information given to journalists to enable them to prepare a future report.

In addition, information cannot be disclosed which is prohibited by law - for example, by the Privacy Act.

3. COMMUNICATIONS WITH THE MEDIA, PARLIAMENTARIANS AND PUBLIC

In order for the Department of Justice to provide the media and other members of the public with timely, complete and accurate information, the following is the department's policy:

- (a) Communications by designated spokespersons with the media and Parliamentarians must be reported to the Communications and Consultation Branch which works in close consultation with the Deputy Minister and Minister's Office. Others who receive questions must refer them to official spokespersons.
- (b) Information provided to the media and other publics must be clear, factual and consistent with government policies, and approved communications plans. There are special restrictions applying to commenting on cases before the courts to ensure that the fair trial of the accused is not prejudiced. This is known as the *sub judice* rule (see Criminal Law Branch policy).
- (c) All forms of media must receive equitable treatment in all parts of Canada; distribution systems must take into account not only mass media of both official languages, but also of specialised media, as justified, and regional media.
- (d) Communications with the media must take into account the operational exigencies of the media. Media and other public inquiries must receive quick and accurate responses.

4. ROLES AND RESPONSIBILITIES

Departmental Spokespersons

- 1. Spokespersons are officers designated in their specified areas of responsibility by the Deputy Minister, and on occasion, the Minister, to respond to enquiries from Parliamentarians, the public, the media.

The list of authorised spokespersons is maintained by the Communications and Consultation Branch and is updated regularly. A copy may be obtained from the Branch.

2. Spokespersons are appointed at headquarters and in the regions, either on a continuous basis to answer questions concerning a program activity, or on an ad hoc basis to deal with specific questions related to an announcement or court case.

3. All spokespersons are required to undergo training offered by the Communications and Consultation Branch. Upon being identified as a spokesperson, you will be contacted by the Director, Operations and Ministerial Services to arrange for this training.

4. When spokespersons are contacted by the media or Parliamentarians they are to advise the Communications and Consultation Branch of the contact. They must consult Communications and Consultation to obtain authorisation for and assistance in arranging media interviews (eg print media, radio or television). The Communications and Consultation Branch determines with the Minister's Office the interviews to be granted, bearing in mind that spokespersons who participate in such forums are speaking on behalf of the Minister.

5. In the event that a spokesperson has dealt with the news media or Parliamentarians without the involvement of the Communications and Consultation Branch, it is the responsibility of the spokesperson to advise the Head of Media Relations and/or the Director of Operations and Ministerial Services either orally or in writing as soon as possible.

6. It is not appropriate to discuss advice or recommendations tendered to the Minister or a client department, to speculate about policy decisions, to offer opinions on or to speculate about present or future cases, or to disclose privileged information.

7. For spokespersons who are members of legal services units, there are often additional reporting requirements established by your client department that must be observed.

8. Should officers of the Department who are not officially appointed as spokespersons receive calls from the media, they should ensure that calls are referred immediately to the Director, Operations and Ministerial Services, in Communications and Consultation. Calls would then be redirected to the appropriate spokesperson, or to the Minister's Press Secretary.

9. Officers moving into a new position who were designated as a spokesperson in their former position do not carry that designation with them.

Designated Regional Spokespersons

1. In most cases the regional spokesperson is the regional director; however, he or she may appoint litigation counsel as spokesperson for a particular case.

2. On occasion, it may be necessary to defer responding to media or other inquiries until additional information is available. In such situations, the designated

spokesperson in the regional office may wish to seek further information from their Sector at headquarters, or from Communications and Consultation. This, however, should be done as expeditiously as possible.

3. It may also be necessary in some cases to refer the caller directly to the headquarters spokesperson or, if it is a matter of advice or a political decision to be taken, to the Minister's Press Secretary. In this case the person to whom the caller has been referred must be advised immediately, or have been consulted beforehand.

4. On occasion, it may be necessary to consult with regional offices of client departments when the media inquiry concerns an opinion or case involving that client.

The Minister's Office

1. All requests for information of a political nature or involving future policy, legislation, or decisions of the Minister or Government, will be answered by the Minister's Office.

2. The Minister's Office will ensure that communications are coordinated with other departments and agencies of government at the Ministerial level.

3. No briefing sessions for the media or other publics or press conferences may be held without the approval of the Minister's Office. This is obtained via the Communications Branch.

The Deputy Minister

1. The Deputy Minister is responsible for designating managers and specialists within the Department, at headquarters, in regional offices and in legal services units to serve as primary spokespersons.

2. The Deputy Minister, together with the Communications Branch, ensures that the list of designated spokespersons provides a capability for communicating in both official languages.

Associate or Assistant Deputy Ministers and Chief Policy Counsels(Sector Heads)

1. News releases and other information materials prepared by communications officers require the approval of the Sector(s) responsible for the said policies or programs prior to submission to the Deputy Minister and Minister.

2. Sectors are required to discuss, with Communications and Consultation, requirements for adequate communication in both official languages. This is a requirement of the Government Communications Policy of July 1988 and of the Official Languages Act.

3. Sector Heads should ensure that officers designated by the Deputy Minister as spokespersons are prepared to discuss frankly and on-the-record the information within their area of responsibility.

4. Spokespersons in the Litigation and Legal Services Sectors and in the Regions will advise the Communi-

cations and Consultation Branch in advance of any court motions, appeals, hearings, pending decisions which are liable to be of interest to the news media so that arrangements can be made to prepare the necessary communications material, and to advise central agencies (PCO, PMO) where necessary.

Litigation and Regional Counsel

1. In both civil and criminal proceedings, litigation counsel act on the instructions of a client. Whether the "client" is the Minister of Justice or another Minister, department or agency, it is the client, not counsel who is responsible and accountable for committing the Government to a particular course of action. Consequently, where information is requested in respect of matters on which the client has not issued instructions, the spokesperson should check with the client in advance of providing information.
2. Matters of opinion or speculation are not the proper subject of discussion by civil or criminal litigation counsel. This would include (but would not be limited to) conjecture about whether the Crown might institute proceedings or launch an appeal etc.
3. Since the actual conduct of an action is entrusted to counsel, it will be incumbent upon counsel, if designated as a Spokesperson, to provide requested factual information which relates to that particular action, together with any contextual information that may be necessary. However, decisions and the considerations made by the client are not the responsibility of counsel and inquiries about them must be referred to the client department.
4. Should a situation arise in which it is difficult to determine whether a response to an inquiry might entail discussion of a client department's policy, counsel should seek the advice of his or her superior and/or the client.
5. Steps should be taken to make certain it is understood that this policy applies equally to departmental personnel and to standing and special legal agents. Specific instructions to this effect should be provided to standing and special legal agents.
6. See the Criminal Law Deskbook Policy on "Relations with the Media".

Counsel in Legal Services Units

1. Communications with the public, Parliamentarians and media about a client's business are the responsibility of client departments, not of legal counsel.
2. On occasion, the client department may request counsel to respond to media inquiries where legal issues are involved.
3. See the Legal Services Sector Deskbook Policy on "Relations with the Media" now being developed.

Director General, Communications and Consultation

The Director General, Communications and Consultation, has operational responsibility for the Department's program of relations with the media, Parliamentarians and the public. These responsibilities are shared with the Director, Operations and Ministerial Services and the Head, Media Relations.

The Director, Operations and Ministerial Services and Head Media Relations will:

- Ensure that calls from the media, Parliamentarians and the public are responded to as soon as possible, responding themselves to routine requests and undertaking the necessary liaison and research with spokespersons, and other officials.
- Respond to calls directed to the Minister's Office, at the request of the Press Secretary or other Ministerial assistants.
- Provide training, advice and counselling to spokespersons who deal with the news media, and to the Minister's Press Secretary.
- Communications and Consultation notifies the Press Secretary daily of any media contacts or requests and notifies the Policy Adviser of any requests from or contacts with Parliamentarians. Spokespersons must provide information concerning inquiries to Communications to make this possible.
- Regularly advise the Minister's Office and the Deputy Minister's Office of subjects of media interest which are not of a routine nature.
- Regularly advise the Privy Council Office, Deputy Prime Minister's Office and Prime Minister's Office of any subjects of public or media interest; advise counterparts in other Departments and agencies of issues which may involve them or their Minister.
- Be prepared to report to the Deputy Minister or Minister's Office the number and type of requests received on any subject. Sectors must keep a record of calls from the media or Parliamentarians and forward them to Communications and Consultation, either orally or in writing.
- Organise all news conferences, media lock-ups and other events.
- Maintain, produce and circulate a list of current departmental spokespersons twice a year or more as required. This list is available to all departmental employees.

5. MEDIA SPOKESPERSON TRAINING

Communications and Consultation will arrange for training for all departmental spokespersons. Such training is funded by the departmental central training budget and is mandatory for all spokespersons. Refresher courses are available.

For more information, contact:

Wendy Sailman	Director, Ministerial Services & Operations (613) 957-4620
Irene Arseneau	Head, Media Relations (613) 957-4211
Dawn Nicholson-O'Brien	Director General Communications & Consultation Branch (613) 957-4221

ADDENDUM I

A directive of the Prime Minister, issued November 23, 1984, provides policy guidelines for communications with the public by public servants. The directive states:

1. Communications with the public, including particularly Members of Parliament and news media representatives, are a part of the duties and responsibilities of managers in the public service. A staff function in support of this management role is performed by information officers in all departments.
2. Public servants should be prepared to openly provide factual information to the public and the media within their areas of responsibility that describes or explains programs and policies that have been announced or implemented by the government. To contribute to open government, such interviews shall be

on-the-record and for attribution by name. Off-the-record background briefings will only be permitted in exceptional circumstances and must have prior Ministerial approval.

3. Public servants should not go beyond this discussion of factual information. It is not appropriate to discuss advice or recommendations tendered to Ministers, or to speculate about policy deliberations or future policy decisions.
4. These guidelines cannot and do not authorise the disclosure of information which is specifically prohibited by law. Public employees acting in good faith under these guidelines will not be considered having violated oaths of secrecy.

(Version française disponible)

Commonwealth Distance Training Course in Legislative Drafting

Meeting of the Project Advisory Group, September 29 1993

Aide-memoire

1. The meeting was conducted as an audio-conference. Participants were: Patrick Guiton (CoL, Vancouver); Vincent Crabbe (Barbados), Hilton McIntosh (Ottawa); John Hookway, Keith Patchett and Jeremy Pope (London).

2. The following documentation was before the meeting:

- (1) Proposals of the Course Developers
- (2) Report on the Evaluation of the Pilot Module
- (3) Pilot Module materials:
 - (i) Course Book;
 - (ii) Workbook;
 - (iii) Audio-cassette

3. Strong approval was expressed for the quality of the materials comprising the pilot module. The course developers were congratulated on the work to date and enthusiastic support was given for the continuation of the project on the lines developed in the pilot module.

4. The meeting discussed the proposals of the Course Developers arising out of the testing of the pilot module in Barbados in July 1993. The following paragraphs summarise the conclusions reached on those proposals.

A. Course content

1. Soundness of overall approach

5. In its essentials, the approach adopted in the pilot module provides an acceptable balance between the theory and practice and is capable of providing trainees with the basic knowledge and skills in an acceptable way of learning.

2. Coverage of topics selected

6. If the topics included in the pilot module are to be studied in accordance with the general course approach, there is little room for substantial reduction in coverage or length.

3. Level of difficulty

7. The course is to be designed for persons having legal qualifications. Those coming new to legislative drafting should be able to undertake a course using materials of the level of difficulty of the pilot module, provided that -

- the first modules enable the trainees to acquire a solid understanding of the foundations of the topic and to become familiar with basic concepts and techniques;
- sufficient study time is provided.

4. Syllabus coverage

8. The following topics should be deleted from the syllabus:

- 37: Financial provisions
- 40: Statutory Authorities and corporations
- 41: Licensing and registration
- 42: Legislation implementing treaties

These amount to about ½ module.

9. The possibility of developing specialist modules to cover matters omitted should be examined again once the basic course is operational.

10. Certain topics of a more descriptive or procedural nature should be accorded shorter treatment than originally proposed. These are to be found in the first parts of the syllabus:

1. History of parliamentary drafting
2. The function of legislation in the common law tradition
3. Legislative drafting in common law systems
4. The role and responsibilities of Legislative Counsel
5. Types of legislative instruments in common law systems
6. The structure of legislative instruments
8. Objectives in the preparation of written law
9. The organisation and operation of a Government drafting service
10. The relationship between the client Department and Legislative Counsel
14. Stages in the legislative process
15. The role of Legislative Counsel in relation to the legislative process

It should be possible to confine these to ½ module, especially if greater use is made of published sources as the course material.

5. Length of modules

11. These syllabus changes should permit the syllabus to be reconstituted into 5 modules, though the overall length of study should not be altered. The length of the study time for 5 modules should reflect the experience from the pilot that for a 6 module course a range of 60 to 90 hours per module would be needed.

12. Accordingly, for a course involving 5 modules, the minimum study period would need to be set at 75 hours, with a range of 75-100 hours per module (ie, the equivalent of 30-40 hours per week of full-time study for each of 12 weeks). It is recognised, and should be made clear to participants, that such a level of full-time commitment is unrealistic.

B. Course treatment

6. Use and frequency of boxes

13. The present scheme of boxes for activities and exercises should be continued. But greater emphasis must be given in the study guidance to the capacity for the individual trainees to organise the study process to suit their own preferences.

7. Organisation of materials

14. The division of materials between binders should be maintained. The course should comprise an Introductory Booklet and 4 Binders.

Introductory Booklet

This would include the kinds of material at present in the first 15 pages of the Workbook, but expanded to include more detailed guidance on the various features of the course. It should include illustrative examples of the activities set, including the Drafting Projects.

Binder 1: Course text.

Binder 2: Activity Boxes; Exercise Boxes; Drafting Projects.

Binder 3: Answer Boxes; Suggested Answers.

Binder 4: Course materials and precedents; locally acquired materials.

8. Supporting materials

15. Selected materials should be provided which would be directly concerned with the study and tailored for use with the course. A separate Reader of materials on legislative drafting should not be developed.

9. Course textbook

16. A course textbook should be prescribed and supplied as one of the course materials. The Course Developers with Jeremy Pope will confirm whether Vincent Crabbe's new text (*Legislative Drafting*, Cavendish Publishing, October 1993, £29.95) best fulfils the requirements for a textbook that complements this course.

17. Participants should also be supplied within the course fee with a Dictionary and a Thesaurus. The course should be designed on that assumption.

10. Audio-materials

18. As the Course Developers are satisfied that 4 tapes of 90 minutes each can be prepared without any extra financial implications, fuller use of audio-support should be explored. Audio materials should be used to support the course work and the subject-matter of the course, in cases where it is suited to that purpose.

19. Audio support should not be standard for all Projects; it should be used selectively for those which will most benefit from it.

20. Consideration should be given to the use of audio tapes by mentors to communicate their comments on Projects Drafts to participants.

C. Drafting Projects and Assessment

11. Drafting Projects

21. The maximum number of Drafting Projects should be set at the equivalent of 2 Projects a week over 12 weeks full-time.

22. Projects on the lines of those in the Pilot are appropriate, but a better quality of work would be likely if the following procedures (to be explained in the Introductory Booklet) are required:

(1) trainees be asked, as a first stage, in the preparation of their Project to work out, after studying the instructions, the topics and questions that will need to be dealt with in their draft. (In the very first Projects, these questions would be given at the end of the instructions to illustrate the technique);

(2) in the mid-range Projects, trainees be asked to compare and revise their plan of questions and topics with a check-list provided (with the Suggested Answer materials); in the later Projects, they would be expected to work independently in the finalisation of their legislative plan;

(3) trainees be asked to produce a first draft of their Project from their revised plan;

(4) in completing that draft, they would be expected to scrutinise it for errors, using a check list which they have evolved, under guidance, in the course of studying the earlier modules on syntax, style and structure;

(5) on completion of the first draft, trainees be asked to reconsider it by reference to a series of questions provided (with the Suggested Answer materials);

(6) the trainees be asked to prepare a revised draft of their Project to take account of matters suggested by their consideration of these questions;

(7) they be asked to compare this second draft only with the Suggested Answer and the commentary on it.

12. Self-assessment and external review

23. Self-assessment of Projects is feasible, under certain conditions; it should encourage the development in participants of a capacity for self-criticism.

24. Only a proportion of the Projects should be subjected to self-assessment; the remainder must be received externally if confidence in the standards of the trainees is to be created.

25. External review should be required as a minimum for the final Project in each Module and for one other in each of the last 3 modules. There should be a maximum of 12-16 self-assessed Projects, making a total of 20-24 Drafting Projects for the full Course.

D. Course Support

13. Mentor support

26. The course should continue to be written on the premise that mentor support will not be available for the study of the course matter. There would be many jurisdictions in which such support cannot be provided.

14. Moderator support

27. For the Drafting Projects, some external moderation is essential. But the course should be written on the assumption that such support may not always be locally available.

28. Where local support can be provided, it would be open to the trainee to submit all the Drafting Projects for moderation to a local moderator.

29. Where no local support is available, trainees should undertake their own review of those Projects

which are designated as suitable for self-assessment. They would be required to submit their work on the other Projects to an external moderator, by fax or post.

30. Although external moderators would be supplied with the Suggested Answers and commentaries on the drafting projects, the Course Developers should develop some form of manual to explain and give guidance to moderators on their role and responsibilities.

E. Timetable

31. The Course Developers are now in a position to proceed with the main course development. Completion cannot be expected earlier than the second half of 1994. It is not intended that any other modules would be exposed to pilot testing. The Course Developers accepted Hilton McIntosh's offer of the facilities of his programme to pilot test aspects or new features of the course that may be developed.

F. Miscellaneous

32. The meeting expressed support for the view that the course should ideally be delivered through regional centres rather than by a single institution. It was acknowledged that a single centre may be necessary in the initial stages. The scheme for delivery of the course is to be the subject of discussion between CoL and Com-Sec.

33. The Commonwealth Law Ministers are to be informed at their meeting in November of the progress of the work and asked to give their full support to the programme when it is instituted.

KWP

3 October 1993

Computerising the Legal System

The Development of Computerisation in the Commonwealth

Memorandum by the Commonwealth Secretariat

1. Increasingly steps are being taken by Commonwealth countries to computerise aspects of their legal systems. Applications of computer-technology have included the computerisation of statute books and case-law, of registers of title to land and of prison records, and the development of software tailor-made for legislative drafting, for treaty registers and for use by court registrars. Whilst some of these developments are taking place in the private sector, most are within the domain of governments. In some jurisdictions progress has been rapid and remarkable. In others scarcity of resources has meant that conditions have not hitherto been favourable to large scale computerisation. A recognition of the significance and value of computerisation is however common ground.

2. It is also likely that a number of jurisdictions are inadvertently passing up present passing-up opportunities to develop electronic legal data-bases. These will be jurisdictions where word-processors are employed to produce legislation and/or court judgments but where the resulting computer files are not being archived methodically in order to build up what in time may be, for example, a computerised full text series of law reports¹. With the cost of computers ever reducing and their capabilities ever increasing, such a concept is within the realistic expectations of all.

3. There are 2 broad areas of Commonwealth interest:-

- (i) Maximising the use of existing technology in the interests of enhanced mutual assistance. This includes encouraging (a) the recording of primary legal materials - statutes and decisions of the higher courts - on computer disks at the time of their enactment or delivery; (b) the recording of existing primary legal materials; (c) Commonwealth-wide access to data-bases already created or being established; and (d) the application of CD-ROM technology;
- (ii) Promoting and assisting the general development of computerisation in the legal field throughout the Commonwealth through the sharing of experience and coordinated action.

MAXIMISING USE OF EXISTING TECHNOLOGY

Recording of primary legal materials

4. In many member states the recording of legal materials in a "computer -friendly" form i.e. on a word-processor hard or floppy disk is a recent development or

one which is now taking place. It is however a development which is to be welcomed and encouraged. The recording of new statutes and case-law opens the way to the more involved undertaking of computerising the entire corpus of the law of a jurisdiction. This in turn renders law-revision activity easier and more cost-effective. The potential is also opened up for access to the computerised materials by government departments, practitioners and the judiciary through software developed for the purpose, for international on-line facilities, and for the application of CD-ROM technology.

Accessing on-line facilities

5. Given the use made in research and in the preparation both of legislation and cases for trial of comparative Commonwealth legal material, there would be clear mutual advantage if developed systems, and particularly those that are "on-line" to practitioners and others, could be made available to users in other Commonwealth countries and, where possible, on the most favourable terms. However, it must be noted that "on-line" costs can be considerable (particularly in terms of international dialling where the system is not available through the established network which provides access through local calls) and that accordingly the CD-ROM option discussed below can be a much cheaper mode of accessing information where this is available on disk.

6. In the context of sharing data bases, the initiative taken by the Law Reform Commission of British Columbia in creating a data base with references to law reform materials in the Commonwealth - and by then making it available across the Commonwealth at no charge - is not only to be warmly welcomed, but hopefully may have set a standard others will wish to follow.

7. Such an approach would call, in some cases at least, for international accessing to be borne in mind at the time when the systems were being designed or updated. Consideration would need to be given to compatibility and to the preparation and dissemination of instruction manuals to facilitate access and searching by those outside the jurisdiction, although much of the software now in use is so "user-friendly" as to reduce these requirements almost to the mundane (and such manuals would probably be required within the jurisdiction in any event). Naturally, if accessing by other governments were to have resource implications for the receiving government, it might need to examine how these costs, or part of them, could be recovered. However, the expectation would be that any such costs would be minimal. The volume of requests for information

would be unlikely to be large, and the fact that the Commonwealth is spread across nearly every time zone in the world would mean that a significant amount of this use would be likely to take place at times of day (or night) when local users would not themselves be accessing the system.

Using CD-ROM technology

8. The capacity of CD-ROM to store vast quantities of information is considerable. CD-ROM refers to a "read-only" disk which in appearance is identical to an audio CD but which in fact is capable of storing up to 220,000 pages of printed text (i.e. 650MB or the contents of 1,500 double-density floppy disks). From the Secretariat's own point of view, it is likely that, sooner rather than later, the Secretariat may need to have recourse to publishing the Commonwealth Law Bulletin on CD-ROM. Under such an arrangement, each recipient government department would have a relatively inexpensive CD-ROM reader (cost approx. £300), plugged in to (or an integral part of) virtually any PC. The whole of the series would be contained on a single CD-ROM, and could be searched etc readily through software contained on the disk with the full text being brought up on the screen. A replacement disk would issue every three months or so. Eventually, such a system could build in to an "on-line" service, so that governments who wished could enter the central system at Marlborough House and search and retrieve information fed in to the system but not yet incorporated on an issued disk.

9. The capability of CD-ROM is such however that it may be possible to think in terms of the production of a single CD-ROM disk that could hold the combined statute books or other legal materials of a number of Commonwealth jurisdictions. The inability to amend issued CD-ROMs (a new disk must be issued instead) places limits on their value, at least in the context of an area of rapid legislative change, but such disks would remain enormously valuable research tools for all Commonwealth governments at a significant discount to on-line facilities. That is not of course to question the use of on-line facilities for checking on the most up to date legal position.

10. A number of jurisdictions have their statutes on a data-base. The Commonwealth Secretariat would be happy to facilitate the exchange of information with a view to assisting the development of individual or cooperative CD-ROM projects and would encourage national governments to give the Secretariat details of their legal computerisation programmes.

GENERAL DEVELOPMENT OF LEGAL COMPUTERISATION

11. The question of cost is clearly uppermost in the minds of all those looking to increase the application of

computer technology to their legal systems at whatever level of technical sophistication. A thorough and pragmatic analysis of the desired objective at each level of development is required and the extent of both the initial financial outlay and ongoing costs should be researched fully before any step is taken.

12. Once a full needs-assessment has been made and preliminary costing done the broader question of the financial structure which will support the computerisation programme undertaken must be addressed. A consideration of involvement of the private sector or at least commercialisation of the government's information service is inevitable. Whilst such matters are outside the scope of this paper it is hoped that a developmental government policy will not in practice be hampered by the niceties of private sector agreements.

13. The mutual benefit in the exchange of information and ideas and the possibility of fruitful cooperation in developing and commercialising computerised legal data bases is obvious. It is suggested that Ministers may wish to further the discussion at last year's meeting of Senior Officials of national experience in the development of legal data-bases. Ministers are also now invited to implement the recommendation of that meeting and formally to establish a Commonwealth Legal Computerisation Committee. The Committee would be comprised of experts from those Commonwealth jurisdictions with the greatest experience in this field who would oversee and stimulate the co-ordinated, efficient and orderly development of computerisation of legal systems within the Commonwealth. The precise terms of reference of the committee are appended to this paper at appendix A.

14. Attention is also drawn to the Pilot project outline - Computerisation of justice functions of small jurisdictions at appendix B. This is a paper by the Foundation for Responsible Computing which emerged from the 1991 meeting for Senior Law Officers of small Commonwealth Jurisdictions. It deals, in notable detail, with a procedure for approaching computerisation, possible supply sources and approximate costings.

APPENDIX A

ESTABLISHMENT OF THE COMMONWEALTH LEGAL COMPUTERISATION COMMITTEE

Recommendation as agreed by the Meeting of Senior Officials

In the light of developments in Commonwealth countries as described in the discussions, the Meeting decided:

- (i) That Law Ministers be invited to establish a very small group of highly-experienced experts to serve as a Commonwealth Legal Computerisation Committee.
- (ii) That the actual experts be drawn from the four or five Commonwealth jurisdictions with the greatest experience in the computerisation of legal systems and the development of legal data bases.
- (iii) That the Committee be a standing Committee and have terms of reference enabling it to:
 - (a) oversee pan-Commonwealth developments in these fields with a view both to securing maximum efficiency and to ensuring that dissimilarities which could eventually lead to disruption in exchanges of legal information are avoided;
 - (b) foster the orderly development of regional co-operation in these areas (including with relevant non-Commonwealth countries);
 - (c) inter alia assist in developing approaches to legal computerisation particularly suitable for small jurisdictions;
 - (d) advise individual governments ad hoc;
 - (e) foster such transfers of technology between Commonwealth countries as may be appropriate;
 - (f) assist in developing any publication programmes that may become desirable;
 - (g) assist in advising on any necessary amendments to relevant legislation to accommodate technical developments (eg evidence, data protection, computing).
- (iv) The Committee should be serviced by the Commonwealth Secretariat and report both periodically to Law Ministers and Senior Officials through the Commonwealth Secretary General.
- (v) That the Committee be self-financing.
- (vi) That the Committee pay special attention to the Pilot Project Outline - Computerisation of Justice Functions of Small Jurisdictions.

APPENDIX B

FOUNDATION FOR RESPONSIBLE COMPUTING

PILOT PROJECT OUTLINE COMPUTERISATION OF JUSTICE FUNCTIONS

OF SMALL JURISDICTIONS

Prepared for the
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COMPUTERISATION OF JUSTICE FUNC- TIONS OF SMALL JURISDICTIONS

Outline of a Pilot Project

Background - The Cyprus Meeting

In August of 1991, a five-day Commonwealth Meeting, hosted by the Government of Cyprus, was held in Nicosia for Senior Law Officers of Small Commonwealth Jurisdictions (the Cyprus Meeting). At the invitation of the Commonwealth Secretariat, the Foundation for Responsible Computing (FRC or the Foundation) organised the fourth day of the Cyprus Meeting, which was devoted to Computers and the Law Pitfalls and Possibilities for Smaller Jurisdictions.

In response to a number of papers² presented on behalf of the Foundation, a fruitful discussion involving all attendees produced a consensus and recommendations for action duly reflected in the Report of Meeting, the relevant portions of which are reproduced in Appendix A hereto. In particular, the opportunities for a small developing state presented by the automation of its justice functions were considered by the Cyprus Meeting to be of such importance that a pilot project was envisaged whereby the Commonwealth would assist one or more small developing states in the computerisation of its legal system. In that regard, the FRC was invited by the Commonwealth Secretariat to prepare a working paper for such a pilot project, in pursuance of the requirements formulated at the Cyprus Meeting, to be presented to the Meeting of Senior Officials of Commonwealth Law Ministries to be held in Singapore from 30 March - 2 April, 1992 (the Singapore Meeting).

Project Overview

The participants at the Cyprus Meeting, as a result of their own reviews and considerations, were unanimous in identifying a list of critical operational areas where functions should be automated, and in expressing their

over-all need for computer- and telecommunications-based tools to allow them to bridge time and distance in liaising and coordinating activity, sharing experiences, working collaboratively, and accessing commonly needed resources (such as Privy Council decisions) on a timely basis. The elements specified by the Cyprus Meeting as priorities for action³ are accordingly addressed in the present paper, together with suggestions on order of implementation, possible supply sources, and approximate costings.⁴

The nature and traditions of the common law system invest the project for automation and electronic communication between Commonwealth jurisdictions with a particular resonance. The heritage of common law binds this community across oceans and continents, time zones and centuries, so that the task of making this great body of law and precedent more readily accessible inspires both awe and prudence. To carry out this task will require skill, perseverance and willingness to learn, so that the benefits of the modern technological revolution in communications may be made to serve the needs of the peoples and governments of the full range of Commonwealth jurisdictions.

With this aim in view, we have examined the underlying applications that would be needed to automate the various operational areas and we have also considered the necessity to lay the groundwork for an open architecture enabling the most efficient and effective execution of this project. Larger scale implementations will follow if the initial stages are successful, as well as subsequent implementation of additional functionality in a complementary fashion. In this examination we have taken into consideration the current state of the art as well as cost elements in terms of their impact on the small jurisdictions in whose interest the project is initially designed.

Succeeding in a project of this nature requires not only thoughtful planning but also the exercise of stringent discipline. Our recommendation is first to take the time necessary (probably from four to six months) to define an architecture, or common technology platform, within the framework of which operational applications would then be implemented. In the balance of this paper we outline the key elements of the project.

Planning the Project

The underlying assumptions on which planning could usefully proceed are set forth in the FRC's *Guide to Effective Procurement Techniques* presented to the Cyprus Meeting,⁵ and these elements are accordingly not repeated in the present paper.

As explained at some length in the FRC's *Guide to Effective Procurement Techniques*, a working group or steering committee (Working Group) needs to be established at the outset in order to ensure a timely, cost effective systems acquisition process. This approach is

the more important in the present context as compatibility between systems in the various jurisdictions must be assured if the project is to achieve maximum advantage to the users.

The Working Group coordinates the entire procurement process and takes responsibility not only to assess technical options and the suitability of the hardware and software products selected for the tasks at hand, but also to identify and monitor user requirements and preferences, to identify suitable vendors and supervise the contractual negotiating process, and to plan for an orderly implementation, comprehensive acceptance testing, and adequate post-implementation review and support (including user training and vendor support). For optimal results, therefore, the composition of the Working Group must include: at least one senior policy individual of the client department or ministry, who has command of the broad goals and objectives of the project; managerial personnel from each department whose operational areas are involved or directly affected by the outcome of the project (i.e., delivering or receiving services that will be automated); technical personnel into whose jurisdiction maintenance and support of the new system(s) will fall; a project manager (which may be an individual but preferably, for obvious reasons, would be a firm of information technology consultants); and a legal advisor experienced in hardware and software contracting, as well as in the request for proposals (RFP) process.⁶

To ensure compatibility (and therefore ultimate project success) in the multi-jurisdictional context of this project, it will also be essential for the Working Group to make its deliberations and decisions available to each of those jurisdiction(s) which, while not the immediate subject of the pilot project, have already automated administration of justice functions (or will be automating such functions during the anticipated timeframe of the pilot project). The reports of the Working Group could, for example, issue in the Commonwealth Law Bulletin. Interested jurisdictions could arrange with the Commonwealth Secretariat to receive texts and/or copies at an earlier stage than publication. Similarly, interested jurisdictions could be represented at meetings of the Working Group at appropriate stages of the project.

I. Defining a Common Technology Platform

Technological advances over the past five years or so with increases in power of microprocessor chips, decreases in component size, and declining prices have greatly enhanced the feasibility of projects such as this, by facilitating a general migration away from the expensive mainframe technology of former years to what has come to be called distributed or network computing. Over the same period, significant advances have been made in standardisation, particularly in hardware and operating systems, such that it is possible for prudent

users to define a technology platform that is vendor-independent⁷ and that will allow maximum flexibility, as time goes on, in adopting new technology without discarding the old.

Achieving a framework that will enable compatibility and information sharing should be possible if four common architectural building blocks are emplaced:

- a common *relational database*;
- a common *network operating system*;
- a standard set of specifications to be met by *network servers*; and
- subject to any flexibility permitted by the network operating system, a standard *network workstation*.

The objective will be greatly facilitated if, in addition, a common suite of application software is adopted for applications that contemplate data exchange (e.g., word processing, desktop publishing).

Database Management System (DBMS)

For computers, the workhorse of information storage and retrieval is application software known generically as a Data Base Management System (often shortened to "DBMS"). There are basically three kinds of DBMS: *hierarchical*, *network* and *relational*. Where they differ is in how they store records, which has a significant impact on their ease of use, their ability to retrieve information quickly, their ability to unify separate domains of information, their ability to handle heavy processing throughput, and the amount of memory they require. Success in achieving the strategic benefit sought by the Commonwealth of improving information delivery capability will depend on the type of DBMS chosen.

In most common use are *hierarchical* systems, which store information in a vertical hierarchy resembling an inverted pyramid or "tree" structure. In a true hierarchy, records at one level are accessible only through the records below them. There are at least two disadvantages to this system, as follows:

to retrieve information from the depths of such a database, or to perform even the most perfunctory programming or maintenance tasks, a user must be intimately familiar with the structure of the trees (a formidable requirement when the database is large and complex); and

because there are no cross-links between trees, a user must either accept slower response times or allow data to be duplicated in more than one tree, significantly increasing storage requirements.

A *network* database structure permits horizontal links to be established between the various levels in what is otherwise a hierarchy, cutting down on the duplication of information, but complicating the process of retrieval. With network systems an even greater premium is placed on the user's understanding of the data structure,

which can become so complex that very specialised training is required to work with it.

In a *relational* database structure, data is organised in tables, each row of which constitutes a record. A column from one table can be included in other tables, forging a relational link between all the tables in which the column appears. The result is that:

- duplication of information is kept to a minimum, since only relational links need be repeated, with the advantages of greatly improving the ability to update, minimising the opportunity to introduce error into the database, and virtually eliminating inconsistencies between databases;
- training requirements are lessened, since a knowledge of the database structure is unnecessary to achieve success in retrieving the desired information; therefore a broader range of users can benefit from the resource and administrative personnel and secretaries as well as lawyers will be able to use the relational DBMS quite readily;
- separate domains of information can be readily unified into a single database by the simple expedient of a relational link, with the result that each new application can work with *all* of the information stored under the relational DBMS, without any conversion, copying or re-keying; and
- reporting flexibility is completely unlimited.

In our view, a relational database, incorporating the SQL database language⁸ an accepted international standard, is the correct choice for the Commonwealth as a common database environment, not simply because of its storage efficiency and its reporting flexibility, but because of its unparalleled ability to unify separate domains of information.⁹ Moreover, a number of the leading relational databases offer compatible versions that operate on a multitude of technology platforms (i.e., combinations of hardware and operating systems), which may more readily facilitate the trans-jurisdictional adoption of the relational database.¹⁰ The Working Group should direct its attention, at the earliest possible date, to the selection of an appropriate relational database product, giving due attention to technology platforms already in place.

Network Server

The functionality of the microcomputer, while well suited to the needs of individual computing, does not, however, lend itself to the additional requirements engendered by the complex environment of many users performing a variety of tasks, sharing and competing for resources. For the network to succeed in meeting the needs of users, at their desktops, the abilities to share stored data, to manage competing needs for computing resources and to process communications functionality formerly provided within the unified structure of the mainframe or minicomputer must still be accommo-

dated. In the network computing architecture, these requirements are assigned to servers, computers that are connected to the network so that they are available to be shared by many users.

Computers designed as servers¹¹ outwardly resemble the central processing unit of a minicomputer, physically downsized but typically more powerful. The specific configuration (power, capacity, size) of a server tends to be defined by its role¹² and the roles of servers generally are considered to fall into three classes:

- *file servers*, which provide users with the ability to share stored data, and to control printers and other peripherals;
- *communications servers*, to manage network users and resources and to process intra-workgroup and inter-workgroup communications; and
- *application servers*, which are used to handle applications that are not optimally addressed at the desktop (for example, for reasons of horsepower, or the need to provide multiple concurrent access).

The role of a server is accomplished most effectively within network computing architecture by relatively inexpensive systems specifically designed¹³ to function as servers on a network (hereinafter, "network servers").¹⁴ These network servers offer multiple independent data communication channels and other features providing redundancy, reliability, data integrity and security of a calibre formerly associated only with large and expensive systems, and the ability to run industry-standard network operating systems (like Novell NetWare and UNIX).

We recommend that the Working Group should, at the earliest possible date, identify appropriate specifications for a range of network servers (which may be capable of being met by more than one manufacturer). Such a range would then form the basis for future purchases by all participating jurisdictions.

Network Operating System

The keystone of network computing, the network operating system must provide the means for integrating the various types of dissimilar computing resources minicomputers, mainframes, network servers and microcomputers and multiple network topologies into a unified system. With an astute choice of network operating system, the role of a server (particularly an application server) can also be accommodated, within certain parameters, by minicomputers, mainframes and even high powered PCs, with the happy result that, in many, if not most, cases, participating jurisdictions will not be compelled immediately to abandon investments in older hardware. Rather, they may convert, during a transitional phase, on a basis that recognises the economic life,¹⁵ if not the useful life, of existing equipment.

There are probably no more than half a dozen products, at most, that bear review and a key selection factor will be the range of equipment and peripherals which each can support. The Working Group should direct its attention, at the earliest possible date, to the selection of an appropriate network operating system.

Desktop Workstation

In a network computing architecture, word processing and most applications¹⁶ will operate at the desktop, meaning that an intelligent desktop microcomputer will assume much of the processing burden. That provides a number of benefits¹⁷ provided that an appropriate choice of desktop microcomputer is made.

It is generally accepted, since a 1987 report¹⁸ issued by the Gartner Group, a respected North American think tank, that there is much benefit in standardising upon a desktop workstation and in adopting a graphical screen display, or user interface as it is often called. The magnitude of the benefit was analysed in some detail by Gartner Group, through an examination of both the acquisition costs, including interest expense (hard costs) and the ongoing training and support costs (soft costs) of providing a desktop microcomputer and a defined set of applications to knowledge workers. Based on a life-cycle model developed in order to properly compare one-time and ongoing costs, their conclusion was that hard costs comprise only 28% of the life-cycle cost per desktop unit in a five-year period, with the balance 72% going to soft costs. The study also showed significantly lower soft costs associated with workstations that provide a graphical user interface, as well as consistency of screen layout¹⁹. The intuitive nature of a graphical user interface combined with consistency of screen layout²⁰, with the result that users tend to be familiar with, and regularly use, more applications and incremental training time for new applications is significantly lower.

The Working Group should recommend standardisation of ongoing purchases on a specific workstation incorporating a graphical user interface.

Application Software

Soft costs are also much affected, adversely, by an unnecessary diversity of application software. Operational efficiency also suffers as a result of excessive diversity, particularly where the application affects regular data exchange, such as word processing software and desktop publishing (DTP) software. Moreover, if existing equipment is to be kept for its economic life, and maximum flexibility assured for the selection of new equipment, key application software should be capable of running on a number of technology platforms. The Working Group should recommend standardisation of ongoing purchases of key application software on specific products, giving appropriate weight in selection to availability on a variety of technology platforms.

II. Implementation of Specific Applications for Commonwealth Jurisdictions

As a result of the consensus expressed by the participants at the Cyprus Meeting, we have accepted the list of critical operational areas requiring automation, so that we have essentially taken as done the initial phases of what would normally be undertaken as a needs assessment. Attention, and the discussion which follows, have accordingly been focussed upon the most advantageous prioritisation and staging. However, a further elaboration of the functionality desired in conjunction with each application or grouping of related applications (i.e., the detailed phases of the traditional needs assessment) should still be undertaken,²¹ in conjunction with a review of the functionality available in operational applications in use in relevant settings (e.g., government departments, law schools and universities, large law firms). For example, there are a number of applications developed in law firm and law school settings, oriented to the tracking and annotation of statutes and statutory provisions, linking of related cases and legal concepts in multiple jurisdictions, and general legal research tools and resources, that may be particularly responsive to the goals and objectives of departments of the Attorney-General and Justice in a small-state setting. Moreover, some large Commonwealth jurisdictions, such as Canada²², have compiled comprehensive catalogues of operational justice-related systems which will greatly facilitate such a review. The FRC stands ready to assist the Working Group or individual jurisdiction(s) in identifying resources relevant to particular applications under consideration.

Prioritising and Staging Functions to be Automated

One should not underestimate the scope or significance of the project contemplated. This is a management project of some complexity that will profoundly impact the department(s) and ministry(ies) involved in each participating jurisdiction, and it should be implemented in progressive stages, so that users at all levels are comfortable with the techniques and results as work progresses. Indeed, proper staging will be crucial to success.

In this project, the following factors must be given due consideration in identifying which applications must come in advance of others, and which may, or should, be grouped together:

- the relative complexity of the particular application;
- the existing expertise of the relevant user community;
- the importance of the services which will depend on the application;²³
- the importance of the application to the achievement of the departments or ministries broader

goals and objectives;

- the dependency of the particular application on other applications to be implemented or other aspects of the project;
- the potential to achieve improved services, cost savings, cost displacements and other efficiencies; and
- the motivational importance of an early success with obvious benefits.

Internal Publishing Capability for Statutes

On the basis of the foregoing factors, we would recommend beginning with the establishment of internal publishing capability for statutes desktop publishing to use the commonly applied phrase, or DTP. This is a mature and (relatively) inexpensive²⁴ application that may be readily implemented and mastered at appropriate staff levels without unduly complex training. Moreover, the alternative of outside professional publishing is well known to be very expensive. Thus one can achieve not only early success but also demonstrate the advantage of cost displacement, so that cost savings on outside publishing may be applied to fund ongoing elements of the larger project.

In addition to hardware, which will have been selected with the demands of this application in mind, and DTP software, this project element will entail conversion to electronic form of the entire legislative series of the particular jurisdiction. If the statutes have previously been typeset by a publisher using modern typesetting software, it may be possible to procure the data files created by the publisher and electronically read them in to the format of the selected DTP software²⁵. This is the most advantageous situation and should be explored as a priority. Alternatively, commercial services now exist to enter text on a large scale, either by scanning if the subject matter is of clean typeset or typewritten quality or by keyboard entry.²⁶

Publication in Electronic Form

It is widely regarded as fashionable to publish electronically, and there are certainly benefits to be enjoyed over paper in terms of space saving, portability and stability of the medium. However, commercial publishers and many who enjoy the in-house ability to publish electronically are very candid in admitting that a paperless society is still far away, and one must *always* make publications available in paper as well as in electronic media. Indeed, if this is not done, a fundamental principle²⁷ of the common law access to the law will effectively be denied, since those lacking the specialised equipment will not be able to exercise their right of access to the law.

The desirability of electronic publications in the Commonwealth context can readily be appreciated with re-

spect to the availability and convenience of omnibus legislative series (perhaps including the laws of several jurisdictions). As far as databases are concerned, the cost of the electronic publication often compares quite favourably to on-line access charges.

Assuming that ²⁸ some consideration will need to be given to the desired characteristics of the publishing medium, be it CD-ROM,²⁹ laserdisc, WORM,³⁰ or one of the newer "erasable" high-density media.³¹ The appropriate data file format must also be considered in this context, as the format in which data is stored is independent of the storage medium. For example, the ability to read a CD-ROM depends not only on having a CD-ROM reader but also on the ability of the application software possessed by the user to read the data file format in which the information is stored, which ties back in to the selection of application software discussed earlier in this paper.

Draft Legislation and Bills

The availability of statutes in electronic form provides a foundation for other important applications affecting draft legislation, bills and repealed legislation. It would be a relatively simple matter, but of obvious importance, to adopt the use of DTP format for draft legislation and bills.³²

One would also be in a position, as a next step, to equip legislative draftsmen with some of the powerful drafting programmes that facilitate not only increased productivity but consistent quality and workproduct sharing, both within and between jurisdictions (inter-jurisdictional sharing of legislative workproduct being of obvious benefit and importance in the Commonwealth context). This potential is of particular significance to the harmonisation of enabling legislation to carry out multilateral treaty obligations, bilateral extradition treaties, and similar exercises with Commonwealth-wide application.

Treaty Registers, Repealed Legislation and Court Records

The next major step, however, is the introduction of a database application in the form of a document management and indexing system³³, so that the various chunks of text can be put away when not in use and found when needed.

The design of the document management and indexing system should permit inclusion of abstracts of any document, so that it can point to useful items that are not in electronic form on the network.³⁴

It should also facilitate what is called full text indexing, as well as abstraction or cataloguing of entries so that not only the abstracts but also the actual text of documents can be searched, using a variety of well-established and new search engines (including artificial intelligence software).

The document management and indexing system

makes it immediately possible to establish such things as the desired treaty registers, the historical file of repealed legislation and a system for handling court records, both active and archived.

Access and Retrieval Capacity

Once a document management and indexing system is in place, it becomes quite feasible to add the next level of productivity tools. Software programs that provide a linking capability (called hypertext) between discrete items of text, graphics, and even voice and animation (usually referred to as multimedia) are now widely available at ever-decreasing cost³⁵, and are being incorporated by large law firms into important information management tools³⁶. The information management tools³⁷ combine with the "addressing" power of the document management and indexing software to make it possible to annotate and cross-reference at will.³⁸

Thus, one might create cross-reference links³⁹ between a statutory provision and its predecessor provision (now repealed but still relevant⁴⁰), to the relevant portion(s) of any white paper or other official or unofficial explanatory material, and ultimately to decided cases, as well as to relevant provisions or terminology and decided cases of other Commonwealth jurisdictions. Thus, in the context of sentencing practices, one might compare the effect upon, for example, incarceration and recidivism of a particular legislative approach in one jurisdiction to results in a second jurisdiction employing the same approach, and then to results in a third jurisdiction employing a different approach to the same problem.

Collaborative Applications

An area of importance to the participants in the Cyprus meeting was the ability to work collaboratively with their colleagues in other jurisdictions, and a variety of relatively simple and inexpensive applications—electronic mail, computer bulletin boards and computer conferencing—can be implemented to facilitate this, once the basic technology platform is defined and compatible application software identified. It does not depend upon the prior implementation of the applications described above and might therefore proceed in parallel. Moreover, it may serve as a considerable incentive to adopt the common platform.

An example of the potential of computer bulletin boards was much in evidence in Cyprus in the context of Privy Council decisions. Electronic mail has a particular potential in, for example, extradition proceedings, money laundering, and other manifestations of transnational crime.

Conclusion - Leveraging With Technology

This paper has for reasons of space and terms of reference concentrated on the architecture and on the tech-

nology needed to carry out the design agreed on by the working group for the pilot project. The establishment of a common technology platform is the proximate stage of a wider purpose to make the heritage of the common law accessible to the peoples of Commonwealth jurisdictions and to bind them more closely through the devices of modern communications systems. The architecture and techniques are simply tools available for this end, and the crucial component for the process is and will always be the commitment and the will of the managers and the users of the system to serve their communities as effectively as their abilities permit.

Innovation and particularly mechanical innovation can also nurture the Luddites and the inflexible nay-sayers who tend to nest in bureaucracies. Cost conscious managers in the various jurisdictions have already been made aware of the costs of resistance when understanding of the benefits and economies of information technology has not been absorbed into the approach of system users to their work patterns. The method of involving all levels of users into the systems acquisition process through the device of the working group has been found to be effective in large as well as in smaller work places and jurisdictions, and the initial and enthusiastic contribution of the Senior Law Officers, acting as a working group at the Cyprus Meeting, has served as a spur in the preparation of this paper as a first contribution to the application of computer technology to meet their specified requirements. The realisation of the project will depend on their sustained interest and in the interest, understanding and flexibility introduced and maintained at all levels of government service as the work of innovation proceeds.

The possibilities for future applications open out from the introduction of the common technology platform, which will enable important strategic benefits allowing the Commonwealth to build on the success of the pilot project. It will be possible, for example, to implement distributed support for the Commonwealth network, in the sense that a particular jurisdiction with a particular expertise may be assigned responsibility by a network secretariat - the permanent successor of the Working Group - for, say sentencing databases,⁴¹ thus facilitating the creation of centres of excellence. Similarly it will be possible to leverage, for the benefit of all the jurisdictions participating in the Commonwealth network, the collective knowledge, experience and capability, and, perhaps most importantly, budgets, in bringing world-class technology to bear in addressing the ongoing needs of the Commonwealth. It is a worthy task.

In summary, the pilot project outline proposes the following sequential pattern:

1. A Working Group is established to coordinate the project process, and disseminate the deliberations and decisions of the Working Group to interested Common-

wealth jurisdictions;

2. The Working Group assesses technical options, defines a common technology platform, and selects the most suitable computer hardware and software products for the tasks at hand;

3. Desktop publishing, which provides a basis to establish internal publishing capability for statutes, is suggested as a priority, beginning with existing legislation.

4. The following priorities are suggested for the sequential elements enumerated in our terms of reference:

- (a) publication of omnibus legislative series, ultimately including the laws of several jurisdictions, in electronic media;
- (b) extending internal publishing capability for statutes to incorporate draft legislation and bills;
- (c) the introduction of a relational database application in the form of a document management and indexing system to organise the collection of statutes, draft legislation and bills;
- (d) extending the document management and indexing system to establish the desired treaty registers, historical file of repealed legislation, and handling of court records.

5. Additional possible scope for the project includes the collaborative applications, electronic mail, computer bulletin boards and computer conferencing.

EXTRACT OF MEETING REPORT
**FOURTH MEETING OF SENIOR LAW
OFFICERS OF SMALLER COMMONWEALTH
JURISDICTIONS**

Nicosia, Cyprus, 19-23 August, 1991

Computerisation and the Small State

- There is a need for the preparation of model laws to govern the operations of computer systems to ensure that the necessary national legislation is both effective and uniform, so as to enable a jurisdiction to benefit from the case law and experience of other jurisdictions in a particularly complex and challenging area of the law.
- It is essential to ensure that small states in particular are enabled to take full advantage of the considerable opportunities presented by computer technology, with special reference to such matters as:
 - legislative drafting;
 - law revision;
 - treaty registers;
 - court records;
 - case law; and
 - desktop publishing.
- It is vital, especially for small jurisdictions, to enjoy access (and, where possible, on-line access) to relevant legal data bases as these are developed in other Commonwealth jurisdictions. There is thus a need for systems to be developed which are compatible and for access to be enjoyed on the most favourable terms. The Commonwealth Secretariat should pursue these matters on a pan-Commonwealth basis.
- Some small states may wish to consider the feasibility of moving to a paperless legal system, with an electronic statute book and law reports, and with consequent economies in printing and other efficiencies.
- The evaluation, purchasing, installation, training, maintenance and development of computer systems are particularly complex tasks for small developing jurisdictions and are matters on which technical assistance should be available from aid agencies for those who require it. There is considerable scope for exchanges of information and experience in this area, and a need for future meetings to keep the matter under review. In particular, the Commonwealth Secretariat should be invited to explore the feasibility of fully computerising developing small states initially by means of pilot projects.

REFERENCES

1. A notable exception is understood to be Botswana, where superior court judgments are being kept on floppy disks for this eventual purpose.
2. Most relevant to the present paper is *Safety in Numbers - A Guide to Effective Procurement Techniques* (hereinafter "the FRC's *Guide to Effective Procurement Techniques*"), a paper jointly prepared by Steen Frandsen, Managing Partner of Frandsen van Beek, a management consulting firm, and Harold Ross, a legal officer with the City of Calgary. Other papers were *Admissibility of Computer-Produced Evidence* by Robert MacKinnon of Osler, Hoskin & Hoskin & Harcourt, a Canadian law firm, and *Critical Legal Issues of Technology for Governments and Institutions*, by Brian Bawden, President of FRC.
3. See Annex A to this paper. The immediate essential elements have been identified as: legislative drafting; local law reports; drafting of judgments; a treaty register; historical file of repealed legislation; handling of court records.
4. We ask indulgence for putting forward a detailed and technically complex proposal, but the consequences of a superficial approach can be particularly costly in this type of endeavour. Particular care has therefore been taken to explain technical concepts, to set forth options in clear terms, and to identify the terms of art in a management context, with the result, ironically, that the presentation may appear to be simplistic to the sophisticated reader.
5. See footnote 1 above.
6. For a discussion of this process, see Part One of the FRC's *Guide to Effective Procurement Techniques*, entitled Using the Request for Proposal (RFP) to Manage the Acquisition and Procurement of Computers and Telecommunications.
7. Vendor independence is synonymous with an ability to choose the best tool for the job. Just as significant, however, is the danger of relying on a single vendor in an industry that is rapidly rationalizing, as declining prices and the advent of standards make the industry increasingly competitive.
8. SQL (sometimes pronounced "sequel") is an acronym that stands for Structured Query Language. Originally a proprietary language developed by IBM, SQL has become an accepted worldwide standard and, in the view of industry commentators, SQL is and will continue to be the de facto standard for database languages into the next century.
9. To state the other side of the argument, the conventional wisdom is that relational databases are slower than hierarchical. In our view, and without meaning to sound trite, that depends a lot on the task at hand. For high volume iterative processing, hierarchical databases can have a speed advantage because, quite simply, a good programmer will set up the inverted pyramids of information to favour the process by presenting the information in the order required for processing, duplicating information into as many inverted pyramids as need be, at the expense of storage space. On the other hand, for searching and reporting (which will represent its primary use in the Commonwealth context), the advantage is completely reversed and the relational database has a vast superiority of response time, storage efficiency and reporting flexibility. Any speed advantage of a hierarchical database is lost as soon as the advantage of presentation order is lost which, of course, is exactly what happens in the context of searching and reporting.
10. Oracle and Informix, respectively, are probably the industry leaders in this regard.
11. It is possible to press into service as "servers" the central processing units of existing mainframes and minicomputers, if the network operating system supports the particular technology and if it makes sense to do so from an economic point of view. See the discussion under the heading "Network Operating System".
12. A server is to a mainframe or minicomputer as a specialty shop is to a department store; it derives its advantage from being ideally and uncompromisingly suited to its task, with no unnecessary over head. The specialty shop servers which may be physically very distant are then brought together by the network to which they are connected in what the user perceives as an electronic shopping mall.
13. Modular design readily permits a particular system to be configured with components optimally suited to its role, whether as a file server, communications server or application server, and thus two servers that appear outwardly identical may look radically different once the cabinet is opened.
14. Leaders in this field include NetFrame Systems, Sun Microsystems, Fujitsu/ICL, IBM, Compaq, and Digital Equipment Corp., among others.
15. Recent experience has demonstrated that equipment turnover from older minicomputer and mainframe systems has an increasingly shorter cycle, particularly in an environment of rapidly declining prices for new equipment of greater power and capacity, as relatively high maintenance costs for older equipment can easily be re-allocated to finance replacements.
16. The need for shared access and the processing speed to be derived from an extraordinarily powerful computer invariably dictates assigning the principal processing chores for the relational database to an *application server*. See discussion *infra*.
17. Desktop microcomputers effectively networked offer numerous advantages over mini- or mainframe computing, including: cost, both of hardware and software; independent performance (simply stated, each desktop microcomputer has exclusive use of its own processing chip and, in contrast to a minicomputer or mainframe, the activities of other users on the network do not degrade the processing performance of that chip); access to a wider variety of software applications (from a programmer's point of view, the relative simplicity of microcomputer operating systems makes it technically easier to write software for the desktop microcomputer, and a significantly larger base of users makes it financially more viable); the ability to add capacity to the network incrementally; minimal exposure to single points of failure (it is a problem of some magnitude when a mainframe host that provides processing capability to scores, if not hundreds, of users fails); the ability to keep individual "spares" on hand; the flexibility to upgrade and re-allocate equipment on a user-by-user basis.
18. Strategic Analysis Report dated 5/20/87, "End-User Computing - Measuring and Managing Change", a limited distribution publication of Gartner Group, Inc., Stamford, Connecticut.
19. These criteria are met, most notably, by Apple with its Macintosh line of microcomputers and by microcomputers built to the so-called IBM standard with sufficient power to run Microsoft Windows software. There are several Unix-based graphical interfaces (Motif and NextStep are two) which may bear review, but there is, as yet, a paucity of application software written for these environments.
20. Interface consistency ideally means that the same functions in different software products always bear the same nomenclature (for example, the editing functions of *cut*, *copy* and *paste*), are identically positioned in the menu of functions (ie. grouped under the heading *Edit*), and are activated by identical keystroke combinations. Made popular by the Apple Macintosh, it was joked that a Macintosh user didn't take the shrinkwrap off the instruction manual for the first few weeks of using the software.
21. WordPerfect, for example, offers versions that run on, and seamlessly exchange files between computers using the DOS operating system, DOS with Windows, OS/2, Macintosh OS and Macintosh A/UX, UNIX, Data Generals OAS/VS and Digital's VMS, among others.
22. For a thorough treatment of needs assessment, see *A Guide to Computerization of Information Systems in Criminal Justice*, United Nations Publication, Series F, No.58 (forthcoming).
23. The Departments of Justice and Attorney General of Canada, in August 1990, published the *Directory of Canadian Justice Information Systems* which covers court systems, police systems,

- correctional systems and research systems in use in the administration of justice at the federal, provincial and municipal levels in Canada. The Directory is available from the Research and Development Directorate, Department of Justice-Canada, Ottawa, Ontario K1A 0H8.
24. One must realistically assess the possible impact of interruption of those services in the event of unforeseen difficulties and incorporate contingency planning where appropriate.
 25. For preliminary budgeting purposes, it is realistic to anticipate a cost of \$Cdn12,000 for a fully equipped DTP workstation (micro-computer, printer and software).
 26. Commercial publishers in the English-speaking world would generally provide text files written in the North American or international version of ASCII. ASCII (rhymes with passkey and stands for American Standard Code for Information Interchange) is a binary language capable of representing the letters of the alphabet, the numerals of the decimal system, and the control functions of an ordinary typewriter keyboard; for publishing purposes, text files are tagged with SGML (Standard General Mark-up Language) to show formatting and other specialized instructions not available in ASCII. Specialized parsing software is available to read in the files to the desired format.
 27. For preliminary budgeting purposes, it is appropriate to anticipate a range of charges from \$Cdn1.00 to \$Cdn3.00 per page for either scanning or keyboard entry.
 28. There are generally considered to be eight principles, or expectancies, forming the internal morality of the common law, of which access to the law, or promulgation, is one. The other seven are: generality (of application); clarity (of meaning); compatibility (or non-contradiction); prospective effect (or the presumption against retroactivity); constancy; feasibility (or not requiring the impossible); and congruence (between the law and official action). See Fuller, L.L., *The Morality of Law*, Yale University Press, 1969.
 29. A process called mastering is involved, which is expensive unless the cost is amortized over numerous copies. It may be feasible, in light of recent technological advances and price reductions, to consider the purchase of a mastering system (approximately \$Cdn40,000) if it was to be made available to a number of jurisdictions. In-house mastering could have the effect of significantly lowering the cost of publishing in electronic media.
 30. An acronym which stands for Compact Disk Read-Only Memory. CD-ROMs are non-erasable, which is increasingly seen to limit the applications to which they may efficiently be put.
 31. WORM stands for Write Once Read Many. Like CD-Roms, WORMS cannot be erased, and therefore they cannot be annotated and must be replaced in order to be updated.
 32. Erasable optical disks, with density of storage comparable to CD-ROM, have recently become available. Erasable high-density media offer a number of advantages for in-house publishing, including the ability to edit, annotate and update.
 33. Appropriate technical and procedural safeguards would be needed to assure the integrity of the final texts of the Acts following Royal Assent.
 34. For preliminary budgeting purposes, a figure of \$Cdn500 per workstation, with a minimum of \$Cdn25,000 may be used for the acquisition of the basic software, but it must be borne in mind that this application is likely to require customization.
 35. This provides a means of incorporating and enhancing the usefulness of established paper-based libraries. For example, one may have attended a conference or meeting where a useful paper was delivered. Upon returning from the conference, one places the paper in the departmental library and completes an electronic reference card in the document management and indexing system, identifying keywords and other relevant criteria. As a result, the material can readily be accessed in a wide range of contexts.
 36. One of the larger manufacturers, Apple, has for years included a stereophonic sound capability as a standard feature of its computers and has now become the first to include a multimedia software package, *QuickTime*, as a standard feature.
 37. A leading Canadian law firm has co-developed with a commercial software firm a text and graphics hypertext application for contractual precedents, statutes and literary content (opinions, research, articles and the like), to which voice capability will soon be added. The FRC would be happy to supply further information.
 38. For preliminary budgeting purposes, a figure of \$Cdn 750 per workstation, with a minimum of \$Cdn25,000 may be used.
 39. In a hypertext environment, secondary information (annotations, cross-references and the like) is "nested", that is, the information is not brought to screen unless requested by the user. So that a user will know when there is secondary information available in respect of text on his screen, the existence of links to secondary information is indicated by the presence on the screen of a small symbol, or "icon". Typically, in a graphical user interface, the user "points" to the icon with his pointing device, or mouse, and "clicks" (depresses the button on the mouse) to call the secondary information to the screen. The secondary information generally appears in its own "window" on the screen, where, depending on the access privileges granted to the particular user, it may be read, copied, amended or printed, and then "put back".
 40. The existence of each such cross-reference would be indicated on the screen by an icon and could be called up by a single key-stroke.
 41. Note that legislative text, once captured in electronic form, is never erased from the system; rather its status is altered.
 42. See, in this connection, the ongoing work of the United Nations Criminal Justice Branch in relation to the computerisation of criminal justice statistics.

Computerising the Legal System: the Botswana Experience

by P T C Skelemani, Attorney-General of Botswana

Introduction

The purpose of this Paper is to describe the experience of the Botswana Government in its efforts to computerize the legislative drafting process, the 1987 Revised Laws of Botswana and the Botswana Law Reports. Computers were first installed in the Attorney General's Chambers sometime in 1989 for use by the Drafting Division in order to facilitate the drafting process. Bills and other legislative material were keyed directly into the computers and then copied onto diskettes which were then forwarded to the Government Printer for printing and publishing. This has not only speeded up the legislative process within Chambers in that, inter alia, time previously lost typing and re-typing documents and proof-reading them has been substantially reduced, but has also paved the way for more efficient use to be made of the computers.

Goals and objectives of the project

Since the first computers were installed in Chambers, several more have been installed and other Divisions within Chambers are also putting them to use - the General Division for the storage of legal opinions and Agreements entered into between the Government and third parties, the Lands Division and the Deeds Registry for preparing and storing information relating to the allocation of State Land.

It quickly became apparent that there existed greater scope for the use of our computers in the day to day work of the Department. Within the General Division, for example, it is difficult to access data relating to Conventions and Treaties in order to determine, inter alia, what Conventions and Treaties Botswana is party to, or when Botswana became party thereto. One has to laboriously leaf through piles of papers in order to obtain such information. On the other hand, if a computerized Treaty Register were established, it would be possible to access vital information at the stroke of a few keys.

But it is really within the Drafting Division that the most difficulties are encountered, and in which computerization on a broader scale is most urgently required. The Division is responsible not only for the drafting of legislation, but also for the revision of the Laws of Botswana as well as the production of the Botswana Law Reports. The last Law Revision exercise we had was completed in 1988 and culminated in the 1987 edition of the Laws of Botswana. It was done at great cost to the Government by a company outside Botswana. Similarly, the 1983, 84, 85 and 86 volumes of the Botswana Law Reports were printed out of the country, also at

great cost. The Laws of Botswana do not form part of our data base and, with another Law Revision looming, it would be so much better, not to mention so much less expensive, if they were. That way our draftsmen would be able to manipulate them as necessary to ensure that they were up to date at any given time, and, on a day to day basis, counsel and other persons who need to make constant reference to the Laws would have easy access to them. Besides, the 1987 Revised Edition of the Laws of Botswana, made up of bound volumes, has become too cumbersome to work with. Computerizing them would result in the on-going process being cheaper, easier, speedier and more efficient. Likewise, legal research would be much faster.

In so far as the Law Reports are concerned, the difficulty faced by the Drafting Division is that judgments are sent from the High Court in typewritten manuscripts which we must then edit in Chambers. The exercise is therefore laborious and time consuming. Also, the entries for the indices of the law reports are made and kept on 5"x 8" cards. The cards are susceptible to loss and there is no back up to the system. Because of manpower constraints, it has not been possible for us to produce the Law Reports as speedily as we should and there is therefore a backlog of typewritten judgments still to be edited.

Finally, the Government Printer, until recently, encountered difficulties with the drafts created in Chambers because they reached that Department in a format which the Printer found it difficult to deal with. For one thing, we in Chambers used Wordperfect 5.0 and the Government Printer 5.1. It therefore meant that the Government Printer had to convert the material from wordperfect 5.0 to 5.1. Secondly, we also used different fonts - the Government Printer used Times Roman 12 pt while we used Courier 12 pt. The side notes were also a problem and had to be re-set when the documents reached the Government Printer. All this of course meant that time was wasted reformatting documents and often, during the process, errors were introduced into the document, which entailed proof reading a document more than once.

It was against this background that sometime last year, a decision was made, in Chambers, to improve upon the system already in place.

In the short term, we envisaged, in Chambers, the expansion of our data base to include the Revised Laws of Botswana and the Law Reports. Our computer network would be linked to a network at the High Court in Lobatse to facilitate the easy flow of data between us, and it

would also be linked to the network at the Government Printer for the same reason. In the long term, we envisaged expanding our data base to include modules on areas such as litigation, conveyancing and corporate law. Our network would then be linked to other networks such as the network at the Police Headquarters and that at the Ministry of Local Government, Lands and Housing to enable other users to gain access to information which they required of us. The High Court in Francistown would also be linked to the network.

But computerization along the lines envisaged raises a number of crucial questions -

1. the goals and objectives to be achieved by such a project
2. on what scale the project should be embarked upon
3. the costs involved and whether they justify embarking on such a project; and
4. our technical ability to manage the project.

A short Paper was prepared by Chambers and circulated to the Government Printer, the High Court and the Government Computer Bureau. Their response was positive and we commenced consultations with them in order to determine what could be done to improve the system. It became apparent during the course of those consultations, that there were very real and worthy advantages to be gained by computerizing on a wider or broader scale.

The Computer Bureau, during the course of these consultations, revealed that the Government had approved a computerization project to link all Government Ministries and Departments in order, inter alia, to make access to information easier and to create greater efficiency within the Civil Service. However, the Bureau did not think that our project was inconsistent with the greater Government one - the Bureau would just have to work out how to fit it into the greater one. The Motor Vehicle Insurance Fund was also consulted because it supplied and installed the wordprocessors presently used in Chambers pursuant to an Agreement entered between itself and Chambers. The Fund has also, under the said Agreement, maintained the wordprocessors from time to time.

A Working Group comprising representatives from the said institutions was established towards the end of last year. Its terms of reference, are, inter alia, to formulate and execute an orderly implementation plan of the project, to identify the users and requirements of the computer network, to determine the volumes of work, and to identify the technical personnel whose responsibility it will be to maintain and support the system.

The Group realizes that the project is a complex one whose scope and significance should not be underestimated, and that it is vital, if the project is to succeed, that a careful needs assessment analysis be undertaken.

The project being as complex and ambitious as it is, must also be implemented in stages, each stage being implemented after users have mastered the necessary techniques associated with it. This is to ensure that we do not bite off more than we can chew.

Costs

Cost is also an important consideration. We cannot afford to make expensive false starts and believe that we must begin modestly. The costs of the project envisaged fall under these broad headings - hardware, software, training and maintenance.

We already have several computers and laser printers in Chambers, as well as a file server. (13 Epson PCs with Samsung screens, 3 HP Laser Jet III printers, 1 HP Laser Jet IIIP, and 1 Kyocera F 2200, and a Wang PC 380/33c file server). The Government Printer has recently acquired new more sophisticated equipment, while the High Court in Lobatse possesses some 5 Olivetti Wordprocessors. Technology is constantly evolving and we realize that if we are to carry out our various tasks efficiently and successfully under the project, it will be necessary to replace obsolete equipment or enhance what we already have in place. It is difficult to come up with any estimates until the Bureau has done a detailed study, but we are comforted by indications on the market that the cost of computers is going down rather than up. It is also difficult to estimate what the cost of software for the project will be. Estimates will be made when the Bureau's detailed study is carried out, but, again, indications are that the cost of software is on a downward trend.

A significant factor here for us is the conversion of the magnetic tapes containing the Laws of Botswana. The Laws were printed by a British company using the Miles 33 system and will have to be converted into a format which we can use. The process has in fact begun and is estimated to cost some £15 000.00 sterling.

Training will be an on-going process to ensure that users are able to use the computers correctly at every stage of the project. It is again difficult to say, at this point, exactly what cost will be incurred on training.

Our technical ability to manage the project

This is yet another question of crucial importance. We must have an efficient technical support system in place if the project is to succeed. If we encounter too many mechanical, transmission or other technical problems, it could create a significant stumbling block. The Computer Bureau is confident that it will be able to handle many aspects of the project on its own, but concedes that it will have to seek the assistance of others to handle other aspects. A South African company, IPEX Systems, which has for some time supplied the Government Printer with its equipment, trained its staff and provided technical back up support has, in fact, been in

formally approached by the Working Group and has participated in some of the Group's meetings.

Implementing the project

The Bureau was given the task of carrying out a preliminary study and reporting its findings to the Group. Experts from the Bureau visited the High Court in Lobatse, the Attorney General's Chambers and the Government Printer in order to determine, inter alia, what the needs of each were in terms of hardware and software, whether the equipment in place was adequate to permit the implementation of the project, and what the training needs of each were.

The study was carried out earlier this year and, in August, the Bureau circulated its Report on that study. Members of the Working Group are studying the Report and, as soon as it is approved, the Bureau will embark on a detailed study and produce a Statement of User Requirements. This will be followed by a Project Memorandum for formal approval of the project by the Ministry of Finance. Only then can the necessary funds be released. We are optimistic that the Ministry will approve, given the Government plan to computerize the entire Civil Service, and also given the very real advantages to be gained by implementing the project.

As pointed out earlier, we believe that the project should be tackled in stages, and the Bureau, in its recommendations in the Report of the preliminary study, reiterates that. The first phase is to deal with the immediate needs of the Drafting Division as already outlined, and the second or secondary phase will deal with the broader aspect of the project.

In order to get the first phase of the project off the ground to enable us to achieve our goals, it was agreed as follows by the Working Group -

Chambers

1. The question of which wordprocessing software should be used by Chambers depends very much on what is most compatible with the system in place at the Government Printer. There was a suggestion that Micro Soft Word be used but it was finally decided to retain wordperfect as the loss in productivity would far outweigh the conversion overheads of wordperfect at the Government Printer.
2. Since wordperfect files will be transported to the Government Printer's Apple Macintoshes for layout and typesetting, the files would have to be properly formatted.
3. IPEX Systems would also endeavour to find the best way of computerizing the card index system used in connection with the law reports.
4. Staff in the Drafting Division will have to be trained in the correct use of wordperfect.

The High Court

1. As already indicated, the High Court has several Olivetti wordprocessors. These will have to be replaced with computers which are compatible with those in place in both Chambers and the Government Printer. At least six computers will be required to get the initial phase of the project off the ground. Since judgments of the High Court in Francistown are also reported by Chambers, the question of equipping it with computers will have to be examined.
2. All those who will be using the computers in the High Court will have to be trained in the correct use of wordperfect.
3. As soon as the computers are in place, all judgments will cease to be typewritten. Instead they will be keyed directly into the computers, copied onto diskettes and copies of the diskettes passed on to Chambers.

It has also been agreed that modems should be put in place to facilitate access to data between the three institutions.

The Government Printer

1. Staff in the Government Printer will be trained in the correct use of the new equipment recently installed.
2. The Government Printer will obtain a cartridge holding one chapter of the Laws of Botswana from Eastern Press, the UK company which printed the Laws of Botswana, in order to test it on their system.
3. In order to eliminate the backlog of law reports, the Government Printer will assist Chambers by dedicating two typists to key in the judgments from the original typewritten manuscripts with the handwritten editorial notes effected by Chambers.

The secondary phase of the project and how it is to be implemented will be examined by the Bureau in its detailed study.

Progress made

The Government Printer and Chambers are particularly impatient to see the actual implementation of the project get under way but we do realize that being Government Departments, there are procedures to be followed before projects can be implemented.

However, given the difficulties experienced by Chambers and the Government Printer, it was felt and agreed, by the Group, that priority be given to some aspects which form part of the initial stage of the project and that we should, even though the project has not been formally approved, do what we can, in the meantime, with the resources that exist in each of our budgets, to alleviate some of those difficulties.

Thus, in July of this year, staff in both Chambers and the High Court were trained in the correct use of word-perfect by IPEX Systems. In Chambers the training proved particularly useful to professional staff who were not as competent as the secretarial staff.

The only problem is that with respect to the High Court in Lobatse, it had been hoped that computers would have been installed sometime before July ended. However, the computers are now expected to be installed in October and, in the meantime, the knowledge gained is not being put to use.

Last month, IPEX Systems also installed macros in Chambers and these have resolved the difficulties which we were experiencing with formatting our Bills and other legislative material. After an initial uncertain start, those using them in the Drafting Division of Chambers have mastered them and have confirmed that their use is making the drafting process easier, faster and more efficient.

For its part, the Government Printer is very pleased that the font, side notes and text of documents are now in a format which has made his task easier.

The Bureau has applied for lines from the Botswana Telecommunications Corporation to facilitate the putting in place of the modems referred to earlier.

Conclusion

There is still much work to be done to make our project a reality, but we are confident that with determination, careful planning, prudent management of financial resources and the assistance of those who have more expertise than we when we falter, we shall succeed.

Botswana is mindful of the recommendation made at the Senior Officials of Commonwealth Law Ministries held in Singapore in April last year for the establishment of a Commonwealth Legal Computerization Committee. We welcome this development and hope that it is established soon. Once established, we hope that the Committee will assist us should we require such assistance.

An Information Systems Strategy Study in the Legal Department of the Hong Kong Government (1992-1993)

Presented by the Honourable Jeremy Mathews, CMG, JP, Attorney-General of Hong Kong

INTRODUCTION

The primary emphasis of this paper is to describe the experiences and results of an Information Systems Strategy Study in the Legal Department of the Hong Kong Government which was concluded in October 1993. The paper will show why the study was necessary, its objectives and the practical benefits expected from implementing the Study's recommendations.

2. Incompatible systems

The Legal Department of the Hong Kong Government began acquiring computer based office technology in the mid-eighties, somewhat later than many other jurisdictions. However, in common with most other jurisdictions, we acquired systems to meet immediate and particular problems, with little thought or opportunity to ensure future compatibility between the systems. In fact, even if we had had the money and time, it is only recently that diverse systems have been available with common interfaces.

3. A strategic study

Although we have had some notable successes, such as our Chinese and English text Bilingual Laws Information System, it became clear that the increasing pressure for more computer based office solutions would lead to even more proliferation of incompatible systems. The solution was to undertake a strategic study of our current and projected information technology needs and to adopt a plan to acquire the necessary tools.

4. Appendix materials

The Appendix includes some information about the size and organisation of the Department and its Divisions and the systems now in use.

5. Other matters

Before giving an overview of our strategic study I would like to make some general observations about recent developments in the field of information technology.

6. Data and text sharing problems being resolved

I have already mentioned one recent change of importance. It used to be the case that the sharing of text and data between different programs and computing platforms was very troublesome, if not impossible. In large part due to the increased capacity and power of personal computers, these problems are near to complete solution. The almost seamless movement of text between

different programs, with all of its formatting and font information intact, is a very recent development and it comes in pre-packaged form without the need for professional programming assistance.

7. Power up! Costs down!

While the power and reliability of the personal computer keeps dramatically improving, the cost continues to drop. This, coupled with the increasing sophistication (and simplicity of use) of software, puts office technology solutions within reach of even modest budgets.

8. Word processing for lawyers, like it or not

One of the conclusions of our strategic study was that word processing still remains one of the best productivity tools, the one that is most easily cost justified. However, the unique feature about word processing today is that it is word processing by the lawyer, not the lawyer's secretary. When one considers the inherent inefficiency of all of a lawyer's words having to be created at least twice, once by the lawyer by handwriting or by dictation and then again by the secretary's typing, it is obvious that productivity can be improved if the lawyer is willing to do his own typing.

9. Voice to text technology

Perhaps the long promised "voice to text" technology will make the transition easier for those lawyers who are reluctant to use keyboards. Even though "voice to text" is not yet perfected, it is clearly easier now for professionals to learn to use computers. The widespread availability of graphical user interfaces, colour, excellent HELP files and tutorials make computing less of a challenge than it was so recently. The new user need never encounter DOS, that cryptic, difficult to remember, disk operating system that discouraged all but the most dedicated from accepting computers in their office.

10. EMail

Our strategic study recommends that all of our lawyers and virtually all of our support staff have computers on their desks and that they all be capable of communicating electronically (EMail). We have had this facility for some of our lawyers and staff for the last 3 years and I can personally attest to its usefulness, particularly at the senior management level. It obviates the need for telephone messages and reduces the number of meetings.

INFORMATION SYSTEMS STRATEGY STUDY

11. The need for strategic planning

In the Legal Department, the acquisition of computers and other office technology, on a project by project basis, resulted in the creation of separate 'islands' of technology which served the needs of the inhabitants of each island but which created barriers to the exchange of useful information between the islands. It became difficult, and due to time constraints, practically impossible to share information, particularly information that would be useful to the managers of the Department who have to explain and justify the application of scarce resources to central agencies of government and to legislative bodies.

12. Information Systems Strategic Study (ISSS)

The Hong Kong Government recognised the inefficiencies caused by applying new systems in response to immediate problems. In 1991 it began a programme of conducting Information Systems Strategy Studies (ISSS's) for Departments where the application of information technology was perceived to be likely to result in increased productivity or efficiency. The studies would result in a strategic plan for the application of information technology in the Department over a period of 5 years, with annual reviews and adjustments to keep the plan current. Because the Department already had some systems installed and because we were under pressure from our own managers and lawyers to expand, diversify and integrate them, we were able to justify an early commencement of an ISSS.

13. An ISSS consultancy

Our ISSS started in October 1992 and was concluded in October 1993. While some of the departmental strategic studies have been conducted by the Hong Kong Government Information Technology Services Department, others, including the Legal Department's, have been done by management consultants with experience in carrying out such studies. Our consultant was chosen by competitive tender from among submissions we received from international firms operating in Hong Kong. We chose the firm of Deloitte Touche Tohmatsu, who employed experts from the USA and Australia. The cost was USA \$410,000, plus the time invested by the Legal Department and Information Technology Services Department Services staff.

14. Objectives of the ISSS

The objectives of the strategic study were to -

- (a) identify information systems needs, at both the Department and Division levels;
- (b) prioritise needs yielding greatest improvement in services, while considering costs for systems;
- (c) develop short and long range plans, including time frames and investments;

- (d) recommend standards for selecting software and hardware that consider future integration needs; and
- (e) analyse the Department's structure to optimise the use of information systems.

15. A report of 6 volumes

The strategic study has resulted in the production of a report of 6 volumes. The following paragraphs describe the various stages of the study and the conclusions reached.

16. Volume 1 - Strategic Alignment and Baseline Review

This first phase of the study consists primarily of a detailed analysis of the Legal Department, its identified problem areas, structure, objectives, cultural and critical success factors, business functions, existing information management systems and technologies, and information sharing needs within and outside the Department.

The Appendix contains some of the information extracted from this volume, including the current organisation and strength of the Department and a description of its existing computer applications.

A conclusion of note from this volume is that the compartmentalisation of the Department into various Divisions has resulted in an inefficient exchange of ideas and technology, non-standard methodologies, inhibitors to integrated systems, obstacles to the sharing of reference documents and disparate solutions to common problems and information needs.

17. Non-ISSS initiatives

Early on during the study, we and the consultants also identified certain subjects and projects which were outside the contracted scope of the consultancy but which it might be valuable for the Department to undertake to improve its productivity. They included -

- (a) Weighted Workload Management - a quantification and ranking of the combined internal and external demand for services over a specified period of time;
- (b) Productivity Measurement and Analysis - an ongoing quantification of how effectively and efficiently the work demand is converted to legal services;
- (c) Full Scale Business Re-engineering - the streamlining and restructuring of the Department in order to reduce costs and increase productivity by improving efficiency and effectiveness;
- (d) Total Quality Management - an ongoing programme to ensure that defined quality targets are achieved and maintained; and
- (e) Change Management - a technique for ensuring the effective and efficient implementation of

organisational, operational, cultural and other changes in an organisation.

Implementation of our Information Systems Strategic Plan (ISSP) will involve some of initiatives, particularly re-engineering at the work-flow process level and change management. However, the thorough implementation of the initiatives described succinctly above require large investments of time and money to be done properly. For the time being, we have decided to treat these initiatives as long term goals so that we can focus our efforts on the implementation of the ISSS.

18. Volume 2 - Strategic and Potential IT Systems

This volume, building on the information obtained from Volume 1 about how the Department operates, presents the Logical Applications Architecture and ranks the proposed applications according to their relative importance to the information systems strategy and their potential impact on the Department's efficiency and effectiveness. An "application" is a computer program or combination of programs that fulfil a functional information requirement, and a "logical application" is, for example, the 'application' of the word processing function without regard to the physical way in which the application is provided to users. That is, no recommendations are made at this stage as to whether word processing will be provided at individual work stations or via a central computer.

The following logical applications were identified -

- (a) Library Management - this includes the traditional law library needs of cataloguing, ordering, lending and tracking; but also includes legal opinions reference management and the Department's full text retrieval legislation databases;
- (b) Tracking - addresses the unique and independent information processing needs of the 5 law Divisions of the Department with regard to tracking of cases (civil, criminal and appeal), the giving of advice, the drafting of legislation, counsel assignment and scheduling, hiring of non-Departmental counsel to conduct cases (including fees accounting and management), evidence tracking, extraditions, and confiscated assets and their liquidation;
- (c) Documents Management and Archival - this includes the preparation, storage, indexing, updating, backup, recovery, retention and archiving of documents;
- (d) Office Automation - this includes document processing (word processing in English and Chinese, graphics and spreadsheet functions; document scanning for the capture of text and images for incorporation into documents or other applications; electronic mail, calendaring and scheduling; file disk utilities; and voice mail which allows for use of the telephone to send and receive digitally recorded voice messages to and from voice mailboxes;
- (e) Master Index - addresses the common information processing needs of all Divisions of the Department with regard to the elimination of the data and information compartmentalisation problems identified in Volume 1. The index provides a central Departmental level cross index to all cases and documents which are processed by the various divisions;
- (f) Information Centre - generates operating, statistical and management information reports using inter and intra Division transaction data extracted from production databases. Users in each Division will be able to use the extracted data to define and tailor unique reports and prototype, demonstrate, modify and finalise various operating, statistical and management information reports;
- (g) Common Interface - this ensures that all users will operate on the same types of applications (Graphical Users Interface - GUI, for example), the same terminal and application access security, standard data exchange interface and external applications interface;
- (h) Administration - this covers the processing needs of the Administration Division with regard to personnel management, purchasing and financial and accounting transactions and inventory of equipment and supplies.

Not included in the list of recommended applications are a document imaging system or a litigation support package. Imaging was considered too expensive to cost justify and litigation support would be considered on a case justification basis.

19. Volume 3 - Technical Infrastructure

This report provides a logical (as opposed to a physical) definition of the architectures for the technical infrastructure needed to support the implementation of the logical applications identified in Volume 2. Three architectures are identified -

- (a) Computing Platform - defines the technical standards and conventions for the Application Program, Application Program Services, Operating Systems and Hardware components;
- (b) Data - defines the sources and destinations of data and databases;
- (c) Network - defines the logical work groups in the Department and their information exchange needs.

The report also includes diagrams of these architectures and recommends a strategy on how to move from our existing systems which do not conform to the new applications or architectures.

It is perhaps useful here to state that because this is a "strategic" study, the report does not actually recommend particular hardware or software, but rather the elements and capabilities that must be met by whatever hardware and software is chosen. It is therefore not possible at this stage to say what products we will be obtaining. However, it was necessary for the purpose of preparing the costs and benefits analysis in Volume 5 to make certain assumptions about the products needed in order to estimate costs. Following is a brief list that may give a more concrete feel for the way we are heading -

- (a) We will be using a "client-server" configuration of PC's (about 650 of them), bigger PC's as servers and mini computers with both network and PC laser printers, all connected by local area network with communications access to remote locations;
- (b) By the time purchases are made (we hope in 1994), 486 PC's will have entirely replaced 386's. Windows graphical user interface is the likely choice over IBM OS2 because of the wider software selection. Colour monitors will be standard. A low capacity laser printer for each counsel to reduce time away from the desk;
- (c) The network software will probably be Novell Netware, but Windows NT will be investigated;
- (d) Servers and minis will be UNIX based, but Windows NT Advanced Server will also be looked at.

20. Volume 4 - Management Infrastructure

This report recommends the management structure necessary to implement the strategic plan and manage the Department's information resources. Its recommendations include -

- (a) A definition of the scope of responsibilities of the Information Technology Services Department (to provide technical assistance and advice using their own or contacted staff) and the Legal Department (to be solely responsible for the information and data assets and the management of the application softwares which are essential to the delivery of legal services to the government);
- (b) The establishment of an Information Resource Management Programme to organise, train and empower the executive and divisional levels of management to administer effectively the Department's information and data assets, including the delivery of information to end-users and implementation of the strategic plan;
- (c) The establishment of a new unit within the Department to be responsible for information resource management, including policies and procedures for the use of the various applications identified in Volume 2. The appendix includes

several pages of detail about the responsibilities of the proposed unit;

- (d) The establishment of a new executive level Information Resource Management Committee, a strategic plan implementation Steering Committee, divisional steering committees and project teams for implementation of the strategic plan. The executive level Information Resource Management Committee will be a permanent committee consisting of the Attorney General and his management committee plus the director of the new Information Resource Management Unit.

The establishment of a group of staff within the Department whose responsibilities are devoted to the effective implementation and maintenance of information systems, including ongoing training of users, is considered vital to the success of the strategic plan. Experience in other projects and in other jurisdictions has shown how critical it is to avoid leaving the implementation of these projects solely to the computer professionals. It has also proven unsatisfactory to rely on only the part time involvement of regular staff whose other duties hinder the most effective use of computer applications. Ideally, in a legal department environment, a legally trained person should perform this role in order that there be a thorough understanding of the user's needs and the credibility necessary for effective communication of training and ideas.

21. Volume 5 - Recommended Strategy, Costs and Benefits Analysis

As might be expected, the results of the costs and benefits analysis are crucial to determine whether a case can be made for acquiring the funds necessary to implement the recommendations made in the earlier volumes. Calculation of costs and benefits is almost as much art as science. Assumptions need to be made and recognised, and a different assumption can lead to greatly different, but still legitimate, results. For example, costs can be based on current dollars, even though the prices may change before purchases are made. Assumptions can be made as to price and inflation trends, or the issue can be ignored. Because a large investment is made at the beginning of the project, a return on investment calculation at the end of 1 year may make the project seem prohibitively expensive, whereas at the end of 5 or 8 years the project might seem eminently justifiable.

It is difficult to condense this volume into anything meaningful in the context of this paper, but it might be useful to describe a few of the cost and benefit concepts used -

- (a) Non-recurrent costs - one time costs associated with the acquisition, development and implementation of the systems (includes system development and re-engineering costs, capital costs, training, site preparation and start up consumables;

- (b) Recurrent costs - costs associated with the ongoing operation and maintenance of the systems (this includes hardware and software maintenance, rental of data lines, consumables, on-going training and staff costs);
- (c) Tangible benefits - quantifiable dollar savings to be realised with the implementation of the systems (includes staff savings and system maintenance costs of old systems being replaced and self insuring on PC maintenance rather than entering into maintenance contracts for several hundred PC's);
- (d) Notional benefits - benefits measurable in dollar amounts but which cannot be realised as hard dollar savings (includes staff savings where gains in productivity and efficiency represent less than 100% for various grades of staff, and cost avoidance benefits obtained from not needing to acquire future staff or equipment due to gains in productivity and efficiency resulting from the system implementation);
- (e) Intangible benefits - those that cannot reasonably be quantified in dollar terms though they may be as or more significant and material than the tangible or notional benefits (examples are more responsive to enquiries, more comprehensive management information, lower error rates or increased effectiveness and speed).

As an indication of the size of the proposed system, the non-recurrent cost over 5 years is estimated at US \$12.5 million. The recurrent costs are so dependent on assumptions about staff redeployments, etc. that I will not provide them here. On the savings side, the plan is esti-

mated to result in the elimination of about 30 secretarial/typist/clerk posts. The break even point where total costs - total benefits occurs in year 8.

22. Volume 6 - Implementation Plan

The implementation plan recommended dividing the implementation into 2 phases, with the first phase including library management, document management and archival and office

automation. Left for the second phase, to start in the 3rd year, are the master index, tracking, information centre and administration.

This report contains detailed recommendations for all of the projects and activities that will need to be undertaken, including pre-implementation projects, staff acquisition, space and facilities, and hardware and software and management.

CONCLUSION

23. While a strategic study of the magnitude described in this paper may not be justified (or even necessary) in smaller jurisdictions, for a Legal Department of the size and complexity of Hong Kong's we consider that the study was very worthwhile. It confirmed our intrinsic belief that a comprehensive information systems strategy was necessary to make the best use of our resources in the next few years.

24. Although the initial cost of implementing the plan will relatively high, there is no doubt that a better, more productive, Legal Department will be the result. We also expect that the provision of modern office technology to our professional and support staff will contribute to both pride and satisfaction in the Department's work.

APPENDIX CONTENTS

1. Hong Kong Legal Department - Information on current situation
2. Organisation Chart of the Legal Department
3. Business Applications Portfolio and Logical Interfaces - Context Diagram
4. LA02 Tracking Application Logical Modules - Context Diagram
5. Information Resource Management (IRM) Program Organisation

Hong Kong Legal Department

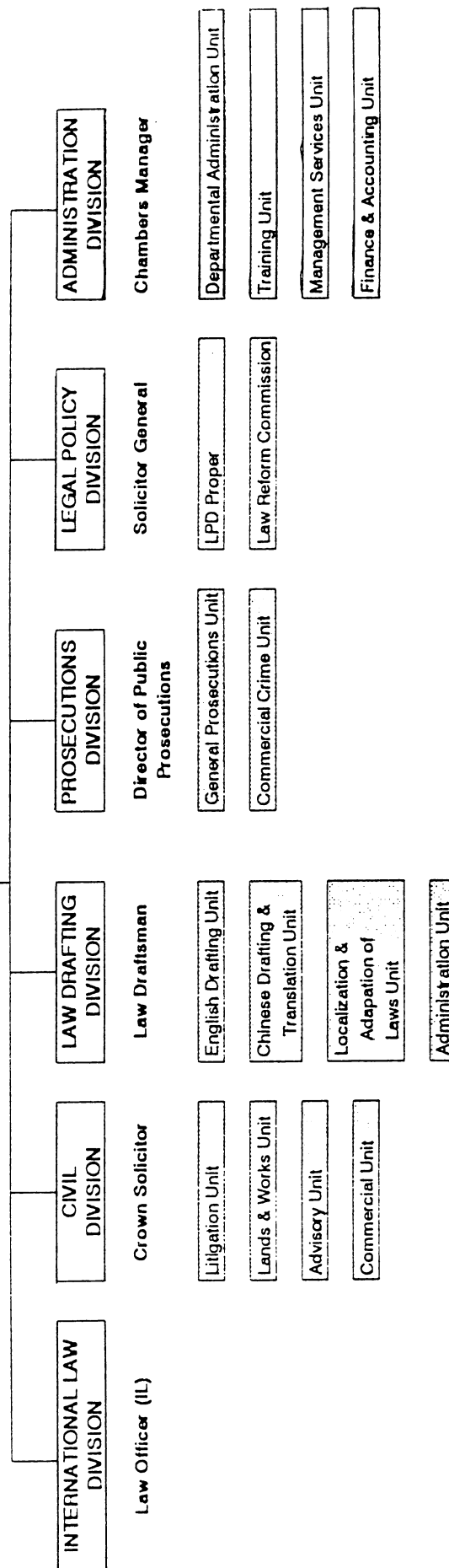
Information on current situation

1. The Department has 267 lawyers and 545 support staff divided into 6 Divisions including Prosecutions, Civil, Law Drafting, International Law, Legal Policy and Administration.
2. There are 400 installed PC's, about half on lawyers's desks, and 120 connected to an EMail network.
3. Current significant applications include -
 - (a) Bilingual Laws Information System - this Wang mini-computer supports full text retrieval (using STATUS software) of all Hong Kong statutes (in Chinese and English), judgments of Hong Kong superior courts, legal opinions and other Departmental documents; external communications for public access to the databases; EMail services; word processing in Chinese and English for the Law Drafting Division;
 - (b) Prosecutions Management Information System - a mini-computer based system providing case tracking, counsel scheduling and statistics reporting;
 - (c) Litigation Indexing Support System - a Wang mini-computer acquired for a particularly large commercial crime prosecution. It uses full text retrieval and document indexing software;
 - (d) Work-in-Progress System - for capturing, maintaining and storing civil litigation case data.

Organisation Chart of the Legal Department

(as at 1.9.1993)

ATTORNEY GENERAL



Total Establishment in Division:	10 + [1]	140 + 1# + [5]	104 + 1# + [5]	340 + [4]	64 + [6]	129 + 1# + [1]
Establishment of Counsel Posts:	6 + [1]	66 + [5]	31 + 1# + [2]	103 + [3]	45 + [4]	-
Establishment of Support Staff Posts:	4	74 + 1#	73 + [3]	237 + [1]	19 + [2]	129 + 1# + [1]

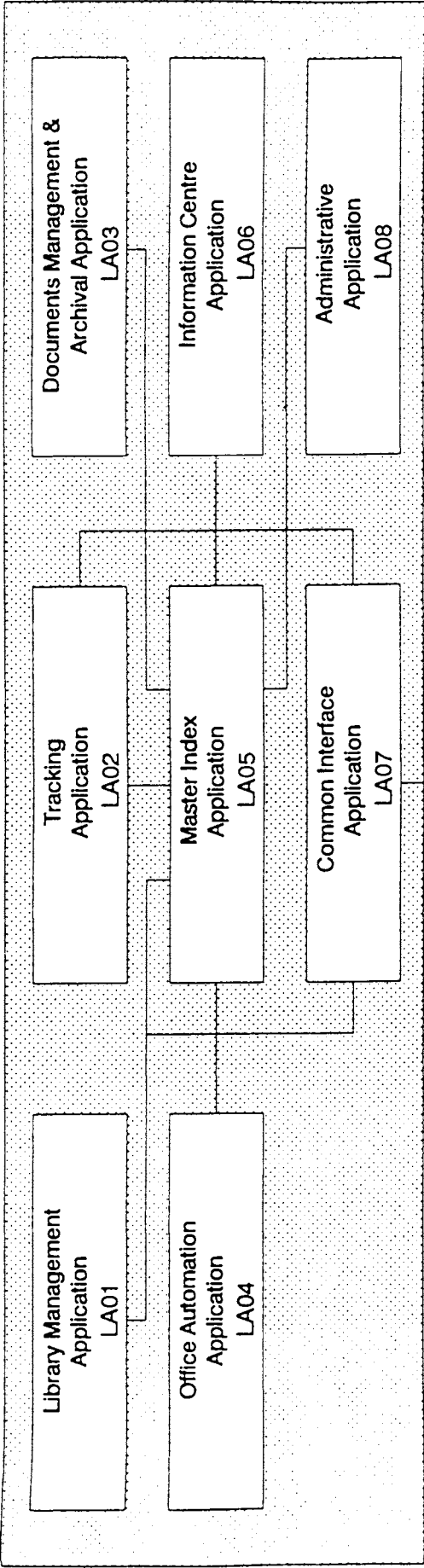
Total Establishment in Department: 787 + 3# + [22]
 Total Establishment of Counsel Posts: 251 + 1# + [15]

Legend: # supernumerary posts
 [no.] supernumerary post held against other vacant post

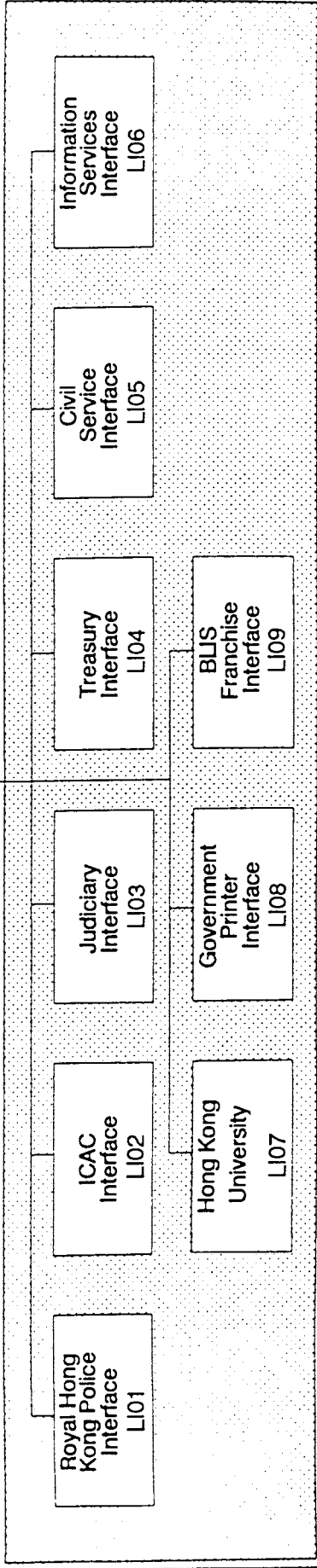
Legal

Business Applications Portfolio and
Logical Interfaces - Context Diagram

Legal Department - Logical Applications:



Hong Kong Government - Logical Interfaces:



Q:\MCS\HOME\SECY\WP5\LEGAL\WD2-2A

Exhibit 2.2.1

LA02 Tracking Application Logical Modules - Context Diagram

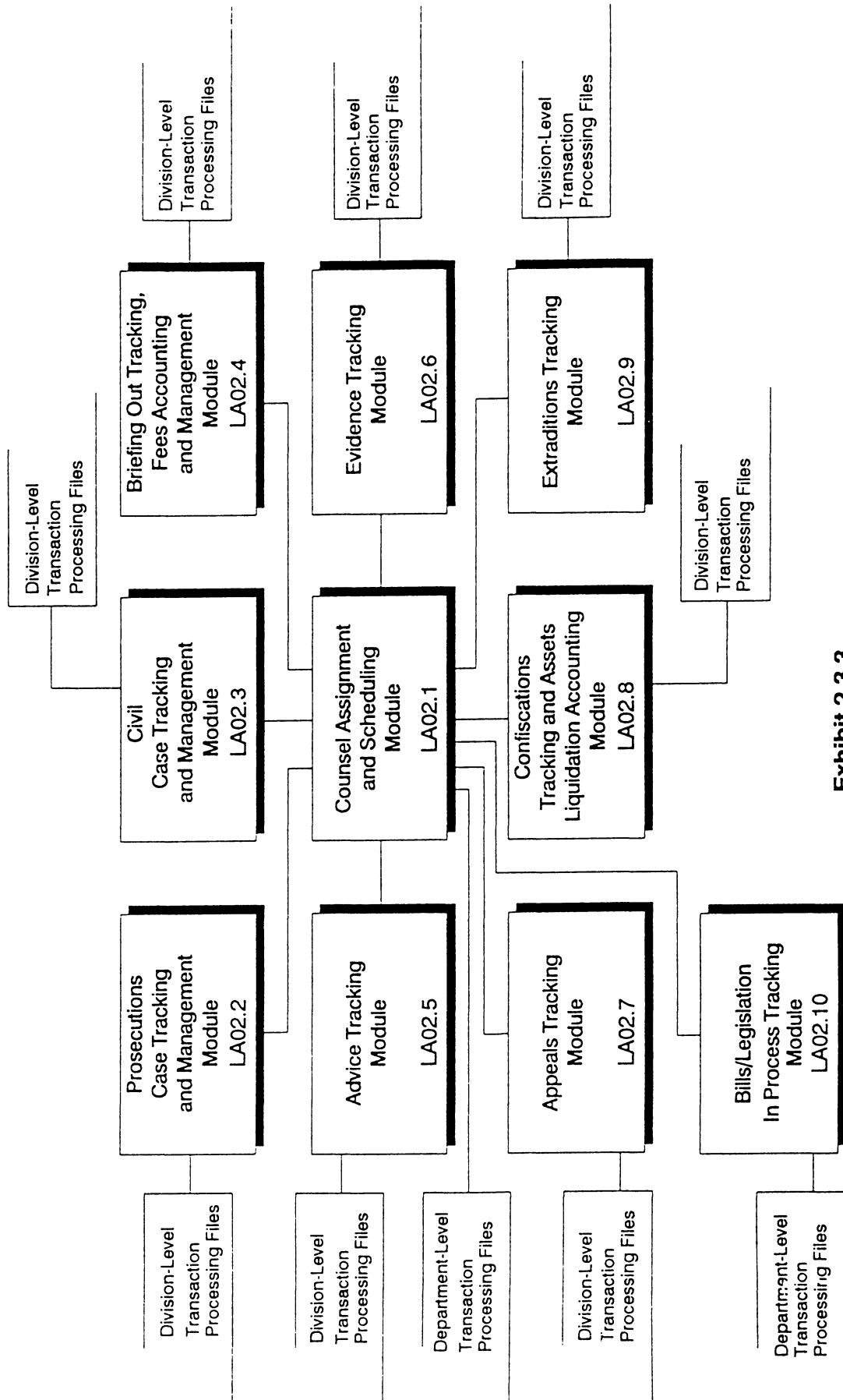


Exhibit 2.3.3

Information Resource Management (IRM) Program Organisation

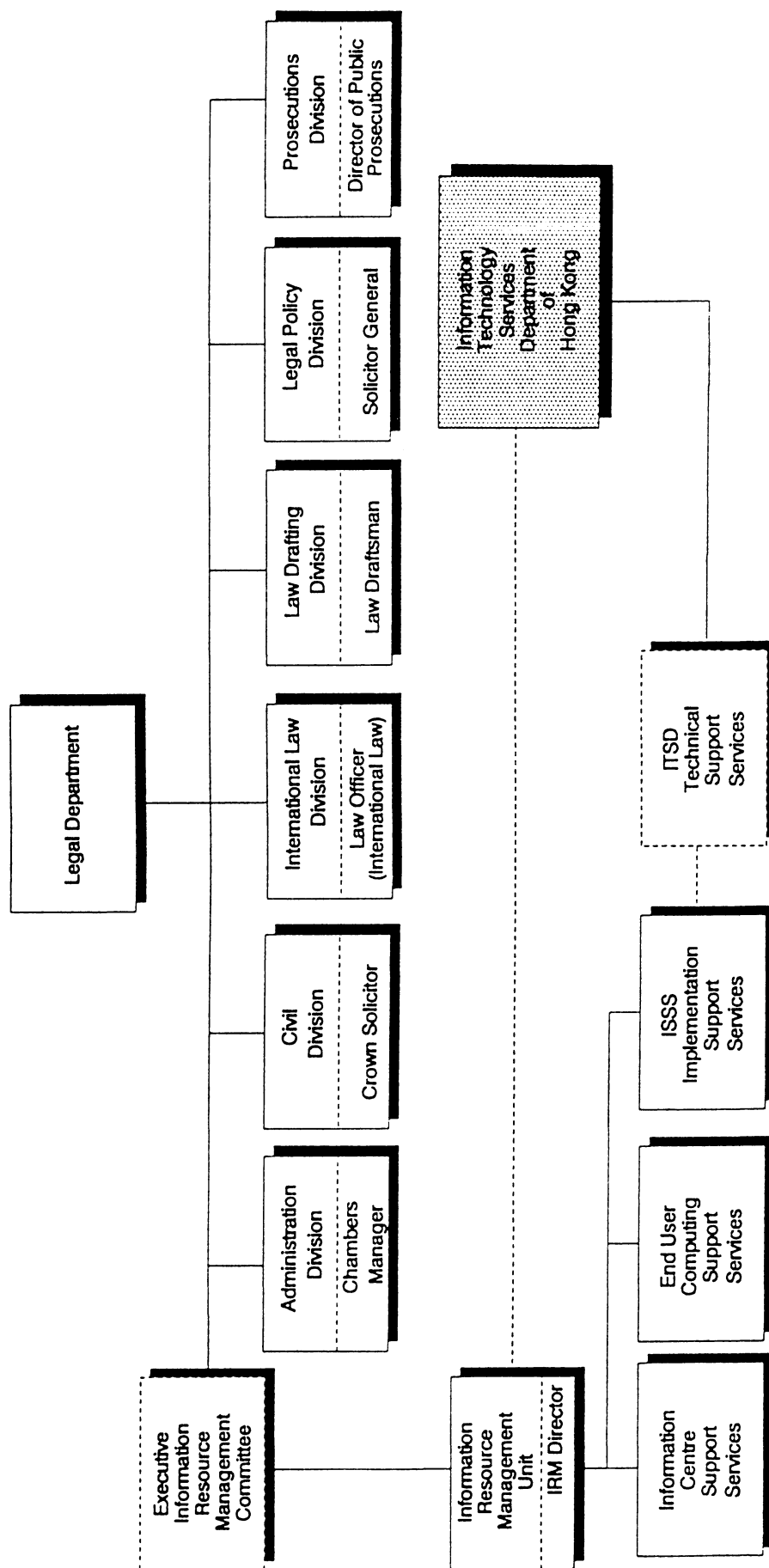


Exhibit 4.2.1

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The Singapore Experience in Computerisation of the Legal Sector

Paper by the Attorney-General's Chambers of Singapore

Introductory Overview

1 This paper gives an account of the origins and evolution of Singapore LawNet which had its humble beginnings with the computerisation of the Attorney-General's Chambers. As the road to computerisation has not always been broad and easy, this paper will discuss some of the implementation issues and difficulties encountered which may be common to other Commonwealth jurisdictions. Finally, this paper seeks to give our views on the solutions adopted and the lessons learnt. The key factors which have contributed to our progress will also be highlighted.

A. ORIGINS AND HISTORICAL EVOLUTION OF LOWNET

1. *Computerisation of Registry of Companies and Businesses*

2. The very first Government Department to embark on legal computerisation was the Registry of Companies and Businesses as early as 1981. The computerisation of the Registry provided the public with an instant information service for print-outs of the particulars of any registered company or business. It also meant that defaulters who failed to file their returns were detected early under the computerised system. The time taken for registration of companies was reduced from 49 days under the manual system to just 9 days under the computerised system.

11. *Computerisation of AG's Chambers*

3 Not surprisingly, the Chambers' computerisation project started with that fount of all lawyers' learning - the library. In September 1985, the Attorney-General's Chambers proposed a Joint Law Libraries Computerisation Project to the Registrars of Supreme Court and the Subordinate Court. This Proposal was submitted in May 1986 to the Ministry of Finance (Budget Division) and the National Computer Board ("NCB"). This led to a closer look at what seems painfully obvious on hindsight ie the computerisation of the Chambers as a whole. As a first step towards this goal, a system study was initiated in January 1987 by the Chambers with assistance from NCB.

4. The Task Force that conducted the study included both legal officers and Information Technology ("IT") professionals.

5. This study aimed inter alia:

- (a) to identify the computerisation and information requirements of the Chambers; and
- (b) to map out a 5 year computerisation plan for the Chambers and estimate the manpower and equipment resources needed to implement the plan.

6. The subsequent approval by the Treasury of the development proposal paper for obtaining the required funds has today resulted in the following systems that have been completed and implemented:

(1) Legislation System

Singapore Statutes Database

- Singapore Subsidiary Legislation Database

(2) Library System

Lexis is also available in the Library

(3) Periodicals Index Database

(4) Malayan Law Journal/Singapore Law Reports Index Database

(5) Debt Recovery System

(6) Advice Management/Opinion Database System

(7) File Management System

(8) Index of Treaties and Conventions Database System

7. Projects that are currently under development include: Enhancing the Singapore Statutes and Subsidiary Legislation System and the Work Assignment System. The projects that are awaiting development include: Crime Opinion Database System, Case Data Management System and Case Text Management System.

8. The \$4.3 million system was launched on 5 January 1990 as a showcase of what IT could do for the legal profession. The local press prophesied that the initiative would propel the legal profession into the computer age (Singapore Straits Times; 5 January 1990). A detailed description of the systems can be found in Appendix A.

III. *LawNet is Born*

9. The first system that was developed and which came on line was the Statutes Database. It occurred to the officers who developed the system that it would be a

waste of the S\$100,000 spent in converting the data alone if it were confined to use within the Chambers. LawNet was thus first conceived and mooted in 1989 as an on line legal database open for public access in the same mould as LEXIS. The motivation was not entirely utopian as the public subscriptions helped to pay for the manpower needed to amend and keep the Database up to date. The Statutes database was launched under the LawNet umbrella in July 1990 by the then Attorney-General Mr Tan Boon Teik. But we had a larger vision.

10. The vision was to computerise the whole legal sector in Singapore. To bring all service providers in the legal field to the lawyer in one single screen at the touch of his fingertips. A concept paper was prepared in Feb 1991 by the NCB in consultation with the two legal officers responsible for the Chambers' computerisation project. The concept paper was endorsed at the highest levels by the Chief Justice, the Law Minister and the Attorney-General. Soon thereafter, the plans were unveiled when Professor S. Jayakumar, the Minister for Law during the Budget Debate on the estimates for the Attorney-General's Chambers on 15 March 91 announced that -

"... a very significant computerisation programme called LawNet, which will cover the Ministry of Law, the Attorney-General's Chambers, the Judiciary, the Law Society and even the Law Faculty's resources. A LawNet National Council will soon be formed to provide a national umbrella, as it were, to integrate and coordinate these computerisation efforts in the entire legal sector. And the members of this Council will be the Chief Justice, the Attorney-General, the President of the Law Society, the Dean of the Law Faculty, (Chairman of the NCB), as well as myself".

11. The Minister's announcement was in response to the concerns expressed by Dr. Arthur Beng, the Chairman of the Government Parliamentary Committee (GPC) for Law and Home Affairs that lawyers may be faced by a multiplicity of networks and databases operated by different agencies. Prof Jayakumar also added that the programme will provide a "one-stop service by providing a single window into all the various laws and legal information required in law practice...when LawNet is in place, it should bring about a revolution in legal services".

12. Just a week after the Minister's announcement, Chief Justice Yong Pung How also mentioned in his speech to newly admitted lawyers at the mass call on 23 Mar 91 that a "proposal is now being developed to set up an integrated computer network for the whole legal sector which will apply the advances of information technology to the provision of legal services. Even the introduction alone in the next few years of electronic filing and handling of court documents will change forever the way in which lawyers in Singapore work...".

13. To provide the support needed for a project of this size, the Treasury was once again supportive and agreed to finance the formation of a full-time LawNet Secretariat, comprising technical and administrative staff, to undertake the development, promotion and management of LawNet. The LawNet Secretariat has a Project Director (a senior legal officer), a Technical Director, two technical staff from the NCB, an Executive Officer, a stenographer and a clerical officer. LawNet is expected to be fully established by 1997. An organisation chart of LawNet can be found in Appendix B.

B. SCOPE OF LAWNET

14. LawNet is an ambitious attempt to build a strategic national information network within the legal sector that will form part of the information technology infrastructure of Singapore. It does not exist as a single computer system. It is a computer network that integrates existing systems located in and operated by various organisations: the Judiciary, Attorney-General's Chambers, Ministry of Law, Registry of Companies as well as the private sector. As LawNet leverages on the systems of these organisations concerned, the costs of operating and maintaining LawNet services is significantly reduced.

I. LawNet Modules

15. LawNet comprises 6 modules, reflecting the 6 broad areas of law and legal practice. These are:

1. Litigation Module
2. Legal Research Module
3. Conveyancing Module
4. Corporate Law Module
5. Intellectual Property Module
6. Integrated Law Office Module

A detailed description of the scope and services of the LawNet modules can be found in Appendix C.

II. Implementation of LawNet

16. The LawNet services are in various stages of implementation, ranging from services already in operation to imminent launches and feasibility studies. The following services are currently available in LawNet:

Litigation Module

- Bankruptcy Search System
- Supreme Court Notices
- Subordinate Court Notices
- Writ of Execution Search
- Company Winding Up Search

Legal Research Module

- Statutes
- Subsidiary Legislation

- Cases Index
- Case Law Database
- Treaties and Conventions Index

Conveyancing Module

- LotBase System
- Property Tax Requisition System by Inland Revenue Authority of Singapore

Corporate Law Module

- BizNet

17. LawNet is an integral part of IT 2000, the national computerisation masterplan. IT 2000 envisages the transformation of Singapore into an intelligent island where IT is pervasive in every fabric of society. LawNet will revolutionise the way lawyers work in Singapore. It will take away from lawyers the tedium of having manually to perform those tasks that the computer can do more efficiently and effectively. It will give lawyers more time to apply their minds to those tasks that require them to think and reflect upon. It will also enable lawyers to work, not only with greater speed and efficiency, but also with greater confidence that their output is comprehensive and accurate.

C. DIFFICULTIES AND PROBLEMS ENCOUNTERED - IMPLEMENTATION ISSUES

18. The following are some of the implementation issues and difficulties encountered which may strike a common chord in those who have attempted legal computerisation:

- (1) Co-ordination and communication between lawyers and computer professionals;
- (2) Choosing the right hardware and how to avoid obsolescence;
- (3) Choosing the right vendor;
- (4) Choosing the right software and designing the system;
- (5) Data conversion and maintaining the Data base;
- (6) Getting good technical staff support;
- (7) Training;
- (8) Licensing and other intellectual property issues.

1. Co-ordination and Communication

19. Co-ordination and communication between the two sets of experts; the experts in law (users) on the one hand and the technical computer experts on the other part is vital. LawNet would not have got off the ground without the commitment and technical support of the National Computer Board. Unless one comes across the rare animal who is both a lawyer and an information

systems professional, the IT professionals usually cannot tell lawyers what they want. The lawyers have to recognise that they probably know more about computers than the programmers know about law. Time and again, it has been proven that no matter how large a law office is, it needs to have lawyers directly involved in the supervision and direction of its computerisation efforts to ensure success. It is probably easier to teach lawyers about computers than to teach computer professionals about law. Lawyers must be patient enough to explain the mysterious workings of the law to the IT professionals and the quirks in a system purportedly based on logic and reason. For example, in developing our Statutes Database we had to explain to the IT professionals such simple concepts as the difference between an Act and regulations and what are sections, subsections and schedules. As the turnover in the computer industry is high in Singapore, one has to ensure that these skills once imparted are passed on. Lawyers must also be able to grasp the implications of technical advice. In our experience most softwares which a law office would utilise are fundamentally similar in design and capabilities to common PC-based softwares such as word processing, database management and spreadsheet softwares. By interposing the same concepts on a larger scale, one can readily grasp the technical implications of the more useful application systems.

II. Choosing the Right Hardware

Hardware configuration

20. The decision on hardware would depend on a variety of factors, chief of which is the size of the organisation. However one factor should be common to everyone irrespective of size, and that is **capability for expansion**. No matter what the present size of any office is, experience has shown that in the area of IT, there will always be the need for expansion and the buyer should not lock himself into a system which does not allow him to expand.

21. Cost is of course the primary factor. Not only does computerisation involve high capital costs but the annual maintenance costs and manpower required to keep it running can be quite substantial. The size of the office is the main factor which will determine the hardware it will opt for.

22. In this age of open systems, compatibility with other hardware systems is very important. For example, the hardware should be compatible with that of the National Printers so that direct conversion of legislation for printing can be effected. Compatibility with the publishers of law reports will allow for speedy publication of law reports. Needless to say, the hardware should also be compatible with other Ministries and Departments to allow the computers to talk to each other. Information and data can thus be easily transferred from one Ministry's system to another. For example information on treaties and Conventions can be

transferred from the Ministry of Foreign Affairs to the Ministry of Law.

Large Law Offices

23. A large law office will naturally look to acquiring a system that will achieve more at a higher performance level because it needs it to achieve a higher level of integration than a small office. Typically, a large office can opt for one of two hardware options; that is, a multiple server local area network platform or a minicomputer based infrastructure. Computer technology is advancing so rapidly that any yardstick for deciding which is the better approach may become obsolete in a short time. Law offices are advised to seek professional opinion and acquire consultancy before jumping into acquisition. For the very large offices, the organisation's growth potential, the amount of data required to be stored and operated on as well as the machine's performance level may mean that a minicomputer set up is more appropriate.

24. The next decision is whether to opt for dumb terminals, ie terminals which are controlled by the host computer. Under this circumstance, all operations are carried out by the host computer and if more than one terminal is logged on at the same time (which is usually the case) the host is powerful enough to serve all of them at the same time. However if too many users are logged on and performing operations which require a great deal of computer processing time, then each individual user will suffer a perceptible delay in response from the host computer. Dumb terminals, unlike microcomputers, do not contain a central processing unit and require no emulation software in order to communicate with the host computer and are usually cheaper than microcomputers. The Central Processing Unit or CPU is the "brain" of the computer. A microcomputer (such as a PC or a MacIntosh) has a CPU and its own operating system and is capable of performing its own computer operations.

25. Another alternative is to link a network of PCs to the host computer. This may be a higher cost solution but the host can be freed from having to run applications which can be run on the PC. Since the arrival of personal computers, computer processing power is right on the desktop of anyone who cares to explore it instead of some huge machine tucked away in the basement of a building. Word processing for example became so popular because of it. It is our experience that it is not practical to run word processing from the host. Word processing users demand quick and consistent response from the computer. Response from a host computer, even if it is normally fast, is subject to changes as the load on the host fluctuates depending on how many users are logged on. Users of word processing do not take lightly to such fluctuations and frustration often results. Also host computers sometimes shut down, sometimes intended as when there is maintenance to be

done or some software is being loaded or upgraded, but most times unintended due to some breakdown in hardware or software. It may be necessary to keep certain basic functions such as word processing operational all the time and this is only possible with a PC configuration.

26. One compromise is to have PCs and dumb terminals in combination. Dumb terminals are provided to those who require to operate only applications resident on the host while PCs are provided to the others who need to use PC based applications such as word processing. This is the configuration in the Chambers. The system revolves round a VAX 6320 supermini computer. Connected to this host computer via a Vaxserver 3500 and another Vaxserver 4200 are 160 PCs, 6 dumb VAX terminals, and 22 network printers (12 laserjets and 10 dot matrix). In addition we have another 7 slave (ie, connected to one PC and driven only by that PC) laser printers for printing of more sensitive and highly classified documents. The Vaxserver 3500, which acts as the server for the Local Area Network in the Subordinate Courts, is connected to the VAX 6320 via a high speed 64KBPS diginet leased line. The Supreme Court and Subordinate Courts Libraries are linked to the VAX 6320 via local multiplexers and leased telephone lines. At each of these libraries there are a Personal Computer, a VAX terminal and a printer. In addition a 19.2 Kbps diginet leased line connected to the AGC VAX to the SNS VAX mainframe allows the legal community to gain access to the Legislation, Cases Index and Treaties Index Databases.

27. This is also the configuration in most of the large law offices that a team from the AG's Chambers visited in the U.S. However there is one notable exception in the Boston office of Testa, Hurwitz and Thibeault, which has about 100 attorneys. Its computer system consists of a host computer linked to dumb terminals and it has no PCs. They informed the team that they have encountered no difficulties with this configuration.

Smaller Law Offices

28. It may not be economical for smaller law offices to procure and maintain a minicomputer system. Yet the same integration issues are present in the larger ones. Fortunately Local Area Network (LAN) technology can solve this problem at a cost that is affordable to them. A LAN linking all PCs to a server makes communication between PCs possible. Common data can be stored and even some common applications can be run on the server. Also document printing can be sent by each PC to common printers via the server. Applications such as E-Mail are also available in most LANs. As smaller offices could potentially grow into large offices, such a network is capable of expansion into a minicomputer based system by adding a minicomputer which acts as a super server. In this connection, choice

of software becomes a crucial consideration. Offices should bear in mind the advantage of portable software that can operate under different hardware and software environment.

Avoiding Obsolescence

29. One can never accurately predict the future. The computer system can be the victim of its own success in that the usage increases so dramatically that it puts tremendous strain on the resources. The result is a consequent deterioration in performance which means that either the whole system slows down or down-time becomes more frequent and prolonged. There are several solutions to this problem. Firstly one can "tune" the system to ascertain the bottle-necks which could be cleared. For example, recently we conducted a tuning exercise which revealed that the system was significantly slower in the morning because that was the time back-up of the data was performed. The back-up consumed a lot of computer resources. With the existing tape-drive hardware, back-up took up the whole morning. Once we changed the tape-drive to the latest cartridge drive, the back-up time was reduced to just 1 hour which meant that the system is now much faster in the morning. Another solution is to plan from the outset for the capability for expansion. The hardware should ideally be able to increase its capacity by merely adding on additional equipment. One need not actually have to replace the existing computer with a new computer in order to upgrade. In the AG's Chambers, the supermini computer we purchased was upgraded by merely slotting in additional hard disks (to increase the memory by 2.5 gigabytes) and adding an additional Vax server to serve our prosecution branch at the subordinate courts. One has to bear in mind that replacing hardware may not be desirable just because of the cost of replacing hardware but it may also mean that one is not able to transfer to the new hardware the effort invested in data conversion and application systems developed over the years.

III. Choosing the Right Vendor

30. One critical consideration in evaluating which software, system or hardware to procure is the question of vendor support. Support includes training for users, resolution of any problems in the software, upgrading of the software when new versions are released and carrying out any customisation. One would do well to ensure that the product is supported by strong vendors established in your jurisdiction. Law offices are not in the business of supporting software and before deciding on any major software purchase they ought to obtain an assurance of continued technical support from their vendors. Otherwise one may end up with a "lemon". Widely used software and standard hardware can usually be supported by most computer vendors and offices in Singapore. The risk of failure or termination of sup-

port usually occurs in the highly specialised software systems where the number of users is low.

31. It is also useful to get a vendor who is able to enter into an over-all responsibility agreement. The highly specialised nature of the IT industry is such that not one vendor can provide you with all the components of the system. However, in order to avoid the situation where each blames the other if something goes wrong, our experience has shown that an over-all responsibility agreement forces the joint-venture partners to solve the problem for the customer. Because of the transient nature of computer processes it is extremely difficult to say where the fault lies without a great deal of tests. The software vendor may blame the hardware and the hardware vendor may in turn blame the communications line.

IV. Choosing the Right Software and Designing the System

32. It is always useful if one can obtain the services of a consultant with hands-on experience in designing a legal computer system in another Commonwealth jurisdiction. This common Commonwealth heritage is a powerful advantage as it is quite likely that statutes, law reports and contracts from anywhere in the Commonwealth will look pretty much alike. We were particularly fortunate that the consultant our vendor had brought in was involved in developing the legislation database offered by what was known then as CLIRS (Computerised Legal Information Retrieval System) which was initiated by the Australian Federal AG's Department. The blue-print of the Database design developed by our Australian colleagues proved itself when the reasons for particular aspects of the design became clear when the system was in actual operation. It certainly saved us the heartache and anguish of learning through trial and error. We also purchased the same software called STATUS which has served us well since 1989.

33. As stated above, it is indeed useful if one is able to tread a well-trodden path by adapting *mutatis mutandis* the designs and systems adopted by other Commonwealth jurisdictions. As EM Forster put it, "fools rush in where angels fear to tread". Nevertheless one should never be afraid to innovate and adapt. But it must be for sound and well thought-through reasons. Unlike a judge who can be persuaded by eloquent arguments, computers work on cold logic. "Rubbish in - rubbish out" is the cliché applied to computers which is nevertheless painfully true. Do not be afraid to change work or office systems in order to facilitate computerisation. If a law office is inefficient because of a poor or non-existent work system, the computer cannot create order out of chaos. Computers are primarily designed around manual work systems. The difference is that they can perform routine functions a thousand times faster. For example, if the office has a poor filing system with no

logical categorisation of files, computerising the system will not make the file system any more efficient. However it will enable the registry officer to search for the file numbers very quickly. Having located the file number, one has still to locate the physical file.

V. Data Conversion and Maintaining the Database

34. There is not much point in having a database with very little data in it. The bottleneck will lie in data conversion. In Singapore because of high labour costs, data entry (ie the typing of information into the computer) can be an expensive affair. At the Chambers the following policies were adopted to overcome this problem:

- (a) standardising the word processing software. WordPerfect was used throughout to produce all documents;
- (b) choosing a system which will enable conversion of WordPerfect documents into the format required by the host computer. This meant that documents which were created in WordPerfect could be loaded into the host computer without having to retype them;
- (c) designing application systems (such as the Case Management System) with data transfer capability so that data need only be entered once.

35. For large quantities of data that need to be typed into the computer there are companies which will undertake such work. They are paid on the basis on the amount of data entered. To ensure accuracy, it is recommended that the data be entered a second time, what is known as key stroke verification. This procedure throws out most errors in the first run of data entry and produces almost perfect results. Most of the actual work is carried out in lower labour cost countries where typist time is cheaper than in Singapore. When using such data entry services one should make clear the data entry rules to the company and obtain a trial set of data to ensure that the result fulfils the requirements before embarking on the bulk of the data entry.

36. An alternative to manual typing is the use of Optical Character Readers (OCR). An OCR first scans a document like a photocopy machine and stores the image in a PC. It then converts this image into data with a character recognition software. This state of the art technology has improved by leaps and bounds over the last few years. The costs have also fallen just as dramatically. We have seen prices of high performance systems tumble from six to five and even four digits in the space of 5 years. However OCRs cannot yet achieve 100% accuracy except in perfectly printed documents. Manpower is also required to prepare documents for scanning. The use of OCR is not viable where the source of the data is old, faded or poorly printed documents. There are even hand-held OCRs available in the market.

37. We have also embarked on creating a data link with the Singapore National Printers so that legislation can be conveyed to the Printers electronically and the final printed version can be released to us electronically for the purposes of updating our Legislation Database.

VI. Getting Good Technical Staff Support

38. Getting good technical support staff and ensuring continuity is always a recurring problem in keeping the system going. No single computer expert is a know-all as different systems and different software require equally different expertise. The more complex the system, the greater is the number of support staff required. Simplicity is the key-word to controlling costs. It is thus important that as far as possible, law offices should ensure that the vendors are able to provide long term technical support for both hardware and software. Obviously PCs are much less costly to maintain than mainframes or minicomputers. For the majority of the small and medium offices in Singapore, a PC based network would probably serve them well with a minimum amount of support required. This is especially when the processing power of PCs has grown by leaps and bounds over the last few years from the XT to the 486 IBM compatibles and now the Pentium chip has arrived. Moreover the manpower pool of IT professionals in Singapore is limited and in great demand. The large offices (with a minimum of 200-300 attorneys) visited in the U.S. typically have a Computer Department with a minimum of 8 to 10 systems officers. The computer staff in Chambers comprises 8 computer professionals (Information Systems Officers) seconded from the National Computer Board and 3 computer operators. Directions and policies are set by 2 senior legal officers who act as co-directors of the Computer Department. These 2 officers provide the bridge between the users and the IT professionals. The Systems officers are mainly involved in developmental work as this stage as the Case Management System is still under development as well as miscellaneous application systems and the continual improvements to the existing systems.

VII. Training

39. For the computerised law office to succeed, training is of the utmost importance. Most lawyers are conservative in their approach to computer technology. The system should therefore be as user-friendly as possible. This can be achieved through selecting software which are menu-driven with step by step prompts. Computer Aided Instruction (CAI) packages can also be purchased for users to learn at their own pace in the privacy of their rooms. In Chambers training is staggered so as not to disrupt operations, and provided in stages, from the very basic computer appreciation courses to word processing to computeraided legal research. Training for users was in some cases arranged with the vendors of the software but most were conducted in-house by the Information Systems Officers. There

is a training room in the computer centre equipped with a computer projector and sufficient terminals for every trainee.

40. For commercially available software it is possible to obtain training from any of a number of commercial training schools. There is also no lack of computer training programmes in Singapore organised by agencies such as the National Productivity Board involving the Skills Development Fund. For specialised systems often the vendor will be able to provide training. In many instances it may be economical to train a core of persons who can then train all other users in the office - the "train the trainers" principle. Wherever possible at least two persons should be familiar with any application system to cater for staff turnover.

17. Licensing and Other Intellectual Property Issues

41. The other issue which was not obvious to us when we first started out was that changing to a more powerful machine involves not only the higher hardware costs but also the licensing costs of running the same software on a more powerful machine. The licence purchased for the software is usually for that capacity of hardware and an upgrade in hardware often means an upgrade also in software. The opening of the Legislation Database did not pose any problem as the copyright resided in the AG's Chambers. However, the opening of the Case Law Database involved the working out of a commercial agreement between the network service providers and the publishers of the law reports. One has to be aware that the sharing of information may sometimes be impeded by intellectual property rights.

D. KEY SUCCESS FACTORS

42. The following are what we perceive to be key factors that were instrumental in our progress:

- (1) Adopting the right approach
 - avoid a false start
 - start small then you can afford to make mistakes
- (2) Networking to bring people closer
- (3) Integration for a winning combination
- (4) Setting realistic goals
- (5) User-friendly and people orientated system

1. Adopting the Right Approach

43. Computerisation of the law office requires a change in work attitudes and office procedures. For such a project to succeed, it is imperative that the higher echelons of the office are totally committed to the project. In the Chambers, the success can be largely attributed to the strong support given by the Attorney-General, the former Solicitor-General and Senior State Counsel.

44. Do not throw good money in after bad. Because one

learns very much through trial and error in this new field, the willingness to admit one's mistake and change course is important lest the mistake becomes the albatross round the ancient mariner's neck. For example, there were at least two instances in the earlier days where we had to write off years of work and costly investments because to continue would have meant getting deeper into the quagmire. In one case the software we had purchased for file management came with the integrated package tendered for. Because of the restrictions of the software, the design was so restrictive as to create more work than it would have saved. Moreover, we had invested months of data conversion into the system. At the end of the day we had to make the hard headed decision to abandon the software and redesign the whole system round another far superior software.

45. Adopting the right approach is thus essential to avoid a false start and the expensive mistake of investing in obsolete equipment which affords little room for expansion or in unsuitable software which lead to dead ends. There are two key words to the successful implementation of a computer system - "networking" and "integration". The larger the law office, the more importance should be attached to these two concepts. Lawyers should realise that these concepts apply whether one has a personal computer ("PC") based system or a mainframe computer.

II. Networking to Bring People Closer

46. A stand alone PC system can only serve one user performing one task (unless a multi-tasking operating system is used) at any one time. This can be quite a restriction. A network of PCs has many advantages. It enables all the PCs on the network to 'share' printers and to make use of the disk space residing in the server (usually another PC on the same network) for file and data sharing purposes. Application software such as word processing, time and billing, client database, case management, etc., can be installed onto the server and be accessed by several users at the same time. Even small offices with 2 lawyers and a secretary stand to benefit from a network of three PCs and a printer instead of keeping them as stand alone machines. PC local area networks have become the *de facto* standard for integrating microcomputers and peripherals in today's modern office.

47. In terms of productivity, networking will reduce unnecessary wastage of time in moving around the office performing tedious functions. For example, in the Chambers, the network enables legal officers to communicate with and send electronic mail to each other from the ground floor to the first floor and across the street to the computer centre at Colombo Court. When the extension to the Prosecution branch at the Subordinate Courts is completed, E-mail as well as data transfer capabilities will be extended there. Hence urgent messages can be sent instantaneously without having to

despatch clerks and data can be sent both ways through high speed lines. Often lawyers are in court and cannot be contacted over the phone and E-mail is useful for ensuring the person gets the message. Furthermore, Data need not be physically carried in diskettes within or out of the office thereby minimising the risk of loss yet speeding the transfer. This will help ameliorate the increasingly high costs of labour by reducing the need for office attendants.

48. Networking also allows the printing of documents on a shared network printer without the officer having to leave his room and carry a diskette around. This will optimise the use of printers and allow investment in one or a few heavy duty high quality printers capable of desktop publishing such as a laser printer. Contracts and other legal documents can also be circulated electronically and amended by a team of lawyers. Precedents of legal documents such as contracts and forms can also be stored on the network so that a lawyer need only select a model and make the necessary modifications on his PC and send it for high quality printing without leaving his room.

49. In the Chambers officers have the capability to fax documents through the PC in the comfort of the office to a selected number of addressees without any human intervention. One need not stand by the fax machine and wait for the line to be free. This facility is known as *Mailfax*. The Chambers has a Local Area Network (LAN) of about 85 Personal Computers linked by the Digital Corporation's (DEC) *PCSA* software. This enables network printing to be carried out. An officer linked to the LAN can send a print job to any of 8 network printers spread out throughout the building and the document is printed without his leaving the office. *PCSA* also enables files to be transferred from one PC to another by means of virtual drives located at the Micro Vaxserver 3500. (A virtual drive is a common drive or directory holding documents to which all pcs on the same network has the same access. It is much like one large hard disk being shared by many pcs.) In this way documents typed by typists can be 'deposited' in a virtual drive and the writer is alerted to check and make amendments without the need to print numerous drafts and without either person leaving his or her desk. This system also cuts down on the consumption of paper in the office. Provision has also been made for officers to access the AG's Chambers Computer System from their homes through the use of modems.

III. Integration for a Winning Combination

50. Integration is important because a law office will need more than one software and more than one database. However, these application must be able to interface or "talk" with one another. As the partner of a New Jersey law firm described it:

"Given a little education, most attorneys intuitively grasp the concept of computer systems integration. Just as success in a legal matter depends on more than a single piece of evidence, an outstanding computer system is really the sum of its parts - how they are integrated into a winning combination."

(Merrill, Charles R.; Integrating Office Systems into a Winning Combination; Legal Technical Newsletter; Vol. VII, No. 5, September 1990.)

51. Integration is extremely important in the context of data conversion. Once data is keyed (or typed) into the computer, one would want the same data to be used by the different computer systems without the need to retype them, especially when secretarial time is expensive. A reduction in unnecessary duplication of data conversion will also ensure greater accuracy of data and the time spent in duplicating data entry could be better utilised in checking the data. For example, data on a firm's clients captured on the firm's client database should also be used for the file management or case management databases. As another example, case citations or summaries contained in a firm's research database should be easily converted into word processing document format in order for those citations or summaries to be used in skeleton arguments or written submissions without any necessity for time consuming retyping and proofreading.

52. An example of integration in action in the Chambers is the ability of the user, at the touch of a few keys, to convert a statutory provision he has found in the Statutes Database (eg section 5 of the Civil Law Act or section 304A of the Penal Code) into a word processing document so that he can incorporate it into his written court submission or draft legislation. This will eliminate much unnecessary copy typing.

53. The System was designed so that with one ID and password a user can gain access not only to the Electronic Mail facility but to all the other applications listed above and to future applications that will be added to the system, all via a single menu. By the use of macros (programs which execute a series of computer commands in one or two keystrokes) the systems are made as user-friendly as possible by using menu screens rather than commands. As one information systems coordinator in a Washington D.C. law firm succinctly put it: "The PC pilot project told us that the typical user did not want to learn DOS (commands). Instead he/she wanted to push one button to do most tasks and agreed to come to training if it was provided. While we attempted to provide all of these items, not all tasks could be reduced to one keystroke." *(Ramsey, Donald R.; Comprehensive Networks Can Solve Law Firm Needs; Legal Tech Newsletter; Vol. VII, No 4 July 1990.)*

11. Setting Realistic Goals

54. As most lawyers start off with very little knowledge of computers, it is always easier to start small and aim for realistic goals. Our experience has been that we learn a lot along the way and our perceptions and ideas change as we grapple with the technology. One should not forget that technology also changes rapidly. Hence an ambitious start may mean that one may be saddled with a lot of obsolete technology. Obviously one should start with the easiest projects first. The early success of these projects will help bolster morale and convince users of the utility of computerisation. In any case, one has to bear in mind that the more senior lawyers and support staff may not be able to cope with a sudden flood of technology pervading into every area of the law office.

55. One should do the easy things first. In our experience we had to decide whether to start off with the statutes database or the legal opinions database. On hindsight we made the right choice of starting off with the statutes database because we had authoritative and well structured documentation on which to design the system. There was no need for retrospective capture and tracing of documents. All the statutes were printed on high quality documents unlike the typewritten carbon copied legal opinions rendered in the Jurassic era before the evolution of the word processor. We would strongly urge any jurisdiction to start off with the computerisation of their legislation and case law first. If one finds the case law too voluminous to handle, one can gain a lot of value out of computerising (as we did) just the subject index and citations of the law reports. With today's technology such a database will fit in nicely into a PC's 150MB hard disk memory and become accessible to a number of users through a Local area network.

56. Following this principle, it is not surprising that in the LawNet project, the legal research module was the first to complete its work. The other modules such as electronic court document handling required more complex consideration of work systems and the reliability of more sophisticated technology. For example, the trademarks and patents system require imaging technology which is able to search and distinguish between graphics and designs. EDI technology also poses legal issues such as authentication, admissibility and other evidential issues relating to electronically transmitted documents. We would not encourage any law office to start off with an EDI or graphic imaging system without first building more straightforward textual databases.

1. User-Friendly and People Orientated System

57. Unless there is a significant breakthrough in the commercial application of artificial intelligence, one has to recognise that computer systems have severe limitations and are inherently unintelligent. One has to de-

sign a system in a meticulous and tedious step by step fashion. Computers cannot think and fill in the gaps if the work system is inherently flawed. They are only highly sophisticated means of communicating, storing and retrieving information. As the old saying goes "rubbish in-rubbish out". Hence it would be extremely difficult to design a system which can track and take in all the variations and permutations in civil procedure like a White Book. Neither can a computer system draft contracts although there are document assembly programs in the US which can assemble or put together clauses in a loosely jointed document.

58. Many organisations have seen their computers becoming white elephants because of the failure to gain users' acceptance. The best hardware and software in the world is useless if the lawyers all suffer from technophobia. What is also not so apparent is that training is equally costly. A program which is designed to be so simple to use that any lawyer can pick it up in a matter of hours will result in substantial costs in training later on. Training costs and user acceptance can also be gained by standardising the commands or menus. What is most frustrating to a lawyer is having to learn different commands for different systems. In the Chambers we have striven to have similar commands for almost all the legal research systems in production. Once a legal officer is trained in one system, he should be able to use the other systems without any additional training. Ideally the systems should be menu driven and as easy to use as any computer game for children.

59. The surest way to repel users is to design a system that will generate more work after computerisation than before under the previous manual system. For example, a file management system should not result in the registry officers having to perform multiple data entry and manual record keeping. The registry officer should only need to enter the particulars of any file once into the computer. The system should then be used to print out labels for the files, bar codes and any other documents required.

E. THE LAWNET APPROACH

60. LawNet is an integral part of IT 2000, the national computerisation masterplan. IT 2000 envisages the transformation of Singapore into an intelligent island where IT is pervasive in every fabric of society, woven into work, play, education and home. The approach taken in LawNet, to integrate the IT requirements in the legal sector with central coordination, is designed to achieve the objectives discussed below.

61. Firstly, LawNet will fully exploit the benefits of computerisation. The process of computerisation involves more than just investment in hardware and software. It requires time to be spent by senior management in evaluating the project and determining the extent

and nature of computerisation. It entails training of staff on new work procedures and computer application systems. It involves conversion of manual records into electronic data, which can be expensive. In order to amortize the high investment in money and manpower, all possible aspects of an organisation's operations should be computerised. Also data should be transferable across application systems to avoid further data entry. LawNet seeks to do all these by computerising most of the external operations of law firms and integrating them with the firms' in-house systems.

62. Secondly, costs are kept to a minimum by the dispersion of computers. The computers in the network are not established and maintained for the sole purpose of providing the services in LawNet. They are procured mainly for the internal operations of the organisation concerned. The provision of the LawNet services is only an ancillary part of the acquisition. As such, the LawNet component comprises only a small fraction of the cost of establishing and maintaining the computers.

63. Thirdly, under central coordination, LawNet is able to establish standards in respect of user interface, data formats, response times, documentation, etc. This will result in greater ease of use throughout the spectrum of LawNet services.

64. Finally, by taking the lead in making available an integrated network for the legal sector, LawNet will spur law firms into making the investment in computerisation that they may otherwise be hesitant to do. The chicken and egg problem is resolved by the government taking the initiative. Firms will have, in addition to the benefit of computerising their internal operations, access to external systems of immediate benefit to them. With the involvement of LawNet in the development of the inhouse system itself, firms will have the assurance of a system that will fully integrate with LawNet.

F. BACK TO THE FUTURE

What does the future hold?

I. Electronic Document Interchange

65. The Times of London, in a special series on "**Law in the 1990s**" predicted that the next stage in the legal application of technology is in the area of the communications revolution - the ability to send information electronically. This is known as **Electronic Document Interchange**, or **EDI**. In Singapore this technology has been applied in **TradeNet**. EDI is a means by which documents may be transmitted electronically from one computer to another without the need for printed paper. Already Customs declarations are made electronically by EDI in TradeNet. There is no reason why court documents cannot be filed and served by EDI. In this manner the days of time wasted in physically carrying documents for filing in court and for service and in searching for them, of printing numerous copies of

documents, of storing piles of such documents both in the courts and in law firms will be forever gone.

66. Whilst we are of the opinion that much technical and legal groundwork has to be covered before EDI can replace the physical exchange of documents in legal practice, this is the direction in which the legal profession must go if it is to become competitive in the global context. The Judiciary is exploring the possibility of the electronic filing of court documents. The Chief Justice in his speech at the mass call spoke of the introduction of the electronic filing and handling of court documents in the next few years. Enhanced Electronic Filing of company registration documents will be offered by the Registry of Companies and Businesses under BizNet. The same can be applicable to the Registry of Titles and Decds, Registry of Trade Marks and Patent and many other government departments where documents are filed.

II. Imaging

67. Image Management Technology is another exciting possibility for law firms as it has the ability to retain on the computer an image of the original document warts and all, including comments scribbled by the senior partner. It can be likened to a photocopy of the document in electronic form in a CD disk like the compact disk. Some of the major advantages in implementing image management are faster retrieval, better document control, reduced use of paper, improved work flow, reduced storage cost, etc. An almost exact copy of the document can be retrieved and printed out at any time through a laser printer. It is as good as a photocopy of the original document and possibly more acceptable as evidence than a mere print out of textual data. However imaging technology entails a great deal of data and storage requirements are very high. It also requires a large amount of computer processing. In both these areas the technology is marching inexorably forward. Computers are getting more powerful without a proportional increase in cost. Data storage capabilities are improving all the time, and CD ROM technology is enabling large amounts of data to be stored cheaply. Also manufacturers are able to squeeze in more and more data into the conventional magnetic disk drives. Certain legal applications such as a patent and trade marks Database must utilise document image technology simply because the Database comprises mainly graphics and designs which cannot be captured on a textbased software. The Registry of Companies and Businesses in Singapore has an imaging system to store and retrieve documents. There are no longer stacks of files on the desks of the Registrars. The AG's Chambers has also used imaging technology to manage and retrieve the voluminous documents in an ongoing multi-million dollar construction arbitration.

III. Litigation Support

68. In one litigation on intellectual property rights, in-

volving 1 million pages of evidence with half of them in Japanese. imaging was used in the U.S. by Bickel and Brewer attorneys to track and marry the English translation with the original Japanese documents. At the trial, the attorneys would rush from the courtroom to the imaging station and retrieve documents referred to at the trial and print an exact copy in seconds. It was then enlarged into a 3" x 5" trial exhibit to refute opposing counsel's statements quoted from the applicable document. The whole process took 5 minutes which contrasted sharply with the opposing counsel's retrieval time of an hour or more. The total system cost the firm US\$180,000 with an annual maintenance fee of \$14,500.

69. In Singapore at the hearings of the committee of inquiry in August 1992 into the fire in the engine room of the MT Stolt Spur at the Floating Dock of Sembawang Shipyard, a multimedia system was used to project vivid computer graphics in motion and photographs of the ship on a screen to facilitate the leading of evidence on technical issues to both the committee as well as witnesses. This multi-media system was also used in a subsequent inquiry in November 1992 into the explosion at Ginza Plaza.

Appendix A

COMPONENTS OF THE ATTORNEY- GENERAL'S CHAMBERS COMPUTER SYSTEM

Legislation System

Singapore Statutes Database (completed July 90)

Subsidiary Legislation Database (completed November 92)

This system enables on-line full-text retrieval of Singapore legislation and also retrieval of indices to the historical development of each legislation. The system will allow for tracking of the status of Bills sent for printing. In addition, desktop publishing facilities are provided to enable editing and formatting of draft Bills before printing.

- *Library System (completed December 90)*

The operations that are computerised include:

- (i) acquisitions
- (ii) cataloguing
- (iii) circulation
- (iv) serials management
- (v) information retrieval

- *Periodicals Index Database (completed 1991)*

- *Malayan Law Journal/Singapore Law Reports Index Database (completed July 92)*

- *Debt Recovery System (completed 1992)*

This system keeps track and manages claims made for and against the Government (eg accident claims, breach of contract) and recovery of monies owing to the Government (eg hospital bills). Features of the system include:

- (i) automatic generation of demand letters and reminders
- (ii) tracking and generation of payment records and automatic issue of receipts
- (iii) computation of costs and interest on payment made by instalments

- *Advice Management/Opinion Database System (completed July 92)*

This system provides for capture and online retrieval of the full-text of previous legal advice given by the Chambers officers. In addition, the information captured includes precedent contracts, agreements and other legal documents of reference value.

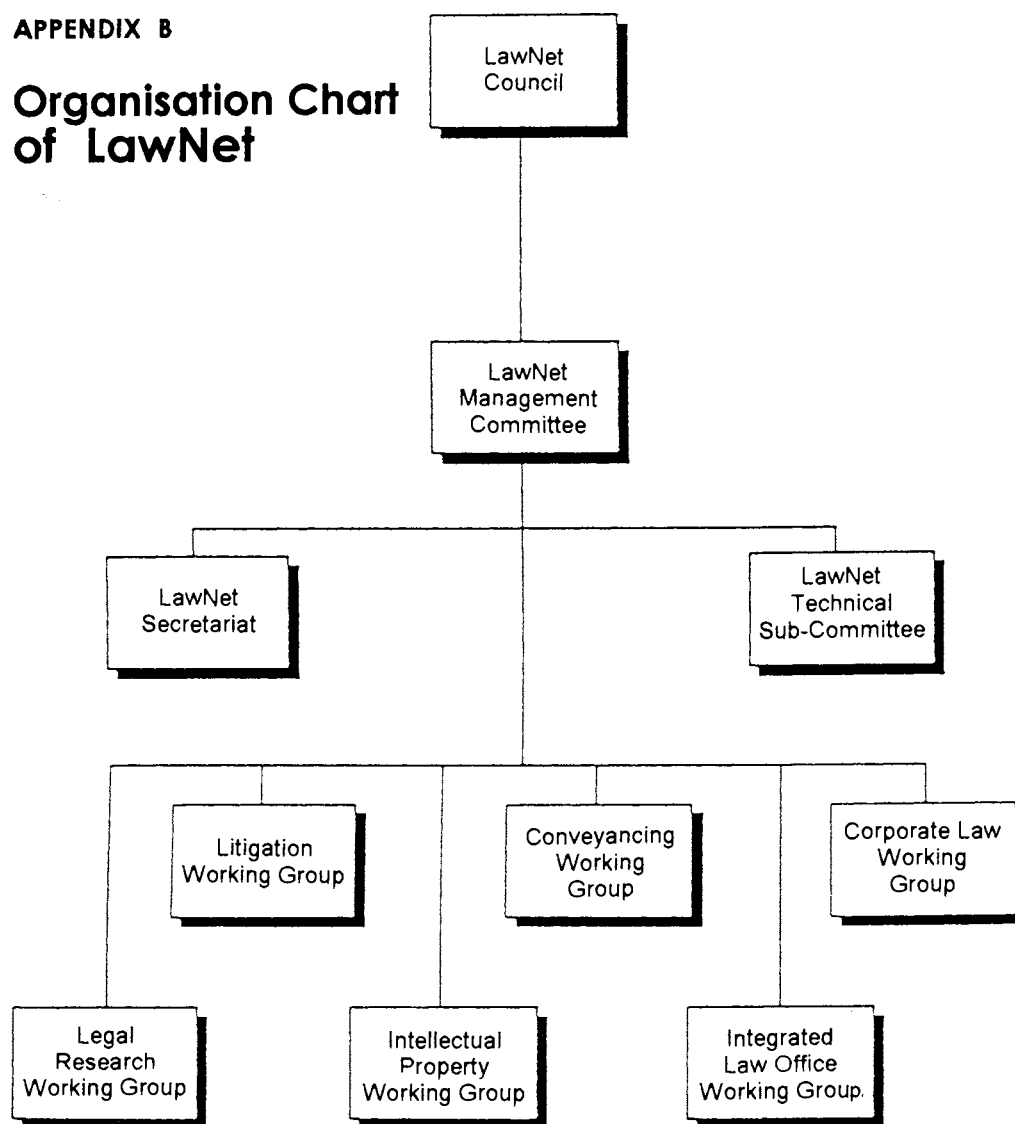
- *File Management System (completed July 92)*

This system provides better control, easier maintenance of file records and more effective tracking of movement of the files. Computerised cross-reference indices are maintained and would enable more com-

ORGANISATION CHART OF LAWNET

APPENDIX B

Organisation Chart of LawNet



plete searches for files in a much shorter time. Bar codes are used for recording file movement which saves time and eliminates human error.

- *Index of Treaties and Conventions Database System (completed July 93)*

Projects that are currently under development include: Enhancing the Singapore Statutes and Subsidiary Legislation System, and Work Assignment System. As for the projects that are awaiting development include: Crime Opinion Database System, Case Data Management System, and Case Text Management System.

Appendix C

DESCRIPTION OF LAUNET MODULES

LITIGATION MODULE

The Litigation Module computerises the litigation process by providing a system that links the computers of the Supreme Court and Subordinate Courts with law firms, permitting many court transactions to be made through the computer. The module consists of 3 systems, the Information Services System, Electronic Court Document Handling System and the Litigation Electronic Mail Network System. These systems when fully implemented, will reduce the manpower required to retrieve information from the Courts, as well as to prepare and file litigation documents to the Courts. On the part of the Courts, the time taken for filing and processing these documents will also be reduced, thus enabling the Courts to respond more quickly to the needs of lawyers.

Information Services System

This system contains information in the court registries that is required by legal practitioners. This information is stored in a computer and accessible through LawNet. In civil matters, the lists of originating processes, execution processes, appeals, and other information required by the court rules to be kept are available. In criminal matters, information on charges and bail are stored. The system also contains information on the status of cases such as dates and results of hearings, parties, solicitors, as well as the court diaries. There is also a database of Practice Directions currently in force and court circular. Other information such as Powers of Attorney registered, Bills of Sale, Bankruptcy list and Practising Certificates are also stored in the system.

Electronic Court Document Handling System

The Electronic Court Document Handling System computerises the submission and processing of court documents. This system permits documents such as originating processes, pleadings, summons and other litigation documents to be filed electronically from the solicitor's office. Where the other party is represented by a solicitor the system can even serve documents electronically. Naturally the implementation of this system entails significant changes to the court rules.

Litigation Electronic Mail Network System

The Litigation Electronic Mail Network links solicitors to the courts and to one another. This facilitates exchange of correspondence and documents between all parties. It also enables the courts to send out notices to solicitors, and facilitates transmission of urgent notices on hearings.

LEGAL RESEARCH MODULE

The **Legal Research Module** provides users with electronic databases of the laws of Singapore. Both Singapore laws and precedent information is available. Data is stored in full text and can be searched by easy to use menus. Materials retrieved can be downloaded to law firms' computers. At present, Singapore Statutes, Subsidiary Legislation, Treaties Database, Singapore Law Reports, Malayan Law Journal, Unreported Supreme Court Judgments and CLAS News are available.

CONVEYANCING MODULE

The **Conveyancing Module** computerises the conveyancing process. It comprises 3 systems, the Lot Base System, the Singapore Titles Automated Registration System. With these systems, a lawyer will be able to carry out most conveyancing transactions and have them processed electronically.

LotBase System

The LotBase system contains information on land area, State Title number, lot history, system of land registration and address of all land lots. Users are able to obtain this information from LotBase through the computer.

Singapore Titles Automated Registration System

Under the Singapore Titles Automated Registration System users can carry out searches on land titles, encumbrances, Powers of Attorney deposited with the Land Titles Registry, caveats and Strata Title Plan schedules.

Integrated Legal Requisition System

The Integrated Legal Requisition System computerises the entire legal requisition process. The user submits a single form electronically. The system sends requisitions to 11 different authorities in 5 Ministries. The computers in these authorities process the requisitions and in most cases provide replies electronically within hours. Under this system the amount of manual processing is drastically reduced in the lawyer's office as well as that of the authorities. In addition the processing time for these requisitions is greatly reduced.

CORPORATE LAW MODULE

The **Corporate Law Module** is primarily concerned with the needs of the business and corporate world. Its systems include Electronic Information Service, Strategic Business Information Service, Electronic Filing Service and Business Bulletin Service.

Electronic Information Service

The Information Service system includes the following databases:

- (i) Instant Information Service
- (ii) Directory of Establishments
- (iii) Companies' Financial Commitments

- (iv) List of Disqualified Persons

- (v) Name Search

Strategic Business Information

The Strategic Business Information Service provides financial information on companies registered. The information includes key figures from the profit and loss statements, balance sheets, and financial ratios which reveal the financial stability of the company.

Electronic Filing Service

This system enables the electronic filing of forms prescribed in the Companies Act. This obviates manual filing and processing of such documents and enables data to be rapidly and accurately loaded into the database for subsequent search by interested parties.

Business Bulletin Service

This system enables notices under the Business Registration and Companies Acts and general announcements to be made electronically to the corporate community. It also enables listed companies to make notices to the Stock Exchange of Singapore.

INTELLECTUAL PROPERTY MODULE

The **Intellectual Property Module** is concerned with the area of Trade Marks, Copyrights and Patents. Under this module, users will have access to the computerised database of trade marks of the Registry of Trade Marks. Users will also be able to file Trade Mark applications electronically. Other services include a Singapore Patents database and research materials on trade marks, patent and copyright laws.

Appendix D

ATTORNEY-GENERAL'S CHAMBERS' SOFTWARE AND APPLICATION SYSTEMS

The following software and application systems have been established in the Attorney-General's Chamber:

- *STATUS*, an information storage and retrieval software. It is used for the Statutes & Subsidiary Legislation Database, PERIND (a periodicals index), a Cases Index and Opinions Database and a Treaties and Conventions Index Databases.
- *ORACLE Database Management System* a database management system to develop the file management systems.
- *ATLAS*, a library operations and catalogue software.
- *ALL-IN-ONE*, an office automation software used for electronic mail and time management.
- *WORDPERFECT*, a PC based word-processing software.
- *ACCESS TO LEXIS, INFO ONE and Government Databases such as Registry of Companies and Businesses and Registry of Vehicles*. On-line searches of these databases can be conducted by telephone dial-up through modems.

Computerised Legislation: A Case Study in Bermuda

by Bryan J Nylin, Technical Consultant to the Computer Systems
and Services Department, Ministry of Finance, Bermuda

Summary

This case study describes the experiences of the Bermuda Government with the computerisation of the Revised Laws of Bermuda, and the legislative drafting process. Two papers have been written about this project previously, one at the conception of the project¹, and the other during its implementation.²

This five year project involved converting about 12,000 pages of printed law, and creating a computerised system that would store, update, and publish future revisions. As a result, the 1989 Revision was edited entirely on computer, and was published without any typesetting cost. Updates since 1989 have also been done entirely on computer, and only the updated loose-leaf pages have been printed. By eliminating typesetting costs and printing fewer pages, publication costs have been cut dramatically.

Now that all of the laws are on computer, such tasks as drafting and research are also greatly improved. Research projects that could have taken days, or weeks, manually are now being done in a matter of hours. We plan to expand electronic access to the law in the future so that even the general public can begin taking advantage of this great resource.

The First Analysis

The Bermuda Government first considered computerising the Revised Laws in 1985. The reasons for doing so were clearly seen at the time. No complete revised edition had been produced since 1971. Bound volumes of laws passed each year since 1971 were becoming too cumbersome to work with. There were not enough printed sets of the Revised Laws to serve the government and legal profession. The cost of preparing, typesetting, and printing another paper edition was going to be enormous.³

The computerisation of the Revised Laws would result in lower printing costs, and wider distribution. It would also deliver the ability to search and retrieve laws from a database, making legal research faster and more efficient. It would make the on-going updating process easier, faster, and less costly. In addition, the end product would be more useful to the legal community.

It was estimated that some 12,000 pages of law, or about 20 million characters, existed in the Revised Laws in

1985. The cost of manually entering all the text into a computer was estimated as well over \$100,000. The emerging computer technology capable of automatic character recognition was at least two years away.

The decision was made to wait until the technology evolved to the point that the conversion from paper to computer disk could be automated.

Phase One, Document Conversion

Technology evolved over the next three years, and finally reached a workable level in early 1988. The Cabinet approved the project in May, 1988, and two consultants were brought in to work on the project.⁴

The primary objective of the first phase of the project was to convert the laws from paper to computer disk. We obtained estimates from several data conversion firms, but the cost remained well over \$100,000. We made the decision to purchase the required equipment and do the data conversion in-house, to be completed by July, 1989⁵. Our reasons for this decision included the lack of assurances from potential vendors that they understood public law, the difficulty of monitoring quality control of work done overseas, and the potential spiralling costs if problems were encountered.

The equipment was installed, and the conversion process started in December, 1988. We completed the data conversion process two years later, in December, 1990. This was 17 months behind schedule, for two primary reasons. First, a lack of skilled labour available to do the conversion process limited our ability to progress quickly⁶. Second, we encountered a large number of pages that were typeset in Bermuda between 1971 and 1976 that contained sloping lines of text, and crooked type. We learned quickly that the recognition technology required neatly produced typesetting, and in straight lines. Much of this text had to be manually typed into the computer.

Phase Two, Desktop Publishing

Once we completed the document conversion, the next step was to format the text properly within a word processor. We had selected the Ventura Publisher software as the final platform for desktop publishing. We used Microsoft Word as the initial platform since Ventura stored its files in Word format. We considered this initial platform to consist of the basic formatting only, without graphics. We created a standard style for the Revised Laws, including new headers and footers.⁷

This portion of the project ended up consuming more time than the actual conversion from paper to disk. We did not anticipate beforehand that the automatic recognition technology only produced an unformatted text file in a standard typewriter font. Every document had to be manually formatted to appear in our new style.

During the time that it took to complete the formatting process, the Word software evolved to the point that it could handle graphic images, left- and right-hand pages, and other features that only Ventura provided in 1988. For this reason, we established Word 5.0 as our desktop publishing platform and removed Ventura from the planning.

By 1991, Word evolved once again, this time into the Windows environment. The advantages of a graphical user interface⁸ for editing, and a built-in programming language were so compelling that we moved our platform ahead one more time. We were able to do so because we still had a small amount of documents to finish in Word 5.0 and had not yet gone to press.

We ended up with nearly 1,000 document files containing over 10,000 pages of law. All the files were converted into the Windows environment by July, 1991. This new platform also provided us with a direct interface to the Linotronic typesetting system, thus eliminating the step of printing to a disk and then reading it into the typesetting machine. We created a program to allow the government printers to call up each document file,⁹ add crop marks¹⁰ to it, and then send it to the typesetting system.

We completed the formatting process and began typesetting the laws by late-1991. The complete printed sets of the 1989 Revision¹¹ were delivered by mid-1992.

Phase Three, Loose-Leaf Updates

The Revised Laws are being published in a loose-leaf format. As laws are added or amended, only those pages that have changed need to be printed. Loose-leaf publishing software was typically selling for \$100,000 or more,¹² plus the cost of another document conversion from our Windows platform. Another solution had to be found that fit within Bermuda's budget constraints. We found the solution within Microsoft Word for Windows and its inherent programming language.

In mid-1991, the Bermuda Government contracted Implex Corporation to design, build, and implement a legislative processing system within Word for Windows. Using the tools within this off-the-shelf software product, we created a series of programs to control the publishing of the loose-leaf updates, and automate the legislative drafting process.

To achieve maximum results, a local area network was installed in the Attorney-General's Chambers¹³ so that the Revised Laws can be accessed by all who will need to use them. Security procedures are in place to prevent unauthorised access. For instance, Crown Counsel may

only search and read the laws, not update them.

The system developed for Bermuda is divided into five major areas:

Drafting. Automates the legislative drafting process. Standard boilerplates were created for each major type of legislation. When a new instrument needs to be created, the system provides some of the standard text automatically. Since all legislation is on computer, the Parliamentary Counsel can easily search and retrieve relevant laws, and even cut and paste sections of text.

Editing. Used for editorialising legislation, and consolidating amendments for publication. The Editor tracks the progress of all legislation, and when new provisions take effect, prepares the legislation for publication. At this stage, instructions are created for the word processing staff so that they can make the changes through the updating system. This ensures that updated pages are processed and published correctly, and frees the Editor to concentrate on content rather than form. The Editor retains final control over changes that are made to the active database of laws.

Updating. The word processing staff use this part of the system to make changes to existing documents and prepare new legislation for publication. Work is sent back to the Editor for review. The key element of the updating system is its ability to modify, track, and print only those loose-leaf pages that are changed from the last printing.

Publishing. Manages and prepares updated loose-leaf pages for typesetting. A master table of contents that is kept up to date by the updating system allows for automatic generation of the table of contents and alphabetical listing of instruments for the Foreword. Replacement page instructions can also be generated for publication.

Annual. Manages the Annual Volume of Acts, and the Annual Volume of Subsidiary Legislation. Copies of legislation, as they were approved, are included in the annual volumes. Small cosmetic changes are made before publication, including placement of the Bermuda Coat of Arms on new acts, and creating headers, footers, and page numbers. Much of this work is done automatically by the system.

By combining all of these elements, we have created a complete system that follows legislation all the way from drafting to publication.

Electronic Access to the Law

The Attorney-General's Chambers has been able to search and retrieve the law by computer since early 1992.¹⁴ It is possible to search for all occurrences of a word or phrase, with a full set of logical and proximity search methods. This has greatly enhanced the research process and has already saved many hours of work.

It has always been our intention to expand this kind of electronic access so that anybody within government, or the private sector, can take advantage of this resource. The means by which we achieve this has yet to be determined. Several options are still under consideration.

CD-ROM.¹⁵ One disk can store over 600 million characters of data. That is enough room to have the complete set of laws for the current year, and up to 20 years for historical reference. For this reason, this would be an ideal format to produce as the disks are relatively inexpensive to produce. However, the low number of users may make the initial production and mastering costs prohibitive.

Floppy Disk. The entire database of laws could fit in a box of ten floppy disks. However, it would require at least 30Mb of disk space to unpack and use them. In addition, the same kind of production as CD-ROM would have to take place in order to build the search and retrieval methods.

Modem. An electronic bulletin board system could be established where those interested could dial in to search and browse the laws over a standard phone line. In addition, individual items could be transferred across the phone line by request. The technology to set up this type of system is only now becoming affordable and easy to maintain. This system would not be connected to the Attorney-General's network in order to provide maximum security.

Lessons Learned

Of all the major pieces of work that we accomplished over the past 5 years, only the document conversion process would be done differently today. We expended a considerable amount of time, and money, to complete the conversion.¹⁶ Even so, we probably spent less than if it had been contracted out to a vendor in 1988. And, by doing so we ended up owning a sophisticated optical scanner and computer, and the knowledge required to operate them.

Since 1988, optical recognition technology has come a long way. Today, the conversion process would be much easier, and cheaper, to perform. Part of the improvement comes from the ability to recognise not just text, but formatting as well. With a little bit of planning, the laws could be scanned in from paper and look very close to the original.

We could have significantly shortened the amount of time it took for the conversion process simply by having more people working on it at the same time. Because it took so long to do this portion, we were not able to have the 1989 Revision printed until 1991. If the decision had to be made again today, we would probably contract out the work to a firm specialising in document conversion. The main reason is because a specialist firm could have many more people on the job, and would be able to

complete it in a matter of a few weeks. We discovered that the timeliness of the publication was just as important as the accuracy.

The main reason we feel that we have been successful is that we had a vision from the very beginning, and held to it throughout the project. When technology evolved to a new level, we embraced it openly. We continually changed and adapted our methods of achieving the vision. Today, the system we have in place does not look anything like our original concept in 1988, but it is true to our original vision.

What the Future Holds

As we gain experience in Bermuda, further improvements and upgrades will be made to the system. Electronic search and retrieval will be expanded and made available to more people. If other jurisdictions get involved, the possibility of publishing multiple sets of laws in a single medium begins to make sense. It is even possible to end up with the law of all Dependent Territories on a single CD-ROM, and available by computer modem from a single source. Sharing the production cost over multiple jurisdictions would greatly increase the feasibility of this kind of project.

Any small Commonwealth jurisdiction that wants to computerise their legislation today will have a much easier time of it than we did in Bermuda. The time consuming, evolutionary process that we followed was the result of constantly being on the leading edge of technology. Today, the technology is a reality, and others can now benefit from the development efforts of the Bermuda Government.

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Legislative Processing System

The Legislative Processing System was developed for the Bermuda Government's Attorney-General's Chambers. Key features of the system include:

- Custom boilerplates to simplify creation of new pieces of legislation
- In-house laser-printing of pending legislation
- Production of replacement loose-leaf pages for printed volumes
- Direct interface to electronic typesetting systems for final output
- On-line searching of laws for easy cross-referencing

- Designed to run on industry-standard personal computers

Some of the benefits that can be achieved include:

- More efficient drafting process due to electronic retrieval of source materials, and ease of revision
- Amending provisions can be incorporated into existing legislation without requiring a complete re-print
- Typesetting errors are greatly reduced due to electronic interface
- Lower printing costs before and after legislation is passed
- Legislation can be printed in-house at any time for any purpose
- Laws can be distributed by electronic means, reducing paper

In order to achieve the desired results, a computerisation of laws project must be properly managed from beginning to end. Every jurisdiction will have situations unique to it that require different automation solutions than others. The core software, however, remains unchanged. A complete project might include the following steps:

- Create legal authority within jurisdiction to create and maintain laws in electronic form
- Convert existing (paper) laws to electronic files by optical recognition
- Procurement of necessary hardware and software
- On-site procedural analysis to finalise specific requirements for software customisation if needed
- Identify print shops that can accept electronic typesetting interface
- Mass editorial work can be applied to laws before publication to create overall consistency (if authority to do so exists)
- Initial publication of loose-leaf volume
- Installation and training of software
- Processing of all updates and publication of new loose-leaf pages

Project duration and costs will vary depending on the specifics of a jurisdiction, such as:

- Quantity of existing law
- Quality of existing printed law
- Amount of editing/modification of existing law
- Frequency of updates
- Amount of customisation required
- Other factors

REFERENCES

1. "Computer Technology in Law Drafting" by Ronald A L Coward. Presented to the Meeting of Attorneys-General of Small Commonwealth Jurisdictions in December, 1988.
2. "Computerization of the Revised Laws of Bermuda" by Bryan J Nylin. Presented to the Second Annual Meeting of Attorneys-General of Dependent Territories in the Caribbean and Bermuda in March, 1992.
3. A printing of 100 sets was done in 1978 at the cost of \$87,625, and they sold for \$1,500 including binders. An estimate in 1987 projected the cost of typesetting and printing 700 sets at over \$1 million. The total printing cost of the computerized laws cost about \$550,000 including binders.
4. The legal consultant to the Attorney-General's Chambers was Ronald A L Coward, former Solicitor General of Bermuda. The technical consultant to the Computer Systems and Services Department was Bryan J Nylin, the author of this paper.
5. The equipment purchased included the Calera CDP-3000XF scanner (later upgraded to the CDP-9000 model), a Compaq Deskpro 386 computer, Hewlett-Packard LaserJet printer with Postscript, and the Ventura Publisher software.
6. We were only able to get half of the manpower originally estimated for the six-month completion schedule. This alone caused a six-month delay.
7. Standard styles were created for such recurring items as section headings, subsection paragraphs, footnotes, arrangement of sections, etc. The header is the text that appears at the top of each page (eg. act name, title and item numbers). The footer is the text that appears at the bottom of each page (eg. page numbers).
8. The graphical user interface (GUI) of Windows is similar to that of the Apple Macintosh. The GUI is widely accepted as the easiest environment to work in. The graphic nature allows the user to see on the screen exactly what will print on the printer.
9. A document file typically contains the text of a single Act, statutory instrument, or other subsidiary legislation.
10. The Revised Laws of Bermuda is printed on 7 by 9.25 inch paper. Typical 8.5 by 11 inch output has to be marked to indicate where the edges should be cut to create the smaller page size. Since Word did not include its own crop marking, we had to create a complex set of instructions to draw the crop marks in the correct places.
11. The 1989 Revision included all laws passed through July 31, 1989.
12. The "Interleaf 5 Document Systems Software" was one example of a loose-leaf publishing system. The high cost and lack of local support in Bermuda were just two reasons we rejected its use in 1990.
13. The network consists of a Novell Network 386 file server connected to personal computer workstations in the Library, each Parliamentary Counsel, and the word processing staff.
14. We use a software product called ZylIndex 5.0 to perform search and retrieval of the database of law document files.
15. CD-ROM is the designation for a read-only computer storage medium that resembles the standard compact audio disc. It is a low cost means of distribution, but requires that the end user have a CD-ROM reader attached to their personal computer.
16. The hardware and software to do the data conversion cost about \$75,000 in 1988. In addition, about 3 man-years of effort was needed to perform the actual conversion.

Progress Report on the Computerisation of Brunei Darussalam's Attorney-General's Chambers

Paper by The Hon PLKDR P G H J Bahrin, Minister of Law & Attorney-General of Brunei Darussalam

1. This reports on the progress of the pilot scheme for the computerisation of Brunei Darussalam's laws and law reports i.e. the creation of an electronic legal database network within the Attorney General's Chambers. The scheme was as a result of preliminary feasibility study which was undertaken between 1987-1990.

2. This scheme was implemented in 1991, with the first step being the transfer and conversion of the REVISED LAWS OF BRUNEI. This was done in the Printing Department and a sub-system is proposed to be installed at the Attorney General's Chambers.

Findings of the Pilot Scheme

3. Although the Printing Department has achieved the required level of expertise in operating the system to implement the actual scheme, especially the proposed sub-system at the Attorney General's Chambers, this would require special operational training to those wanting to manipulate/generate new materials on the system.

4. An alternative would be to assign experienced staff from Printing Department to assist and tutor the staff at the Attorney General's Chambers until the required level of expertise is required. The reason being the complex nature of the operational commands required for the generation of data for printing/publishing purposes.

Implementation of the Project

5. The proposed implementation of this project is towards the last quarter of 1993. In view of the complexity of its implementation, it was decided that the project be divided into 3 specific phases:

Phase I - Upgrading & Expansion

Phase I involves the upgrading and expansion of the pilot scheme equipment at the Printing Department, enabling it to handle the storage and manipulation of both the English and Malay versions of the Revised Laws of Brunei. The upgrades will also enable the storage and manipulation of the Law Reports. Phase I will include the upgrading of the current data storage facilities, purchase of current revisions of operating software and the purchase of an additional workstation to cope with the increased workload of the Phase.

Phase II - Sub-system for the Attorney General's Chambers

The sub-system is a duplication of the pilot system, which is intended to allow the manipulation of data in the Attorney General's Chambers environment. This will allow more efficient law revision and generation of new legal materials.

Phase III

This Phase involves the creation of an electronic legal database which will provide legal counsel/legal officers with more efficient research tools. The database would be derived from the database used for publication by the Printing Department.

Current Status of the Project

To date, the project has so far advanced to Phase I, with tenders pending on Phase II. Current work involves setting up the basis for the electronic legal database. This requires the compilation and storage of past Law Reports. In addition, other forms of legal data stored in the Printing Department and the records of judgments kept at the Judiciary, are also being compiled for inclusion into the database.

The final assembled database in the Printing Department will also be installed in the sub-system at the Attorney General's Chambers. It is hoped that Phases II and III can be implemented by the first quarter of 1994.

Conclusion

The computerisation pilot project has by early indications turned out successfully, barring set-backs should be fully operational by the end of 1994. The establishment of a network with an electronic legal database in the Attorney General's Chambers will prove invaluable efficient as well as providing the opportunity to become part of a computerised worldwide legal network.

Computerisation of Legal Systems: Commonwealth Experience and Opportunities

**Paper by The Hon Dr E N Tjiriange
Minister of Justice of the Republic of Namibia**

We in Namibia saw the need for a computerised legal system when we took over the old Department of Justice, which was more or less an appendage of the Department of Justice of the Republic of South Africa, and began to build it into a Ministry of Justice with all the problems and challenges of an institution of the public legal sector of a sovereign, independent country.

One project which my Ministry planned was the Namibia Computerised Legal Information System (COLIS).

Presently applicable written laws of Namibia are a labyrinth of a series of colonial and post-independence legislation and subsidiary legislation. Certain South African laws passed before 1977 generally applied to Namibia. Thereafter, and up to 1989, only some South African laws were expressly made applicable to Namibia by Proclamations. Then as a result of the fragmented administrative system that existed in the country, ethnically-based sub-central legislative bodies made a series of laws in addition to those passed by various central legislative bodies. Finally, after independence the Namibian Parliament has been making laws. These laws are not easily ascertainable nor are they

readily accessible.

There is therefore the need to consolidate applicable Namibian laws. It is equally important for the administration of justice that the courts, particularly those lower courts outside Windhoek, the capital city, and far-flung centres should have easy access to the laws and judicial decisions of the superior courts. It is also urgent that those involved in the reform and development of laws should have easy access to the present laws. Effort in the past to identify and consolidate Namibian laws did not go far enough to solve most of the problems faced by the legal system.

Thus the planned computerised legal system is expected to make the corpus of the laws of Namibia reasonably accessible and readily available. The project will also greatly facilitate the work of the Law Reform and Development Commission.

The project is facing severe financial and expert constraints so much so that very little has been achieved so far. So Namibia will definitely support the establishment of a Commonwealth experts advisory group to assist the proper take-off of the Namibia project, among others elsewhere.

Computerisation in the Field of Law and Justice in India

Background Paper submitted by India

Introduction

National Informatics Centre (NIC), constituted by the Government of India, for promoting informatics culture in the Government at all levels of its hierarchy such as the Central Government, State Government and District Administrations, has set up a nationwide satellite based computer communication network called 'NIC-NET'. NICNET in its present configuration connects all Central Government Departments/State Government Secretariats, District Administration Headquarters and some Public Sector organisations in a single integrated network. In parallel with setting up of its massive infrastructure, NIC has developed a large number of informatics services for almost all sectors of the Government such as economy, industry, etc. Many of these services make extensive use of NICNET resulting in timely, efficient and reliable flow of information at different levels in the Government hierarchy.

There is also considerable computer activity going on in various Legal Departments. Several day-to-day functions in the Legal Affairs Department and Legislative Departments are being computerised.

Achievements

The National Informatics Centre started computerisation activity in the Legal field way back in 1983 by installing a PC/AT in the Legislative Department of Ministry of Law & Justice, in a small way. The application 'Constitution of India' was taken up as a pilot project and it was successfully developed and demonstrated to the senior officials of the ministry. Taking a cue from the successful experiment of the computerisation of 'Constitution of India' NIC has started expanding its activities in the field of Law and Justice by taking up computerisation in the following Departments/Courts/Tribunals.

1. Courts

- (a) Supreme Court
- (b) Delhi High Court
- (c) Other High Courts

2. Departments

- (a) Legal Affairs
- (b) Legislative Department
- (c) Justice Department

3. Tribunals

- (a) Central Administrative Tribunal

- (b) Income Tax Appellate Tribunal

- (c) Central Excise & Gold Appellate Tribunal

Details of Information Technology activities in each of the above Department/Court/Tribunal is provided below:

Courts

Supreme Court

In 1988 NIC has taken up the activity of computerisation in Supreme Court of India by installing a S/AT 386 computer with six terminals. With the active support of the Registry of Supreme Court, in 1990 NIC has expanded the activity by installing two more S/ATs with twenty terminals. Since then NIC has successfully computerised the following applications:

- (a) List of Business
- (b) COURT NIC
- (c) Caveat Matching Information System
- (d) Caselaw Retrieval System
- (e) Judges Library computerisation
- (f) Payroll computerisation

A. List of Business

The Supreme Court of India brings out the List of Business in two Parts on every working day of the Court. They are Part I and Part II.

The Part I contains Admission Cases (Fresh cases and Miscellaneous cases only) i.e. any case that has not been admitted so far in the Court is listed in Part I.

The Part II contains Regular Hearing cases i.e. all Admitted cases.

Complete data pertaining to about 50,000 pending cases has been entered in the system.

Major advantages of the computerisation projects are that the Registry has been made to adhere to the prescribed rules of Listing strictly.

- Cases are listed strictly according to the seniority of cases.
- Cases are listed before the Judges who are dealing with a particular set of subject categories.
- Any changes in the bench composition in the last minute due to the non-availability of Judges is taken care of by the Software.

- It has become easier to recall any dismissed case when a Review Petition is filed.
- On the spot statistical information is provided.
- Able to provide answers to Parliament Questions.

COURTNIC

For the first time in the history of Indian Judiciary, the Supreme Court pending cases information is available in all 450 and odd district headquarters in India on NIC's NICNET. COURTNIC is an information system designed to provide information on Supreme Court pending cases to a wide range of Users. COURTNIC caters to the information requirement of

- Judges of the Lower Courts
- Advocates
- Litigant Public
- Others who are interested in the on-going activities of the Highest Court of the Country.

The required information is derived from the large databases created in the Supreme Court of India by the National Informatics Centre and maintained by the Supreme Court. Though, till recently, the databases were created only for the purpose of decision making by the Registry of the Supreme Court of India, information of common interest to the legal community is derived from these databases.

The main objectives of COURTNIC are:

- To provide on-line Apex Court information to the litigant community across the Country within the shortest possible time.
- To inculcate informatics culture among the litigant public to enhance their confidence in the judicial process of the Country.
- To help the Registry of the Apex COURTNIC the execution of its functions by providing easy flow of information.

It gives the latest information with respect to the status of the case which could stand as: Disposed of, Ad-journed, Date on which last listed, Waiting position, Appearing in list etc.

B. Caveat Matching Information System

Preliminary hearing of a case to be admitted in Supreme Court is heard ex-parte unless the party that won the case in High Court files a caveat in Supreme Court. To keep track of the parties that have filed caveats a 'Caveat Matching Information System' has been developed and being implemented for the last four years.

This on-line query system generates about 10 reports every day for various sections for their perusal. About 100 files are being cleared every day by making use of the query system.

C. Caselaw Retrieval System

Information related to about 18,000 reported cases of Supreme Court has been stored in the system. The system also contains Head notes (Gist of judgment) in respect of Industrial Dispute Act, Minimum Wages Act and other Acts related to Labour Act. An on-line query system has been developed and demonstrated to the full Bench of Supreme Court in 1988.

D. Case Library Information System

An on-line query system has been developed for providing information to Judges of Supreme Court regarding details of cases about which they have very vague idea. Accessing facilities such as Time & Judge wise and Time & Judge & subject wise etc. have been provided. The system is used extensively by the Judges Library of Supreme Court.

The successful experiment carried out by NIC in Supreme Court, Patna High Court and Faizabad commissionery has prompted the then Chief Justice of India to request NIC to propagate the same to other High Courts and Lower Courts. NIC has accepted the request to modernise all courts in the way it has been done in Supreme Court.

Under the project COURTIS:

- We have taken up 10 of the 18 High Courts for computerisation in the first phase and the rest of the High Courts are being taken up in 1993-94.
- We have provided necessary Hardware and Software in these High Courts.
- Interconnected some of the High Courts to Supreme Court through NIC's "NICNET". These High Courts are on "NICNET" for accessing various data bases and for interactive communications with Supreme Court and among themselves.
- Provided training to all Court officials of these Courts.

CENTRAL ADMINISTRATIVE TRIBUNAL

A. List of Business

Like in Supreme Court here also the day-to-day activity of List of Business has been computerised. The newly filed cases are straight away entered into the computer to get listed in its turn. A Query Information System has been developed to answer the queries of hundreds of litigants.

B. Court Orders Information System

By making use of the terminals provided in the LAN in various court rooms the daily orders, Judgments are being entered directly from the court rooms as soon as they are pronounced. By the time the Members go back to their Chambers the court orders are there on their tables for signatures. It has enabled in saving the valuable time of the Members. This has been very much appreciated by the Members. The operative part of the orders which are relevant to the Cause List generation is automatically transmitted to the Cause List system, thus bringing down the generation time of the List.

C. Caselaw Information System

All reportable cases of CAT are put into the system to have an up-to-date Caselaw Information System. A query system has been developed to answer the questions of Members of CAT. By making use of the database we are able to bring out 'DIGEST' on Quarterly basis. As CAT does not have any official publication of its own it is treated as the official publication from CAT.

DEPARTMENTS

Legal Affairs

An Information System has been developed to keep track of advises tendered by the department to other departments on legal matter and also to provide precedents to the officials of the Department so as to enable them to provide consistency in their advises.

Legislative Department

Complete 'Constitution of India' with schedules, amendments has been computerised. Now the system is operational.

For India Code an Information Retrieval Systems for keeping track of statutes, bills which are being enacted by Parliament from time to time has been developed. It enables the Department to do away with the present practice of "Cut and Paste" till all the Acts are reprinted again.

Justice Department

An Information System to keep track of Institution, Disposal and Pendency of Cases including Supreme Court, all High Courts and lower courts across the country has been developed. A query system has been developed to attend to the queries of the Parliament.

TARGETS

In Courts

Caselaws

Under the project COURTIS, it is proposed to create Case Law data banks at the respective High Courts and

Supreme Court as the cases may be, by the concerned court. By making use of the Software, Caselaw of any High Court may be accessed on the Network. As it is known caselaws are very voluminous. In India Supreme Court alone has got its Caselaws in 123 Volumes each volume containing about 1000 pages. Now Caselaw data banks are created by making use of Scanners & OCR Software to accomplish the creation of Data Bank within a reasonable time frame.

Creation of Data Bank is one aspect and implementation and training is totally different one. For this it is planned to provide training to all officials working in courts at different levels on a large scale. For each High Court there will be a separate technical consultancy cell of NIC to monitor implementation and training aspects.

Others

Management Information Systems are planned for the Department of Justice in order to provide Information Access with respect to total Institution, Pending and Disposal of all Cases in various Courts.

There is also a proposal to computerise 'Consumer Education and Research Centre' with the help of NIC. It is planned to connect all consumer groups in India and to provide accessing facility with overseas public interest groups.

NIC has got international Bibliographic information (including Legal Bibliography) on CD- Roms. This information is being updated quarterly. Users send their queries to NIC to get answers.

Computerised activities are going on in some of the Tribunals such as Income Tax Appellate Tribunal, Central Excise & Gold Appellate Tribunal.

GLOBAL ACTIVITIES

The experience gained by the computer professionals in India can very well be utilised by the Governments of other countries. As the progress of computerisation in Legal field in India is quite substantial and the information accessing facilities are universally common, the same software after standardisation can be put to use globally. Software development is only one side of the coin. The Himalayan task is going to be Data bank creation and its subsequent updations on day-to-day basis. The initial development of Data bank can be achieved by making use of Scanners and OCR Software by the respective Governments. The daily updations to maintain the Data bank up to date can be achieved only by equipping all legal departments and judiciary with suitable computer Hardware and technical personnel. Even after this, there must be some centralised agency in each Government to monitor the whole activity and make available the up-to-date data banks on the global Network. As suggested by the Commonwealth Secre-

tariat in a paper the availability of data bases on CD-ROM tapes may be cost-effective. For this proper coordination among the member countries is essential. The Commonwealth Secretariat may be entrusted with this responsibility of maintaining up-to-date data bank on CD-ROM disks and subsequent distribution to the member countries.

In view of the experience gained by India in the computerised Legal field it is felt with confidence that we can make a considerable contribution to the successful development of Legal Data bases and globalising the activity among all Commonwealth countries across the world.

A Law Database Project in Ghana

A Paper by Kojo Bentsi-Enchill of Data

Introducing Solon

Established in 1992 after two-and-a-half years of development work DataCenta is a small company that is boldly pioneering a Ghanaian electronic publishing industry. DataCenta's mission is to become a computerised information bureau making available to the public legal, financial and other databases. DataCenta's immediate objective is to compile a full text law database in the next two years. In the long term, DataCenta's objective is to become an exemplary information bureau and help develop Ghana's information culture. In addition DataCenta will bring to the Ghanaian public a widening range of foreign database services.

Law Database Project

The original project concept and a demonstration database was developed by ABSC, (Accra Business Service Centre) and Bentsi-Enchill & Letsa, a law firm in Accra. 1989 ABSC identified legal database publishing as a potential area of diversification that it initially thought would involve relatively little new investment in hardware. A computer scientist was obtained through the AIESEC programme to review software options and ascertain the technical feasibility of a full text law database. There followed an extensive review of the literature, visits to international fairs such as the "Computers in Libraries" conference in London in February 1990, the Frankfurt Infobase Fair, in February 1992, and meetings with software representatives in the UK and US. A software package, Folio Views, was selected and purchased because of its powerful features and low price.

Demonstrations of the sample database that was developed never failed to elicit a favourable response from viewers from all walks of life. This preliminary marketing revealed a strong latent local and international demand for a full text law database. Thus ABSC and Bentsi-Enchill & Letsa conducted full technical and financial feasibility studies of a full text law database project.

When a page count was done it was realised (a) that some 70,000 pages of legal material was involved; (b) that it would take ABSC and Bentsi-Enchill & Letsa, given their work commitments and limited equipment, at least 10 years to complete the project; for computers bought in 1986/87 were practically obsolete in 1991, and certainly incapable of handling some of the text re-

trieval software that was reviewed; moreover scanning was not a viable option because of the poor print quality of much of Ghana's legal material; finally, (c) that an ambitious scheme involving on-line, multi-user access and eight PC-stand-alone outstations would cost \$500,000.

A number of statutory corporations were approached for equity investment and other support. The greatest interest was expressed by perhaps the three most internationally minded corporations in Ghana, Ghana National Petroleum Corporation, the Volta River Authority and the Minerals Commission. Their fulsome expressions of interest in investing in such a project (from commercial, institutional and public interest considerations) resulted in a certain relaxation about fund raising for the project. In the event little of the promised required investment materialised. In the past year, a tiny amount of private investment has been obtained largely from personal contacts. The novelty of the project, the long-term nature of return on investment in a country where Government bills can be bought at more than 25% interest per annum, have made private investment difficult to secure. The long term profitability however is not in doubt. Subject to new database projects that may be undertaken, operational costs will fall sharply once the huge tasks of data entry are accomplished and while demand will rise steadily as appreciation of the service increases. In the meantime DataCenta is just beginning to make ends meet. It is under-capitalised but beginning to make some headway. Careful fund raising and financial and operational planning is thus a key concern for any other would-be law database projects.

Ghana's Undeveloped Legal Information Culture

There is no means of conducting fast comprehensive research on Ghanaian law. The basic documents of Ghana law issue from (a) the Council for Law Reporting which produces the Ghana Law Reports, the Digest of Law Reports, the Review of Ghana Law and miscellaneous publications; (b) the Ghana Universities Press which publishes the University of Ghana Law Journal; and (c) the Ghana Publishing Corporation, which publishes statutes of Ghana, the Gazette, the Local Government Bulletin, the Commercial and Industrial Bulletin and other official publications. In addition, there is a host of insufficiently publicised adjudications, notices

and guidelines that issue from various governmental agencies; for example, the Internal Revenue Service, the Ghana Investments Centre, the Ministry of Trade and the Ministry of Finance and Economic Planning, the Customs, Excise and Preventive Service and the Bank of Ghana. This miscellaneous legal material is critical to the conduct of commerce and industry, public life, and the rule of law.

These legal materials are neither cross-referenced, nor printed in sufficient quantities. Many important statutes are out of print. The Ghana Law Reports are ten years in arrears. No local or international collections of Ghana legal materials are complete. The problem of lack of fast access to all the relevant literature on any particular point is compounded when foreign writings on Ghana law are considered. Thus, to Ghana's internal disorganisation is added an absence of organised curiosity about foreign writing on Ghana law, and the absence of a systematic programme for acquiring such literature.

The poor supply of legal materials is costly to the nation and bad for the rule of law. Some investment is lost to Ghana or acquired at extra cost through this underdeveloped information culture. Working with legal materials is a time-consuming business resting on an insecure foundation of incomplete, out-of-date libraries and ignorance of some of the relevant materials. Standards of thoroughness and expertise are thus lowered in a legal information culture that does not exact the highest precision, and is jealous or secretive about the dissemination of relevant information.

The poor state of legal materials mirrors the general national information culture. National and institutional archives are in often parlous condition. DataCenta's law database project is a strategic information project that is calculated to affect other information cultures and contribute to progress in our national information environment. The speedy and comprehensive cross referenced, search/retrieval facility of a computerised database, threatens a revolution in Ghana's legal information culture.

DataCenta's Work Plan

The plan is to complete the database comprising Ghana's laws, law reports and law journals in eight quarterly instalments; starting first with statutes, then moving on to law reports and finally, law journal articles. Work on subsidiary regulations has started with *Bankline*, a compilation of Bank of Ghana Notices to the Public. The database is published on 1.44 mb high density diskettes. By the time the project is complete this will involve 180 diskettes and clearly it will be time to transfer them onto CDROM. On-line dissemination was part of the project plan, but the necessary funds have not yet been available.

Solon 1

The first product on DataCenta's agenda is out. Solon 1 (registered trade name) is full text database of the laws of the Provisional National Defence Council which ruled Ghana from 1982 to 1993. The amazing effectiveness of Solon as a research tool is apparent in this first product. Solon 1 has an alphabetical and a chronological index for easy referencing. All references to other statutes, laws or law reports are cross-referenced by hyperlinks, so the user can flit to any references at the touch of a button. Various searches are possible from simple word queries to phrase searches and combinations thereof using logical separators. The researcher can then sift through the instantaneous search results, in either full text or digest form, or both successively, and have more than ten different documents open on screen at the same time, thus saving many tedious hours of traditional hard copy research. Furthermore, Solon has a "clipboard" facility which enables the researcher to compile notes for himself simply by lifting relevant references of his choice to a computer "notebook" of his own, where he can also record his own conclusions, and thoughts - thus producing a comprehensively finished piece of research in record time.

Benefits of Solon

As a working tool for the professional, businessman or layman with special interest, Solon is unbeatable. Solon is cheaper than traditional productions. If one considers the amount of time usually required merely to locate material and assemble it, much less the time it takes to look through what is most probably an incomplete assembly of material, then Solon pays for itself over and over again. Also, by its nature Solon will enhance the user's business or practice immeasurably.

Solon saves storage space - fifty thousand pages of Ghana Law can sit on one's desk, at one's fingertips. Properly kept, the diskette is virtually indestructible, the chances of loss or mutilation minimal. Neither need one strain to keep up with new enactments and work out their implications on earlier laws - one of DataCenta's services is a continuous updating of all laws.

Solon 2

The next product in the Solon series, Solon 2, is almost complete and receiving final touches. Solon 2 is a specialised database of laws on trade, business and finance which are in force. Solon 2 is directed at the Ghanaian or international businessman of every description, legal practitioners, banks and other corporations - in fact at any person or corporation in Ghana or elsewhere interested in any form of business in Ghana. Solon 2 is comprehensive and is therefore useful of specialised businesses as well as for an overview of relevant laws on business for the new corporation or for an old one which

wants to be up-to-the-mark. A special compilation of Trade Laws being made for the Ministry of Trade, is a closely related project.

Bank of Ghana Notices

DataCenta has also finalised a product which comprises all regulatory Bank of Ghana Notices to the Public, 1966-1993. The Bank of Ghana Notices have for long been an imported species of legislation in Ghana, but have never been compiled comprehensively. Thus, many whose bread and butter would seem to include a close watch on these notices are blissfully unaware of many of them - a patently dangerous and thoroughly unsatisfactory state of affairs which DataCenta hopes to remedy by this product.

Other Services

DataCenta also offers various other services. Firstly, DataCenta offers a *RESEARCH SERVICE*: People can call in with search requests which DataCenta will execute.

Training and Consultancy Services in information storage and retrieval systems: DataCenta has had enough experience in developing its own databases to give advice and direction to other institutions that may wish to build their own. Projects have their unique characteristics inevitably, but general principles of planning, data capture procedures, accuracy and verification systems, project controls, document tracking, etc. are no doubt applicable.

Special Databases for Specific Needs: DataCenta can compile special sub-database on any subject of interest: trade, environment, industry etc.

Equipment Supply and Maintenance: DataCenta will supply computers, CD-ROM drives, hard disks and other accessories. Indeed it is becoming clear that it is in DataCenta's interest, in a society that is in informa-

tion technology infancy, to offer computers and printers at cheap rates. A leasing scheme is under consideration that will make the database more marketable SOLON.

Miscellaneous Points

Copyright and Governmental Consents: The precise holders of the copyright in legal publications must be clearly determined and a reproduction licence must be secured in advance. DataCenta had the nerve wracking experience of delayed consent long after a great deal of work and money had been invested! There was a feeling in some quarters that a law database was a project for government agencies, not private enterprise. Thankfully this was overcome.

Marketing: It is a good idea to sell a law database in small useful chunks, rather than facing potential customers with a large price tag for an as yet uncompleted database. This is something DataCenta has had to learn the hard way. In a relatively uncomputerised society, endless demonstrations and seminars, persistent follow-ups and free training after purchase are necessary techniques.

Preparation and Planning: In a disorganised legal information culture one should never underrate the difficulties of getting a full set of documents together before work starts. Time and time again, work has been held up by a missing legislative instrument, a missing law, etc. The idea of computerising all the laws is simple in essence. In practice the most painstaking labour is involved.

Cooperation: It would give the greatest pleasure to DataCenta to assist and cooperate with other database efforts around the world. Exchanges of databases, meetings, perhaps a law Database association ought to be formed. DataCenta may be reached at P O Box 1632, Accra, Ghana. Tel: 233 21 773970, 772591, 773435. Telex: 2585, Fax: 233 21 772145.

The Office of the Attorney-General

- New Level of Public Expectations and Accountability

The Office of Attorney-General: New Levels of Public Expectations and Accountability

A Discussion Paper by John L.J. Edwards, Professor Emeritus,
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I Introductory Review

Since I wrote my discussion paper for the Law Ministers' Conference held in Canada more than 15 years ago, several major developments have occurred that challenge the traditional functions and powers associated with the office of Attorney General. All the more reason, therefore, to welcome this opportunity to revisit with those of you who are now in office what in 1977 I described as "Emerging Problems in Defining the Modern Role of the Office of Attorney General in Commonwealth Countries". In re-reading what I wrote on that occasion I have to admit that many of the major issues identified in that paper remain as fresh now as they were then. Others have surfaced in the intervening years. In some respects, such as the entrenchment of the Charter of Rights and Freedoms in the Canadian Constitutional Act of 1982, and parallel initiatives in many parts of the Commonwealth towards constitutionalizing basic human rights, the role of the Attorney General as "guardian of the public interest" has scarcely evoked any serious attention. This meeting, hopefully, will address some of the central questions associated with that long neglected aspect of the Attorney General's responsibilities.

During the same period there has been increasing evidence of disagreement between the courts and the Law Officers in the area of judicial reviewability of prosecutorial decisions made by the Attorney General or his agents, the Crown or State prosecutors. In 1977 the House of Lords, in the landmark decision known to every Commonwealth Attorney General as the *Gouriet* case, disavowed any jurisdiction in the courts to review the exercise by the Law Officers of their prerogative discretionary powers. Over the intervening years, however, this decision has been assailed from many perspectives, not the least of which has seen the adoption, across the entire Commonwealth spectrum, of the doctrine of abuse of process which was first enunciated by the same court in *Connelly v. D.P.P.* [1964] A.C. 1254. The task of reconciling these patently divergent theories has yet to be undertaken by the court that originally spawned them. In the meantime, this gathering should take heed of the constant chipping away at the fundamental principle established in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435, as well as the long-term ramifications of the abuse of process doctrine as justification for asserting the judicial reviewability of prosecutorial decisions. More on this subject later in this discussion paper.

Not all member countries of the Commonwealth have, as a central feature of their criminal justice systems, an office of Director of Public (or Criminal) Prosecutions.

Those jurisdictions which do not have such an office must now be in a clear minority. In the vast majority of the countries represented at this meeting the basic characteristics of the office, and in particular the relationship between the Director of Public Prosecutions and the Attorney General or Minister of Justice, and between the D.P.P. and the Government, are spelt out in the respective constitutions, thus underlining the critical importance of the position in the legal machinery of government. If any of you are unfamiliar with the wide disparity of constitutional arrangements on this subject in different parts of the Commonwealth take a look at my 1977 discussion paper. Later on I shall try to update this mosaic which, quite frankly, bewildered me when I first encountered it.

What is of considerable interest to note is the surge of activity in this field by those older member states, such as Australia and Canada which, for so many years, had seemingly never felt the necessity to examine, let alone alter, their existing systems of criminal prosecutions. Having been directly involved in the Royal Commission on the Donald Marshall Jr. Prosecution in Nova Scotia (1986-89), from whose recommendations emerged the first statutorily independent office of Director of Public Prosecutions anywhere in Canada, I believe it is only a matter of time and political enlightenment before this significant reform is adopted in all the other provinces, and federally, across the country. In Australia, the process of change had begun several years earlier with the State of Victoria and the Commonwealth Government leading the way. Notable differences, however, are evident in their respective approaches to the basic elements of independence and accountability. As to these, whether we are speaking of the office of Attorney General or that of the Director of Public Prosecutions, it is very apparent to my mind that important questions arise from the new directions reflected in the Australian and Canadian initiatives. These basic elements need to be addressed by every jurisdiction represented at this meeting, no matter which model was originally adopted or is in place as of this moment.

I include in this exercise England and Wales that gave birth, as far back as 1879, to the original office of Director of Public Prosecutions. As is probably well known by now, after a mere 150 years or so of intermittent debate, the Westminster Parliament in 1985 inaugurated a dramatic turn-around by establishing for the first time in its history a system of full-time State prosecutors acting under the overall direction of the Director of Public Prosecutions who, in turn, remains subject to the supervision and control of the Attorney General. Scotland, I

hasten to add, whose indigenous system of criminal justice, dating back to the 17th century, long precedes that of nearly every other country in the Commonwealth, must have experienced more than a fleeting spasm of national pride in seeing its neighbour embrace the principle of a single national prosecution service for England and Wales controlled and directed by the Director of Public Prosecutions.

Far from signifying a total merger of institutions involving the police and prosecutors, certain features continue to distinguish the prevailing systems within England and Scotland respectively. And these differences mark an apparent divergence of approach to some of the ever present central questions that every jurisdiction in the Commonwealth must resolve to meet its particular circumstances. Whether the differences are more apparent than real remains an open question. I propose to revert to some of these differences more fully in a moment, but for now let me identify the issues that continue to plague many of the countries represented at this gathering. Thus, should departmental control over the conduct of police in criminal cases and that of supervising prosecutors be unified or be completely separate? Irrespective of ministerial responsibility for the police and prosecutors, as distinct entities, should the investigating police have an acknowledged right to determine whether or not to set the criminal process in motion by laying a formal complaint before a justice of the peace (or magistrate), and this notwithstanding the Attorney General's undoubted right to decide whether the ensuing criminal prosecution should be continued or terminated by entering a stay of proceedings?

These very familiar questions were thoroughly canvassed and resolved, or so it was thought, so far as English criminal justice is concerned, by that country's Royal Commission on Criminal Procedure in 1981. Its principal recommendations are to be found reflected in the statutory landmark, the Prosecution of Offences Act, 1985. Before the ink on the statute book had scarcely dried, the same old questions resurfaced in the wake of an unprecedented erosion of public confidence that resulted from the handling of what came to be known as the "Birmingham Six", the "Guildford Four" and the "Maguire" cases, and the wrongful incarceration over many years of alleged members of the Irish Republican Army. These flagrant miscarriages of justice spread across the entire system, from the original police investigation and the seriously flawed scientific evidence to the appellate process. No professional group was immune from the outburst of public criticism that fed upon the spate of revelations. So, once again, an embarrassed government resorted to the traditional malady for neutralising, for a while at least, hostile public opinion, namely, the creation of yet another Royal Commission. Judging by the dramatic and unexpected nature of the reforms advocated by the legal professional bodies in their submissions to the Royal Commission on Criminal Justice, major changes were envisaged in some of the areas with which this paper is presently concerned. The Commission's recommendations have now been released but the final report contains no structural proposals that could be described as fundamental. To move on to another very specific subject on which I have expressed my views repeatedly in other of my pub-

lished writings, I confess to being disappointed at the slowness with which Attorneys General, in whichever Commonwealth country they may have the ultimate responsibility, have taken the bold initiative of making publicly available the policy guidelines that shape individual decisions in matters of prosecution. In my book, *The Attorney General, Politics and the Public Interest* (1984), I traced the origin of this major contribution towards full public accountability for prosecution decisions. In doing so, I recognised the leadership shown by the Attorney General of the Commonwealth of Australia (in 1982) and by the Attorney General of England and Wales (in 1983). My own country, Canada, with the occasional exception, has lagged sadly behind in this kind of endeavour but I hasten to applaud the recent release by the Attorney General of Canada, earlier this year, of the federal Justice Department's "Guidelines for the Making of Decisions in the Prosecution Process". Equally impressive, though not publicly disclosed, was the unprecedented scale of the consultation process that preceded the manual's public availability. My ignorance of similar developments in other parts of the Commonwealth, if they have occurred, is readily admitted and I hope the ensuing discussion will enlighten all of us as to what action is contemplated elsewhere along the lines I have described.

Before leaving this introductory note on the subject of public dissemination of prosecution guidelines, I want to emphasize the central place which the principle of full pre-trial disclosure must be accorded in any such prosecution policy statements. Much as it may offend the more reactionary exponents of prosecutorial responsibilities, the time has come to recognise the damaging effects, in terms of public confidence, of any perception that the State is prepared to seek convictions even at the expense of placing the accused at an acute disadvantage by withholding evidence that could benefit his defence. For too long, in many jurisdictions, the prevailing principle has been that the provision of pre-trial disclosure to counsel representing the accused was a matter of grace and favour. In Canada, the turning point in this outmoded thinking came with the decision of its Supreme Court in the *Stinchcombe* case [1991] 3 S.C.R. 326. Noting that, despite recommendations by the Law Reform Commission of Canada for legislative action on this subject, Parliament has been content to leave the development of the law of disclosure to the courts, the Supreme Court of Canada has now chosen to do just that. In an unanimous judgment, the Justices based the new disclosure principles squarely within the accused's ability to make "full answer and defence", which right, the Supreme Court pointed out, "has acquired new vigour by virtue of its inclusion in section 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice." As the chief prosecutor in every jurisdiction, the Attorney General bears the primary responsibility to see to it that this philosophy is fully reflected in the operating guidelines that govern the individual prosecutor's discretionary authority. As I was putting the finishing touches to this paper the final report of the broadly based Advisory Committee to the Attorney General of Ontario, chaired by the former doyen of criminal law judges in Canada, Hon. G. Arthur Martin, was publicly released. Its far

reaching recommendations, with respect to charge screening, disclosure and resolution discussions, will reverberate across and beyond Canada.

Associated with many of the issues I have introduced in the previous paragraphs is a relatively new development that has begun to surface in parts of Canada and Australia. Nothing approaching an epidemic is evident as I write, but the subject is of sufficient potential significance to the office of Attorney General, in every member country, that this assembly should be informed as to what is happening elsewhere. The issue quite simply is this - to what extent are the Attorney General and his agents, be it the Director of Public Prosecutions, Crown Counsel or State prosecutors, amenable to the disciplinary processes of the professional body that is responsible for maintaining minimum standards of professional conduct? The universality of these standards in any particular jurisdiction is not in issue. What cannot be ignored, however, are the serious constitutional issues that emerge from the shadows if the breadth of the professional body's disciplinary powers are expanded in a way that crosses the boundary line between (i) the prosecutor as an ordinary member of the legal profession who, like his colleagues in the defence bar, specializes in the practice of criminal law, and (ii) the State or Crown Prosecutor in his capacity as the public embodiment of the Attorney General's constitutional powers and prerogatives in the area of criminal law. To clarify the true character of this demarcation line was the challenge presented a few years ago before the British Columbia Court of Appeal in *re Hoem and The Law Society of B.C.* (1985) 20 C.C.C. (3d) 239. No one questioned the statement made by that court that: "The researches of counsel have turned up no case in which a governing body of the legal profession has asserted the power to discipline an Attorney General, or counsel instructed by him, in respect of the exercise of prosecutorial discretion". Such a lack of authority no longer prevails in Canada, but the decisions by the courts in one province have in no way deterred the governing bodies in some other parts of the country from pressing forward with their claims to exercise another level of supervisory accountability over the Attorney General and his agents. I should like to share with you my views on this contentious development, in the hope of clarifying the principles and prerogatives involved.

II A New Level Of Accountability: How Far Does The Disciplinary Arm Of The Legal Profession's Governing Body Extend To The Actions Of The Attorney General Or His Agents, Particularly In The Area Of Prosecutorial Discretion?

The emergence of this question as an additional level of accountability, over and above that of parliamentary accountability and judicial reviewability, should not be dismissed as an abstract academic problem. Up to now, so far as I am aware, this potentially new field of conflict involving the Attorney General and the pertinent governing body of the legal profession has manifested itself only in Canada and Australia. And even in these countries the subject has scarcely been recognised as a pressing issue among the rank and file of the legal profession, let alone amidst the wider public. That it will nevertheless do so, in the fullness of time, would seem

to be inevitable, so this is an opportune moment to take stock of what is involved.

To begin with, it may be useful to recall the solitary instance in which an English Attorney General was held to be amenable to answer charges of unprofessional conduct before the Benchers of his Inn of Court. In what at the time, 30 years ago, was considered to be a situation without precedent, Sir John Hobson, Attorney General in the Harold Macmillan Administration, did not challenge the jurisdiction of his fellow Benchers in the Inner Temple to adjudicate charges against him of unprofessional conduct in the handling of the *Enaharo* case (1963). The original complaint arose out of the heated controversy engendered by the Government's refusal to grant political asylum to Chief Enaharo of Nigeria. The specific allegations directed against the Attorney General were that, in the course of habeas corpus proceedings that preceded the deportation of Enaharo to stand trial for treason felony in Nigeria, brought before the Divisional Court and, subsequently, before the House of Lords Appeal Committee, Hobson had presented an affidavit sworn by the Home Secretary which he, the Attorney General, knew to be inaccurate and misleading. The affidavit had failed to disclose that the Nigerian Government had informed the Home Secretary that senior English counsel, whom Enaharo had wished to represent him before the Nigerian courts, was to be excluded from the country. Among the alternative dispositions available to the Inner Temple Benchers assembled to adjudicate the serious allegations were a reprimand, suspension or disbarment. The Attorney General was represented by counsel and gave evidence refuting the allegations made against him. At the conclusion of the hearing the assembled Masters of the Inn of Court found that the charges were unfounded and that there were no grounds for criticising the Attorney General's conduct.

Shortly thereafter in 1965, and perhaps prompted by the events just described involving the Attorney General of England and Wales, the flamboyant Minister of Justice and Attorney General of Québec, Claude Wagner, found himself having to meet charges of unprofessional conduct arising out of a speech, made at a public meeting, in which Wagner had sought to awaken the conscience of the Bar to the widespread erosion of public respect for the Bench and Bar. The complaint in this case was lodged by the judge whose conduct had been attacked in the course of the Minister's speech. An essential part of the Attorney General's unsuccessful defence before the Montreal Bar Council was that his actions were outside the disciplinary jurisdiction of the professional body. There followed a series of convoluted appeal proceedings culminating in a very brief judgment by the Québec Court of Appeal, in *Barreau de Montreal v. Wagner* [1968] B.R. 235, declaring that the disciplinary powers of the Bar did not extend to the Minister of Justice when exercising the executive powers of the Crown.

My own reading of the two cases suggests that the circumstances of the *Enaharo* case, involving Sir John Hobson, are clearly distinguishable from those just described in relation to Claude Wagner in Québec in 1965. Both of the complaints in the case involving the English Attorney General referred directly to judicial proceedings and the professional conduct of the Senior

Law Officer in his handling of those processes. The political implications of the Enaharo case were properly the subject of debate and accountability in the House of Commons. The professional conduct of the Attorney General, on the other hand, was concerned with his observance of the appropriate standards by which every lawyer is subject to the assessment of his peers. Hobson enjoyed no preferential status in this regard, simply because he was the incumbent Attorney General. An additional complication, regrettably not addressed by the Québec Court of Appeal in the *Wagner* case, arises if the Attorney General also happens to occupy the portfolio of Minister of Justice or its equivalent. In this paper I intend to focus my attention on the amenability of the Attorney General qua Attorney General, and that of his agents, to the professional judgment of their peers with respect to decisions made under the umbrella of prosecutorial discretion.

Much confusion exists on this subject. The phrase "prosecutorial discretion" is often used as if there existed a universal understanding of what it encompasses. Unfortunately, this is far from being an accepted fact. To avoid any misconceptions as to my basic premise, I understand the concept of prosecutorial discretion to include, but not to be restricted to, decisions by the Attorney General or any agent of the Attorney General as to: (i) preliminary questions of law that derive from the definitional, substantive, procedural or jurisdictional aspects of the offence(s) in question; (ii) the sufficiency of the evidence collected by the police and which is legally admissible to support the proposed charge(s); and (iii) whether the prosecution or its termination is called for in the public interest. The challenges presently being mounted by various of the provincial Law Societies in Canada are directed towards one or more of the above instances of prosecutorial discretion. Other aspects, such as the decision to grant statutory consent to the commencement of criminal proceedings, to exercise the right of appeal against conviction or sentence, or to proceed summarily or by indictment, have not figured prominently in the debate.

Without going into the details I interpret the Canadian trend, whenever it has surfaced, as an attempt to legitimize the exercise of disciplinary jurisdiction with respect to the professional competence of the Crown prosecutor in particular cases. Thus in the case previously referred to, *Re Hoem et al.*, involving criminal proceedings against municipal politicians, the Law Society of British Columbia took the position that Crown Counsel should have appreciated that there was no evidence to prove material allegations and, therefore, the charges should not have been proceeded with. Even this assertion on the facts was highly questionable (see *Gillen v Law Society of B.C.* (1985) 63 B.C.L.R. 1), but the Appeal Court chose to reject the Law Society's position on more fundamental grounds, saying:

"The concession that the Law Society has no concern with policy considerations is significant... The limit suggested by the Law Society in that passage is that it is within its powers to determine whether there was a legal foundation for a prosecution. If that were so it would mean in practice that the Law Society rather than the Attorney General would be the final arbiter as to what is an adequate legal foundation the determination whether there is legal foundation for a charge

will always be open to doubts, disputes and differences of opinion, and that is essentially a question of policy whether any given set of facts justifies a prosecution. It is not in the public interest that that determination should be made by the Law Society rather than the duly appointed Law Officers of the Crown... The distinction sought to be made between the exercise of the discretion, and the question whether the lawyer was competent in performing the work leading up to its exercise is an unworkable one ... the separation cannot feasibly be made". (op. cit., pp. 253-255.)

In this passage, the appellate court was emphasizing the importance of keeping in mind the distinction between two essentially separate issues. Blurring of the boundary line separating the two issues should prompt a strong reaction on the part of any Attorney General conscious of the importance of defending his independent status in matters of prosecution. Thus, there should be no serious question raised if what is at issue is the professional conduct of the prosecutor in the handling of a case as it proceeds through the criminal courts. If the alleged breach of ethical standards consists of, e.g., misleading the court, pressurising Crown witnesses as to their forthcoming testimony, or failing to observe the essential requirements of pre-trial disclosure to the defence, no exemption based on the office should protect the prosecutor from his or her accountability to the disciplinary processes that extend to all members of the profession.

By virtue of the very office that is under scrutiny there is an inherent expectation that every Crown or State prosecutor will demonstrate his compliance with the fundamental principles of fairness and justice in relation to the accused before, during and after the trial and the appeal process. The boundary line, of which I speak in the present context, is crossed if the body seeking to exercise the disciplinary review powers of the Law Society focuses its attention on the decisions made by the prosecutor in charge of the case. Such decisions are invariably an amalgam of many considerations including, but never confined to, an assessment of the available evidence and the pertinent law. Whatever may be the theoretical chronology of an individual prosecutor's exercise of the discretionary powers associated with his office, there will always be a consideration of the "public interest" or "public policy" dimensions of the individual case.

There is no need for me in this paper to expand on this major aspect of prosecutorial discretion. I have done so at length in my other writings. Increasingly, the dimensions of these prominent factors are spelt out in some detail in the policy guidelines issued by the Attorney General or the Director of Public Prosecutions. For any Law Society to claim for itself the right to judge what, in any particular set of circumstances, is or is not in the public interest - as was the case in one province of Canada - demonstrates the dangers of sacrificing to another body the constitutional independence and its concurrent responsibilities historically associated with the office of the Attorney General. For the same reasons given by the Court of Appeal in the *Hoem* case, any attempt to separate the inter-related stages in the prosecutor's decision-making process is both impractical and devoid of any sustainable principle. Each stage, in practical terms, is so interwoven with the others that

any attempt by a disciplinary committee to isolate parts of the process from the others would quickly demonstrate the futility of such a review procedure.

To sum up, I can find no justification for the injection of yet another layer of accountability to which the Attorney General and his prosecutorial agents are capable of being rendered subject. Difficult as it may be in the ordinary run of the mill cases to maintain the demarcation line that I described earlier, especially in the face of claims that what is at issue is nothing more than a simple matter of professional conduct, the larger constitutional ramifications should not be ignored. At the same time, I disapprove strongly of any legislative immunity which is designed to insulate the holder of the office of Attorney General from all forms of professional accountability. In the case involving Sir John Hobson in 1963 no such claim to total immunity from the disciplinary processes of the Inner Temple was made on behalf of the then Attorney General. All the more reason, therefore, to react adversely to the provision, still extant, in the Law Society of Upper Canada Act (R.S.O. 1990, Chap. L.8, s.13(3)) which states:

"No person who is or has been the Minister of Justice and Attorney General for Ontario is subject to any disciplinary proceedings of the Society or to any penalty imposed in Convocation or in a committee of benchers for anything done by him while exercising the functions of such office."

There may be other examples of this kind of extraordinary protection conferred on Attorneys General in other parts of the Commonwealth with which I am unfamiliar. Certainly, I am unable to cite any other historical precedents for this kind of immunity. To say the least, it seems incongruous to confer upon every Attorney General in Ontario the ex-officio rank of a Benchers of the governing body and simultaneously clothe the same person with total immunity from the disciplinary powers of the Law Society. In my opinion, the Ontario provision cited above, or any parallel enactments, should be totally removed from the statute book.

Its underlying philosophy is in stark contrast to the landmark decision of the Supreme Court of Canada in *Nelles v. R. in right of Ontario et al.* [1989] 2 S.C.R. 170. After examining the common law precedents and traditional arguments supporting the principle that the Attorney General and Crown prosecutors enjoy absolute immunity from civil liability for malicious prosecution, the Supreme Court (by a majority) ruled that such immunity could no longer be justified in the interests of public policy. As the majority judgment concluded: "...the inherent difficulty in proving a case of malicious prosecution, combined with the mechanisms available... to weed out meritless claims, is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important duties" (*ibid.*, p. 199). The adverse reactions of prosecutors across Canada to the ruling in *Nelles* was to be expected but this attitude could not be supported rationally. Having previously argued in favour of the reform, I welcome this additional form of public accountability encompassing the office of Attorney General and its prosecutorial agents. In handing down its decision the Supreme Court of Canada believed it was breaking new ground so far as Commonwealth

countries are concerned. I imagine that this meeting would be interested to learn of any similar departures from the traditional common law position.

III Dimensions To The Principles Of Independence and Accountability As They Relate To The Attorney General And Director Of Public Prosecutions.

At the conclusion of their meeting in 1991 the Commonwealth Heads of Government issued what they described as the "Harare Commonwealth Declaration". Such high sounding pronouncements tend to lose much of their initial impact with the passage of time and, if proven to be inconvenient or impossibly ambitious, their message tends to be quickly forgotten by future governments committed to their own political priorities. Nevertheless, I think it is important, especially for this gathering of Law Ministers and Attorneys General, to keep in mind the commitment made in Harare on behalf of all member countries:

"to work with renewed vigour, concentrating especially on the protection and promotion of the fundamental political values of the Commonwealth ...the rule of law, the independence of the judiciary and just and honest government..."

At a time of widespread public cynicism and disillusionment among all age groups towards their particular political system and its elected representatives, it would be easy to dismiss out of hand the First Ministers' unqualified commitment towards the pursuit of "just and honest government". I, for one, am not prepared to dismiss this ideal as wishful thinking nor do I think it appropriate at this time to dwell on the vastness of such an undertaking in every part of the Commonwealth. It is, however, my firm belief that there are few areas of greater importance in maintaining public confidence in government than the ordinary citizen's respect for the administration of justice. That respect, when accorded, springs from the depth of the ordinary person's basic values and hopes. Violate those values and you quickly begin to see the erosion of society's confidence in those to whom the enormous powers of government have been entrusted. Nowhere is this more evident than in the institution and conduct of criminal prosecutions. Among the central criteria by which a country's justice system is publicly judged are fairness and evenhandedness in the handling of criminal proceedings, the absence of any perception of bias or political interference on the part of those exercising police and prosecutorial authority, as well as professional competence and integrity throughout the system. As often as not the public focus will be directed towards the highest echelons in the system and, particularly, those holding the critical offices of Attorney General and Director of Public Prosecutions. This is where the ultimate authority for prosecuting crimes is vested and from which source is delegated the broad range of discretionary powers exercised daily by the State's prosecutors.

In my earlier discussion paper for the Commonwealth Law Ministers meeting in 1977, I warned against any attempt fully to understand the bewildering series of alternative arrangements for the offices of Attorney General and Director of Public Prosecutions, as reflected in the respective constitutions of the member countries,

without reference to the prevailing political context of each individual country. For what seems like obvious reasons I eschewed that task in 1977. The sheer magnitude of the exercise explains why I intend to follow the same sound advice today. Buried beneath these constitutional arrangements, but ready to erupt once the surface is scratched, are the broad principles of independence and accountability, with respect to which my own views are probably by now well known. What has engaged my attention more recently, in a series of opinions entitled *Walking the Tightrope of Justice* that I prepared in 1988 for the Nova Scotia Royal Commission into the miscarriage of justice involving Donald Marshall, a young Micmac Indian wrongfully convicted of murder, is the flurry of major reforms instituted in Australia, Canada and Britain, countries which for so many years had adhered, rather complacently, to the status quo with respect to their respective machinery of criminal prosecutions.

The prelude to major institutional changes can usually be traced to public dissatisfaction with, or worse the collapse of public confidence in, the existing structures of government. So it was in Australia in the 1970s. Commencing with indications of possible involvement by the Federal Crown Solicitor's office in Western Australia in a highly organized system of tax evasion, to the series of scandals involving political figures and members of the judiciary in the activities of organised crime, Australia was subjected to the embarrassing findings of one Royal Commission after another. Public confidence in the normal machinery of justice was shaken to the point that Special Prosecutors were appointed, with total independence from the Attorney General, under new legislation providing for such extraordinary appointments. Significantly, the transition from ad hoc Special Prosecutors to the establishment of a permanent statutory office of Director of Public Prosecutions was foreseen and strongly advocated by each of the Special Prosecutors appointed by the Australian Government. With this kind of momentum building up for radical reform the pressures for change were inescapable. The State of Victoria was first off the mark with the smooth passage of its Director of Public Prosecutions Act (No. 9848 of 1982). The following year saw the Commonwealth of Australia introduce legislation on the same subject, and this enactment too (No. 113 of 1983) proceeded quickly through both Houses of the Legislature without amendment or indeed much debate. The particular provisions of both measures demand careful attention if the nuances of the legislation are to be fully appreciated. This comparative exercise will quickly demonstrate the striking disparities between the federal and State philosophies on the questions of independence and accountability.

Subsequent initiatives by the other States in Australia reflect a strong preference for the model originally embodied in the State of Victoria enactment in 1982. It envisages a totally independent Director of Public Prosecutions of the kind familiar to many of the Commonwealth countries represented at this meeting. Time, however, will tell whether the assumed independence claimed for the Director of Public Prosecutions in the State of Victoria is reconcilable with the terms of section 9(2) of the parent statute declaring the Director to be "responsible to the Attorney General for

the due performance of his functions under this Act or any other Act".

Turning to the philosophy reflected in the Commonwealth of Australia statute of 1983, the most notable provision is section 8(1) which states unequivocally that "In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director in writing". Opportunity is provided for the Director to express his reactions to any proposed directive before the Attorney General's views are finalized and committed to written form. When the exchange of ideas has run its course the instructions of the Attorney General must always prevail. Even more fundamentally, the two jurisdictions in Australia diverge markedly on the issue of involvement in the handling of a particular case. Experience has taught us that public scrutiny is likely to be magnified proportionately if the accused is a political or other public figure and questions of non-prosecution or non-enforcement of the criminal law become the subject of public comment in the media or in the legislature.

It is in these kinds of exceptional circumstances that confidence in the doctrine of ministerial accountability is put to its most severe test. The State of Victoria, and those other jurisdictions (e.g., Queensland (No. 95 of 1984); New South Wales (No. 207 of 1986)) that have followed its example in their sensitiveness to the perceptions of political interference, have legislatively deprived the "independent" Director of Public Prosecutions of any right to issue guidelines or directives in relation to individual cases. He must be content with the formulation of general policy directives. In sharp contrast to this statutory policy of enveloping the Attorney General and Director of Public Prosecutions in a shroud of total insulation from decision making with respect to individual cases, the Commonwealth of Australia expressly authorises its Attorney General to give the federal Director of Public Prosecutions directions in individual cases. Such directions, however, it is important to note, must always be made in writing.

Sceptics will not readily be assuaged by this requirement. The real sting, as I see it, is contained in the supplemental requirement that the Attorney General's written instructions to the Director of Public Prosecutions be published expeditiously in the Official Gazette and, in addition, be communicated directly to the House of Representatives. Some delay is permitted if this is necessary to safeguard the interests of the accused or potential witnesses. Such postponement has to be justified before the House of Representatives when the case has finally been disposed of. There has been, as yet, little enough experience in Australia to determine the practical effects of these innovative reforms. Nevertheless, I want to revert shortly to the inherent nexus between these mandatory obligations placed upon the Attorney General and the effectiveness of the doctrine of ministerial accountability.

Understandably, the Australian debates on the measures just described are replete with references to the difference between their indigenous solutions to the problems associated with public prosecutions and that which defines the original office of Director of Public

Prosecutions established for England and Wales in 1879. If for no better reason than its antiquity and the experience it represents, the English office is often used as a talisman by which all later versions of that office are assessed. In considering the significance of the major reforms instituted by the Prosecution of Offences Act, 1985, c.23, and any new directions which the English criminal justice system may be destined to take in the wake of that country's latest Royal Commission's report, it is important to remember that it is the language of the original statute of 1879 that, to this day, authoritatively defines the status of the Director of Public Prosecutions for England and Wales and that office holder's constitutional relationship to the Attorney General.

Despite frequent changes over the intervening years to the subordinate regulations in the field of prosecutions, the essential character of this relationship is expressed in section 2 of the 1879 enactment which speaks of the Director acting "under the superintendence of the Attorney General" and "as may be directed in a special case by the Attorney General". In what has come to be regarded as an authoritative exposition of the respective responsibilities of the two offices, speaking in the House of Commons in 1979 the then Attorney General, Sir Michael Havers, declared:

"My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship is such that I require to be told in advance of the major, difficult, and from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction". (H. C. Debates, Vol. 176, Written Answers, cols. 87-88).

Whenever there is envisaged a system of collaboration between the Attorney General and the Director of Public Prosecutions in the decision making process, as exhibited in the Australian legislation referred to earlier, it is impractical to define with much greater particularity, than in the above quoted passage, the circumstances wherein consultation is mandated. Obviously, any such consultation must precede the making of final decisions, otherwise the Attorney General will be placed in the invidious position of having to defend the exercise of discretionary authority without having had the benefit beforehand of ascertaining the facts and law involved, assessing the public interest dimensions, and rendering his own decision whether to approve or reject the Director's advice and recommendations.

In this regard, the former English Attorney General was at pains to emphasise that his ultimate power to give directions had to be viewed in conjunction with his ultimate responsibility to defend his actions before the pertinent legislative body. Regrettably, it must be acknowledged that few champions are to be found nowadays who are ready to extol the demonstrated value of parliamentary accountability as a key element in controlling the exercise of prosecutorial discretion. Such

lack of support for this principle is readily explained by the relative infrequency of such public challenges, and the customary inadequacy of the questioner's preparation and determination to elicit the full picture of what took place prior to making the decision to prosecute or to stay the proceedings. I am persuaded that something more concrete is called for if we are to inject real backbone into the principle of ministerial accountability for prosecutorial decisions.

Because I retain a fundamental commitment to this constitutional principle as a central element of parliamentary democracy I find myself favourably drawn to the openness aspects of the Commonwealth of Australia's approach to the Attorney General's accountability. Thus, according to the federal statute (No. 113 of 1983, s.8), whenever the Attorney General chooses to intervene in a particular case and to give instructions to his subordinate, the Director of Public Prosecutions, such instructions must be committed to writing and, subject to reasonable delay if it is shown that the interests of the accused or a witness may be seriously prejudiced, the written instructions must be made available for public information. This process necessarily mandates (1) the publication of the Attorney General's written directive, with any accompanying reasons, in the Government's Official Gazette (or its equivalent) and (2) tabling the same information promptly in the Legislature. The contrast between, on the one hand, this kind of specific obligation publicly to disclose the thinking behind questionable decisions and, on the other, the veil of secrecy that prevents any realistic assessment of the values and variables operating at the time of decision making, makes it imperative that every jurisdiction represented at this meeting take a good hard look at the Australian initiatives and then ask themselves, can we justify not accepting a similar degree of total prosecutorial accountability?

Not for one moment am I suggesting that this process represents a panacea for all the weaknesses in the doctrine of parliamentary responsibility as it relates to the office of Attorney General. That doctrine should not be relied upon as the single foundation stone on which the Attorney General's accountability can be guaranteed. As this discussion paper recognises, there are several lines of accountability that must be taken into account by any Attorney General wishing to fulfil his or her constitutional obligations as the responsible member of the Executive. Requiring any interventionist directions in an individual case to be committed to writing and published will not, in one stroke, secure the twin goals of openness and accountability. Nevertheless, I believe this reform has the potential for making a major contribution towards both these central objectives.

As part of my series of opinions *Walking the Tightrope of Justice* in 1988, I undertook a detailed review of the constitutional provisions in a large number of Commonwealth countries whose ostensible purpose is to insulate the exercise of prosecutorial discretion from the negative features associated with partisan political interference. Most have been content to retain the provisions of their original independence constitutions that were designed to achieve that goal. Some have felt obliged to make changes. Nowhere, apart from the specific reforms to which I have alluded, did I find anything approaching the more recent experiments

introduced throughout Australia. A few developments, especially in the Caribbean region, deserve mention for their attempts to wrestle with the protection of the independent process of prosecutorial decision making. The variety of the approaches adopted strongly suggests that there is no single, pre-eminent solution to this enduring problem.

Thus, in Trinidad and Tobago whereas under its independence constitution of 1962 the Attorney General was given power "in any case in which he considers it desirable so to do to institute and undertake legal proceedings against any person before any court" that country's 1976 Republican Constitution (s.90(2)) makes provision for a Director of Public Prosecutions to operate separately from the Attorney General who is "charged with the administration of legal affairs" in the courts. When I visited Trinidad and Tobago I think it fair to observe that there was considerable uncertainty among the principals involved in exactly determining where the boundary lines should be drawn, as reflected in the language of their constitution. No such uncertainty was evident in Jamaica where I was reminded, by almost the last surviving member of its delegation that negotiated Jamaica's independence constitution, it was at the insistence of Mr. Michael Manley and Mr. Alexander Bustumante (the then leaders of the main political parties) that the critical section 94 was inserted as a vital part of their new Constitution. It creates the office of Director of Public Prosecutions as a public office with security of tenure equivalent to that of a Supreme Court Judge. The same protection is to be found, e.g., in the constitutions of Zambia (art. 59) and Sierra Leone (art. 66), and might well have served as a precedent for the Australian incorporation of the same principle into their various statutes.

Perhaps the most frequent provision to be found in the respective constitutions is that which reads as follows: "In the exercise of the powers conferred upon him by this section the Attorney General [or the Director of Public Prosecutions, as the case may be] shall not be subject to the direction or control of any other person or authority". The origin of this provision can confidently be traced back to the classic Commonwealth Office model which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many Commonwealth countries. Explicit as the language of this provision appears to be, its proponents may never have anticipated the emergence of situations in which both the language and the underlying principle of unconditional independence have been assailed from a number of perspectives. This has resulted in constitutional amendments being enacted in certain countries, either by way of completely eliminating the independence of the Director of Public Prosecutions (e.g. in Nigeria) or by placing restrictions requiring the Director to act in accordance with the general or specific directions of the Attorney General in prescribed circumstances. (e.g. in Barbados). Furthermore, in more recent years, we have begun to witness a new phenomenon in which the judiciary are to be found invoking the abuse of process doctrine to challenge the literal interpretation of the constitutional independence accorded to the office of Attorney General or that of the Director of Public Prosecutions. This fairly recent development needs separate attention in order to empha-

size its implications. I shall do so in the next section of this paper.

During my series of visits within the greater Caribbean region in 1988-89 I sensed varying degrees of satisfaction, among different segments of society and among members of the main political parties, with the degree of independence exhibited by successive occupants of the office of Director of Public Prosecutions in the course of fulfilling their constitutional functions. This experience confirmed the first hand impressions I gained in the late 1960s when I had the good fortune to visit a large number of African and Asian member states of the Commonwealth. This should occasion no great surprise, since it is unrealistic to place exaggerated, even exclusive, faith in the independent characteristics of the office as provided for by statute or in the country's constitution. Of no less significance, and in my opinion of even greater importance, are the personal qualities of the office holder and that person's commitment to meeting the highest expectations of ordinary people in terms of personal integrity, impartiality and steadfastness in the face of pressures from whatever quarter.

Even if we assume the possibility of exercising the independent powers of the Director of Public Prosecutions' office with such elevated personal qualities, the principle of total independence without the accompanying sanction of parliamentary accountability is, to my mind, too high a price for any society to pay in achieving the goal of keeping partisan political pressures away from the exercise of prosecutorial discretion. On the other hand, to observe what often amounts to no more than paying lip-service to the principle of ministerial accountability does little to reinforce public confidence in the integrity of prosecutorial decisions. When questions are directed towards the responsible Minister, usually the Attorney General, one major flaw that emerges repeatedly is the absence of hard evidence associating the Attorney General directly with the controversial decision, whatever form it may take. It is this absence of any real basis for invoking effective sanctions against the Attorney General or other responsible Minister that prompts many critics to pour scorn on the principle of ministerial accountability as it relates to the office of Attorney General. Instances of an Attorney General publicly acknowledging his or her direct involvement in a case, with commensurate personal responsibility, are few and far between.

If, therefore, the principle of accountability is viewed as an essential component in preserving the independence of prosecutorial decision making, a solution must be found that will overcome the major flaw to which I have referred above. In my opinion, the answer to this problem lies in the imposition of a statutory duty upon the Attorney General to commit to writing his decision to intervene in a particular case and to do so as an essential part of communicating his decision to the otherwise independent Director of Public Prosecutions. Obviously, the greater the statutory insulation of the Director from any interference by the Attorney General so, in turn, does the doctrine of ministerial accountability assume a more theoretical quality and become of less practical importance. These conclusions were the essence of my

principal recommendations to the Nova Scotia Royal Commission in 1988. In due course, they became incorporated in the legislation enacted by that province in 1990 establishing, for the first time anywhere in Canada, a statutorily independent office of Director of Public Prosecutions.

The legislation adheres closely to that enacted by the Commonwealth of Australia in 1983 and rejects the totally independent model exemplified in many Commonwealth countries and which has been adopted by the States of Victoria, New South Wales, Queensland and South Australia. As I indicated in my introduction, it is disappointing to have to record the absence of any similar initiative in other parts of Canada. Whilst providing in its "purposes of the Act" clause for "the independence of the Director of Public Prosecutions and the public prosecution service" the Nova Scotia statute authorises the Attorney General, after consultation with the Director of Public Prosecutions, to issue instructions in a particular prosecution. These must be in writing and must be published as soon as practicable in the Royal Gazette except where, in the opinion of the Director of Public Prosecutions, publication would not be in the best interests of the administration of justice, in which case the Director, instead, shall publish as much information concerning the instructions as he considers appropriate in his next annual report to the Legislative Assembly. Looking at the various Australian statutes and their remarkably divergent approaches to this question, what I find lacking, especially in those instances where the annual report of the Director of Public Prosecutions is designated as the time and place in which to disclose the issuance of particular directives, is the special effectiveness that I associate with the contemporaneous public disclosure of what is going on in the offices of the Attorney General and of the Director of Public Prosecutions. The passage of time somehow diminishes the bite that can be exhibited when the conduct of a Minister or public official or public figure is examined close to the time of its actual occurrence.

Nothing that I have said in the preceding paragraphs should preclude either of the senior State officials, personally or through counsel, making a public statement in court by way of explanation as to the decision that has been taken. The same observation applies to a situation where the Attorney General is of a mind to make a formal statement on the floor of the Legislature. I see no conflict of principle between the discretionary initiative that has always been at the disposal of an Attorney General "to go public" and the mandatory obligation that, in my opinion, should be imposed by statute to ensure that the written record of the Attorney's or the Director's directives are made available for public scrutiny.

In the same vein, and here I reiterate another major concern upon which I have endeavoured to make my views known, there is an ever growing necessity for making publicly accessible the relevant considerations and criteria that enter into prosecutorial decision making. Ever so slowly the movement towards this laudable goal is gaining new adherents with the Attorneys General of the United States, England and Wales, Australia and, more recently, Canada leading the way. I do not propose in this paper to delve into the specifics of the published guidelines that are now readily available in

each of the above countries. There will be an opportunity in the next section of my paper to touch upon the potential significance of specific guidelines when we turn our attention to the burgeoning subject of judicial review of prosecutorial decisions.

Before doing so, this gathering may be interested to learn how fragile the Canadian initiative might turn out to be in establishing its first statutorily independent Director of Public Prosecutions. Barely 3 years after the office was created, the newly elected Government of Nova Scotia, representing a different political party, is about to launch an independent review of both the legislation establishing the office and the first Director's handling of several high profile cases. During that short period of time the Director of Public Prosecutions's office has received more than its fair share of misconceived criticism. The principal criterion dictating the public response in Nova Scotia to the new office has been the failure rate of prosecutions in which the Director himself has been closely associated. To anyone acquainted with the history of the earliest years of the same office in England and Wales from 1879 onwards (see *The Law Officers of the Crown*, chap. 17), it all sounds like a familiar refrain. The annual reports to Parliament by the English Director of Public Prosecutions between 1884 and 1894 should be required reading for every modern holder of the office, as well as any person who is called upon by government to examine its operation and to make recommendations. What cannot be doubted is that future reform in this area across Canada will be significantly influenced by the outcome of the current Nova Scotia review.

IV Judicial Review Of The Attorney General's Actions

Surveying the most notable legal developments within the Commonwealth in the past 25 years a prime candidate for inclusion in any such list must surely be the growth in judicial readiness to review the exercise of discretionary power by the executive arm of government. What was once in far off days a fairly restricted and straightforward jurisdiction has been expanded in more recent times to what has aptly been described as a "terminological lottery". Judicial review is now predicated on a combination of basic elements as to which many formulae have been advanced by way of explaining the circumstances in which the courts are prepared to intervene. Among the more prominent of these triggering conditions are indications of illegality, irrationality or procedural impropriety on the part of the executive's decision maker. Other broad ranging concepts invoked by the courts to justify their intervention include the unreasonableness of the executive's position or the manifestation of unfairness in the process of decision making. Also lurking in the shadows of any judicial review proceedings is the determination of whether the subject-matter of the exercise is itself justiciable and amenable to judicial review by the courts. My concern in this paper is to examine the application of this growing trend towards an interventionist approach on the part of the judiciary with special reference to the broad range of discretionary powers exercisable by the Attorney General and his agents.

Given the fluid state in which the law of judicial review can presently be described, and the inevitability of its continuing evolution, there are certain central questions which must be addressed as they relate to the office of Attorney General. First, in terms of "justiciability" and "judicial reviewability", what significance should be attached to the historical fact that many of the Attorney General's prosecutorial powers derive from the prerogative, as opposed to the legislative, source of governmental authority? Secondly, in light of the courts' widespread adoption of the doctrine of abuse of process as an expression of its inherent jurisdiction to control its own processes, how far is this development reconcilable with the Attorney General's historic right to determine all questions relating to the institution or discontinuance of criminal prosecutions? Although, as we shall see, there is a certain amount of overlapping in the judicial precedents that touch upon these questions it will be advisable, in the first instance, to treat them separately.

Judicial Review and the Prerogative

One bastion that for the longest time was stubbornly resistant to the encroachment of judicial intervention involves the prerogative basis of executive discretion. Here, the long standing principle of constitutional law kept separate two distinct questions, viz., (i) the scope of the prerogative, in the face of legislative inroads over several centuries, has always been recognized as within the competence of the courts to decide; (ii) questioning the actual exercise of prerogative power, however, was said to be beyond the jurisdiction of the courts. This dichotomy can no longer be sustained, though the exact nature of where the law presently stands is a matter of less certainty. The earliest signs of questioning the immunity of prerogative decisions from judicial review occurred in the English Court of Appeal in *Laker Airways Ltd. v. Dept. of Trade* [1977] 2 All E.R. 182 at pp. 192-3, where Lord Denning is to be found changing his previously expressed adherence to the orthodox constitutional position (see *Hanratty v. Lord Butler*, (1971) 115 Sol. J. 386 and *Blackburn v. A.G.* [1971] 1 W.L.R. 1037). In the High Court of Australia, in *re Toohy* (1981) 56 A.L.J.R. 164 at pp. 183-4, Mason J. (as he then was) gave the first indications of that court's dissatisfaction with the traditional common law position, though in another decision in the same year, *Barton v. R.* (1980/81) 147 C.L.R. 75, the same court refused to encroach on the Attorney General's prerogative power to launch criminal proceedings. As to the reviewability of prerogative decisions, generally, the landmark decisions by the House of Lords in the *G.C.H.Q.* case, [1985] A.C. 374, and by the Supreme Court of Canada in *Operation Dismantle Inc. v. R.* [1985] 1 S.C.R. 441, which followed each other in quick succession, represent a frontal assault that was designed to sweep aside the constitutional barriers referred to earlier.

It should be noted at once that the language of section 32 of the entrenched Canadian Charter of Rights makes it abundantly clear that the potential reach of the Charter extends to all activities of the executive branch of government, at both the federal and provincial levels. In confirming this interpretation, the Supreme Court of Canada in the *Operation Dismantle* case declared that,

henceforth, all governmental actions, derived from whatever source of legal authority including the prerogative, are amenable to the scrutiny of the courts provided it can be established that any of the Charter's enumerated rights and freedoms have been infringed, denied or imperilled. No such entrenched legislation was available in English law to support the position taken by the members of the Appellate Committee of the House of Lords in the *G.C.H.Q.* case, in the course of which Lord Scarman boldly stated:

"... the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say is a matter for which the courts can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. (emphasis added). (*ibid.*, p. 407)."

In deciding which of the prerogative areas of executive action might "by their very nature" not be susceptible to judicial review, some clarification was forthcoming in the same *G.C.H.Q.* case. Without offering any elaboration as to what considerations dictated the hoisting of a "No trespassing" sign beside certain classes of prerogative decision making, Lord Roskill suggested that the following categories would be beyond the reach of the doctrine of justiciability: the making of treaties, the granting of honours, national security, the prerogative of mercy including the granting of pardons, the dissolution of Parliament and the appointment of Ministers (*ibid.*, p. 418).

The fallibility of relying too heavily on such a list has already been demonstrated in the context of the prerogative of mercy. In *Burt v. Governor General* [1992] 3 N.Z.L.R. 672, the New Zealand Court of Appeal, whilst declining to review the decision in question, went on to say: "The claim that the courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of fair procedure had been followed, could not by any means be brushed aside as absurd, extreme or contrary to principle" (*ibid.*, p.61). More recently, the English Divisional Court in *R. v. Home Secretary ex p. Bentley*, (1993) New L.J.L.R. 1025-6, recommended that the Home Secretary should look again at the file of Derek Bentley who had been executed for the murder of a police officer in 1953. The trial jury had recommended mercy and the then Home Secretary's most senior advisers had urged that effect be given to this recommendation. The trial judge, Lord Chief Justice Goddard, however, when consulted by the Secretary of State, had replied that he could find no mitigating circumstances. The death sentence was carried out. In the view of the members of the Divisional Court, sitting in 1993, even by the standards prevailing 40 years earlier, the Home Secretary's decision was clearly wrong. Disavowing any intention on its part to review the formulation of policy for the grant of a pardon "which was probably not justiciable", the Divisional Court nevertheless went on to say that it was far from satisfied that the Home Secretary, in announcing his decision in October 1992 to refuse a free pardon, had given sufficient considera-

tion to his power to grant some other form of pardon that would be suitable in the particular circumstances.

Reading the report of *ex p. Bentley* the feeling is inescapable that the judges reviewing the decision of the Home Secretary in 1992 were uncertain as to the extent of their jurisdiction in this precedent setting case. Satisfied as they were that the decision to withhold a free pardon was clearly wrong, the court nevertheless acknowledged that it had no power to direct the way in which the prerogative of mercy should be exercised. The solution to this dilemma was to assert that the court "had some role to play" but this did not extend to making any formal order or granting a declaration. In the result, the Divisional Court invited the current Home Secretary to conduct a fresh review of the *Bentley* case. It can be confidently assumed that the expectations of the court will be fully met in removing the long standing injustice. A saga of a very different order, involving the same kind of judicial uncertainty as to its powers vis-a-vis the Attorney General, is revealed in the Kenya High Court's disposition of the remarkable *Githunguri* cases (Crim. Applic. 180 and 271 of 1985). As to the wider ramifications of the English Divisional Court's decision, all that can be said at this point in time is that the exercise of the prerogative of pardon is no longer unassailable from judicial review. Initially, the boundaries of judicial intervention are likely to expand or constrict according to the court's subjective view of the merits of the particular circumstances. If that seems a somewhat jaundiced view of the development of judicial review it finds reinforcement in a balanced and insightful essay on "Justiciability and the Control of Discretionary Power" by Professor D.G.T. Williams who concludes:

"Justiciability is inevitably bound up with issues of judicial restraint, judicial techniques, political understandings, and particular controversies; and the determination of justiciability at judicial or political level, should depend in each case on good sense and good timing." (- *Judicial Review of Administrative Action in the 1980s*, O.U.P. 1986, 103 at p. 122.)

Allowing for the uncertainty that seems to be gathering force as to the existence of any prerogative category that *per se* is beyond the reach of what is justiciable by the courts, what does seem to be uniformly accepted by the highest courts is that adherence to the principle of fairness does not mean that it is open to the courts to determine whether a particular policy or a particular decision is fair. Rather, the ambit of judicial review is to be confined to determining whether the process of exercising the discretionary power and the manner in which prerogative decisions are made and carried into effect reflect the duty to act fairly. There are no absolutes and it is generally recognized that the extent of such a duty will vary greatly from case to case.

It is interesting to note that among the catalogue of excluded categories, referred to in the leading English and Canadian cases, no reference is made to the prerogative powers historically associated with the Law Officers of the Crown. Familiar examples include the power to initiate and to stay criminal proceedings and (under Canadian law at least) to prefer a direct indictment; the exclusive authority to grant immunity to witnesses who

agree to appear on behalf of the Crown; the right to appear *ex officio* as "guardian of the public interest" to protect or enforce public rights; the power to control the issue of the Attorney General's fiat with respect to the institution of relator proceedings; and the right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including the Government's relations with foreign states. It is obviously out of the question in this paper to explore the current state of each of these discretionary powers. Instead, I shall endeavour to identify the more general strands of development in the area of judicial reviewability as these relate to the office of Attorney General, wherever these have emerged in recent years.

When I last addressed this gathering in 1977 a major constitutional crisis, involving the Attorney General and the judiciary, was gathering steam in the United Kingdom. Its echoes rapidly reverberated throughout the Commonwealth and are still to be heard from time to time. The instigation for this confrontation was the view trenchantly expressed by Lord Denning, M.R., in *Gouriet v. Union of Post Office Workers* [1977] Q.B. 729 (C.A.). Presiding over the Court of Appeal on that occasion, Lord Denning claimed that, in matters pertaining to the institution of civil proceedings for injunctive relief against threatened breaches of the law, the courts have the right to review the Attorney General's decision and, if necessary, to substitute its own views for that of the Senior Law Officer of the Crown. As is now well known, each of the Law Lords, in the subsequent appeal to the House of Lords, categorically rejected any jurisdiction on the part of the courts to review and control the Attorney General's decisions in matters effecting public rights and the public interest generally. Delivering the leading judgment, Lord Wilberforce declared it to be:

"... a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney General enforces them as an officer of the Crown ... That it is the exclusive right of the Attorney General to represent the public interest - even where individuals might be interested in a larger view of the matter - is not technical, not procedural, not fictional. It is constitutional ... it is also wise". ([1978] A.C. 435 at pp. 477, 481.)

The theme running throughout all the *Gouriet* judgments in the House of Lords is the rejection of the invitation to stake out a jurisdictional claim whereby the decisions of the Attorney General, in the exercise of his prerogative authority, could become the subject of disputation in the courts. In the words of Lord Fraser:

"If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression, of course, not in a party sense but in the sense of weighing

the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts". (op. cit. p. 524).

In emphasizing the remedy of parliamentary accountability, in contradistinction to judicial accountability, as the proper avenue to follow where a challenge is mounted against the Attorney General's decision to withhold his fiat in relator proceedings, the views expressed by the Law Lords in *Gouriet* seem to be out of step with the position taken by the same court in the later *G.C.H.Q.* case, opening the door as it did to a general reviewability of prerogative decisions made by any sector of the executive branch of government.

This new judicial philosophy stands in marked contrast to the same court's refusal in the *Gouriet* case to undertake precisely such an exercise with respect to prerogative decisions of the Attorney General in matters affecting public rights and the public interest. The apparent divergence in judicial doctrine, represented by the two cases, was not addressed in the *G.C.H.Q.* case, and it will be recalled that the prerogative powers associated with the office of Attorney General do not appear among the list of excluded categories which the House of Lords has suggested might not be amenable to judicial assessment and review. This singular omission may or may not have been deliberate, but there already exist a number of instances, drawn from different countries in the Commonwealth, that indicate a judicial disposition to tread carefully when encroaching upon those clearly defined prerogative powers that historically are associated with the office of the Attorney General in England and Wales. The principal body of evidence that supports this conclusion derives from the mounting volume of judicial precedents applying what has come to be known as the abuse of process doctrine. As we proceed to analyze the jurisprudence that governs this new relationship between the Attorney General and the judicial power of controlling any abuse of its processes, a special watch should be focused on parallels with the principles of judicial review as formulated in the broader context just concluded.

Abuse of Process and Judicial Review

The advent of the modern doctrine that there exists an inherent power in the courts to prevent an abuse of its process, even to the extent of staying the trial of an indictment which has been properly filed, is generally attributed to Lord Devlin's judgment in the House of Lords case of *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254. Reinforcement of the doctrine by the House of Lords in *R. v. Humphreys* [1977] A.C. 1 and by the Judicial Committee of the Privy Council in *Bell v. D.P.P. of Jamaica* [1985] 1 A.C. 937, coupled with similar pronouncements of the highest appellate courts in Canada, Australia and New Zealand, leave little room for doubt that the abuse of process doctrine is now an integral part of the common law.

Of all these jurisdictions the Canadian courts appear to have contributed the most guidance in determining the exact scope of the doctrine and what limits prescribe its availability in the circumstances of a particular case. And even there the story of the doctrine's evolution has not been straight sailing. After the general principle was first tentatively invoked by a provincial court of appeal in 1969, it was not until 1978, in *Rourke*, that the

Supreme Court of Canada gave the abuse of process doctrine, what many observers felt was, a confusing and, at best, ambivalent endorsement. Speaking for the majority of the court, in a 5 to 4 decision. Pigeon, J., concluded that:

"... I cannot admit of any general discretionary power to stay proceedings regularly instituted because the prosecution is considered oppressive. In fact, I think the correct view is that which was expressed as follows by Viscount Dilhorne in *D.P.P. v. Humphreys* [1976] 2 All E.R. 497:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred... If there is the power which my noble and learned friends think there is to stop a prosecution in limine it is my view a power that should only be exercised in the most exceptional circumstances". (ibid., pp. 510-511).

Two schools of thought emerged in the Supreme Court of Canada as the Justices wrestled with this new frontier of judicial involvement in the administration of criminal justice. Set against the principle reflected in the passage quoted above was the interpretation of abuse of process as a wide-ranging technique for control by the criminal courts of criminal procedure, a technique illustrated but not limited by the special pleas of *autrefois acquit* and *convict, res judicata* and *issue estoppel*. Although not couched in this precise language one senses the same underlying tug-of-war going on in courts across the Commonwealth, as they come to decide upon the application of abuse of process in particular cases. The latest pronouncement on the present state of Canadian law on the subject is contained in the judgment of former Chief Justice Dickson, speaking for a unanimous Supreme Court in *R. v. Jewitt* (1985) 21 C.C.C. (3d) 7. Acknowledging the previous uncertainty which surrounds the common law position as to the availability of a stay of proceedings to remedy abuse of process, Dickson C.J. concluded:

"...there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases." (my emphasis). (1984) 13 C.C.C. (3d) 1 at p. 31.

This declaratory statement reinforces the view expressed by Lord Dilhorne in *D.P.P. v. Humphreys* that abuse of process "is a power that should only be exercised in the most exceptional circumstances". Amplification by the Supreme Court of Canada of the pertinent criteria by which abuse of process is to be judged was forthcoming in *Keyowski* (1988) 62 C.R. (3) 349, where the Crown had proceeded with a third trial following two hung juries. In interpreting what constitutes "oppressive" proceedings as the basis for an abuse of process plea the Supreme Court ruled that to require proof of prosecutorial misconduct or improper motivation would unduly restrict the operation of the doctrine. These are relevant factors, it was said, but the decision regarding abuse of process should not hinge solely and

exclusively on those aspects of the Crown's decision to relay the indictment.

These references to Canadian decisions may strike you as somewhat parochial on my part. Perhaps. It is, nevertheless, a fact that the development of the abuse of process doctrine has been invoked in the Canadian courts to an extent not paralleled in other common law jurisdictions. There is also an additional element that explains the prominence of abuse of process issues in Canadian criminal trials. This derives from the Charter of Rights and Freedoms, and especially the extremely broad interpretation accorded to section 7 of the Charter since it was first invoked before the Supreme Court. That provision declares: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Despite the widespread opinion, expressed by provincial appellate courts, that the common law doctrine of abuse of process has now been subsumed in the above section of the Charter, with all the remedies available under its section 24, there are outstanding questions as to the onus of proof which are yet to be ruled upon by the Supreme Court of Canada. No less importantly, we have yet to discover how far the Supreme Court Justices, as opposed to the lower courts, are disposed to press their claims to oversee the exercise of prosecutorial discretion under the jurisdictional umbrella of the Charter of Rights, and especially the potent section 7 quoted above.

On the present available evidence the Canadian Supreme Court appears to be working in tandem with its counterpart, the High Court of Australia. Beginning with *Barton v. R.* (1980/81) 147 C.L.R. 75, the Justices of Australia's highest court squarely addressed the conflict of principles inherent in the constitutional question as to who, ultimately, determines where the line is to be drawn between the executive and judicial functions in supervising matters of prosecution. On the particular issue before it in *Barton*, the High Court Justices upheld the New South Wales Attorney General's right to file an ex-officio indictment, with a majority inclined towards the view that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair" (*ibid.*, p. 100). Perceptions change, and I venture to suggest that little, if any, support exists today for such an extreme position. Relying upon the House of Lords speeches in *Connelly* and *Humphreys*, the Australian High Court showed no equivocation in declaring the existence, as an integral part of Australian common law, of the power in the superior courts to prevent an abuse of process in criminal cases and to ensure the right of the accused to a fair trial. At the same time, the Australian Justices expressly disavowed any intention on their part to examine the Attorney General's original decision, under his prerogative powers, to launch the criminal prosecution, stating:

"The courts exercise no control over the Attorney General's decision to commence criminal proceedings, but once he does so, the courts will control those proceedings so as to ensure that the accused receives a fair trial." (1980) 147 C.L.R. 75, 96.

Similar judicial statements, reconciling the principles

that underlie the constitutional separation of functions as they involve the Attorney General and the courts, are to be found in the law reports of many Commonwealth jurisdictions. Repetition, however, does not conceal the simplistic character of the dividing line expressed by the High Court of Australia in the passage quoted above from *Barton v. R.* Just exactly what is comprehended in the phrase "the Attorney General's decision to commence criminal proceedings" is far from clear. Earlier in this paper, when discussing the problems surrounding the scope of the Law Society's disciplinary jurisdiction as it relates to the Attorney General and public prosecutors, I tried to stress the importance of preventing the governing body from intruding upon a range of subsidiary issues that are part and parcel of the discretionary power entrusted to the Attorney General to institute or to stay a criminal prosecution. Legal, evidentiary and policy questions are incapable of being assigned to wholly separate compartments within the decision to commence or halt criminal proceedings. Therein lies the same danger that I perceive exists in not keeping a vigilant eye on the extent of judicial interpretation of abuse of process. If the resolution by any court of that question involves a substantial constraint on the Attorney General's discretionary powers, whether to institute or to stay the proceedings, and whether at large or in a particular case, there should be no reluctance on the part of any Attorney General to confront the underlying constitutional question of the separation of functions in the administration of justice.

In the course of preparing this paper I engaged in a comparative review of Commonwealth cases where the question of abuse of process has been invoked. I found this exercise helpful in assessing how far the courts are prepared to go in pressing their claims to supervise the prosecuting arm of the State with the goal of ensuring a fair trial. It is now generally accepted that, as Lord Diplock observed in *R. v. Sang* [1980] A.C. 402, 437, "...the fairness of a trial is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted". Consequently, whereas at first there was a distinct impression that the courts viewed delay on the part of the prosecution solely from the perspective of whether it was justifiable or not, this approach has now been replaced with a more stringent test as to whether the delay on the part of the prosecution has resulted in the defendant being substantially prejudiced in the preparation or conduct of his or her defence. Different jurisdictions appear to agree that the reneging by a prosecutor of an agreement to extend immunity from prosecution to an accused in return for cooperation which is in fact given constitutes improper conduct and an abuse of process. More recently, the English Divisional Court, following an all too rare review of a wide range of Commonwealth cases on the issue before the court, ruled that the prosecution of a person who has received a promise, undertaking or representation by the police that he will not be prosecuted is capable of being an abuse of process, and his committal to the Crown Court to stand trial in breach of such a promise may be questioned in judicial review proceedings. (*R. v. Croydon Justices, Ex p. Dean* [1993] 3 W.L.R. 198.

Considerably more reluctance is evident, at least in

Canada, on the part of the courts to question the route chosen by the Attorney-General or his agents in launching a prosecution, whether by way of a preliminary hearing or by direct indictment. Although the question has yet to be determined in the Supreme Court of Canada, both the Ontario and Manitoba Courts of Appeal have ruled that the principles of fundamental justice, now entrenched in s. 7 of the Charter of Rights, are not per se violated by the Attorney General exercising his long established right to prefer an indictment directly, thus depriving the accused of the opportunity to cross-examine key Crown witnesses by way of a preliminary hearing. Two important caveats, however, suggest a recognition on the part of the provincial appellate courts that there are no absolutes on this question. In declining on the grounds of the separation of constitutional functions, to recognize any power in the courts to review the prosecutorial functions of the Attorney General, the Chief Justice of Manitoba in *Balderstone v. R.* (1983) 8 C.C.C. (3d) 532 qualified this immunity by reference to the caveat "barring flagrant impropriety" (at p. 534). This is an emotive phrase that judges in several jurisdictions have invoked to describe the principle of last resort when assessing the fairness of the adjudicative process.

More specific dimensions are contained in the important ruling of the Ontario Court of Appeal in *Re Regina and Arviv* (1985) 19 C.C.C. (3d) 1985. After acknowledging what has been said, in countless authorities, to be the unfettered jurisdiction of the Attorney General to exercise his discretion in resorting to a direct indictment, Martin J.A. (speaking for the court) declared:

"The preferring of a direct indictment under s. 507(3) of the [Criminal] Code in combination with the failure of the Crown to make adequate disclosure might, however, result in an accused being unable to make full answer and defence at his trial, thereby contravening s. 7 of the Charter and enabling the trial judge to fashion a remedy under s. 34(1)". (underlining of the Court) (at p. 404).

The same court, in the later case of *R. v. Ertel* (1987) 35 C.C.C. (3d) 398, put the whole issue in an even broader context stating:

"...the power of the Attorney-General to prefer an indictment is in accord with the principles of fundamental justice and forms part of the large arsenal of discretionary powers that the chief law enforcement officers must possess in order to effectively discharge their high constitutional duties. In the exercise of these discretionary powers the Attorney-General is accountable to Parliament or the legislature and the exercise of the power may be reviewed by a court of competent jurisdiction if it results in a denial or infringement of a constitutionally protected right." (*ibid.*, p. 415).

The accountability of the Attorney-General to Parliament or the Legislature has not figured in this paper as prominently as the subject deserves, and as I have given to it in my other writings. The introduction of the Charter of Rights as part of the Canadian Constitution may have resulted in diminishing the parliamentary role in holding the Attorney-General to account for his or her actions, especially in the discharge of prosecutorial functions. It is my belief, however, that the passage

quoted from *R. v. Ertel* (*supra*) would receive, at present, the universal support of the Canadian judiciary, including the members of the present Supreme Court of Canada.

Assuming, as my previous review of the authorities demonstrates, that the exercise of prerogative powers is no longer per se beyond the reach of judicial review, what importance should attach to the fact that most of those erstwhile prerogatives in the criminal justice field are now embedded in statutory form? This may be in the form of specific provisions in a criminal code or other legislation or, as will be familiar to many Commonwealth countries, in their constitutions where statements of fundamental principles are enshrined. Whichever of these alternative forms is used, the statutory language gives some precision to the particular form of discretionary powers. In many instances, the legislative body has given delegated authority to the Director of Public Prosecutions to administer every aspect of prosecutorial discretion. The Attorney General may or may not have concurrent authority or even residual powers, the answer to which must be sought in the specific laws of each country. Nevertheless, bearing in mind the major changes in the modern approach to judicial reviewability subscribed to by the leading appellate courts in the Commonwealth, the question remains, does the incorporation into legislation of the Attorney General's former prerogative powers automatically preclude any consideration of the original source of the same powers? It is my feeling that the historical roots of the Attorney General's prerogative authority to commence or to stay criminal proceedings continue to exert a major constraint upon the judiciary, no matter which Commonwealth country is involved. To rely upon the original source of the Attorney General's discretionary powers as justification for treating the subject as one of the "excluded categories" beyond the reach of judicial review, it might also be thought, would be substantially diminished if these discretionary elements were now to be found embedded in statute law. How valid are these impressions?

Looking at the cases decided in the English courts since the enactment of the Prosecution of Offences Act, 1985, with its detailed provisions governing the duties, powers and responsibilities of the "new" Director of Public Prosecutions and the members of the Crown Prosecution Service, there is nothing that suggests a declaration of "open season" on the part of the judiciary to review the exercise of prosecutorial powers. On the contrary, the approach has been uniformly circumspect and heavily weighted towards concentrating on the process of decision making, as opposed to evaluating the particular decision. For example, in the recent case of *R. v. D.P.P. ex parte B (a minor)* [1993] 1 All E.R. 756, the Divisional Court was invited to review the decision of a Crown prosecutor who had refused to discontinue the prosecution of a minor. The police had earlier decided against administering a caution in the particular circumstances. The approach, reflected in the court's decision, is consistent with that expressed in several other recent cases which have explored the limits of judicial review in prosecution matters. According to Watkins L.J.:

"I find it very difficult to envisage, with regard to that policy [of cautioning], a circumstance, fraud or dishonesty apart possibly, which would allow a challenge to a decision to prosecute or to continue proceedings unless it could be demonstrated in the case of a juvenile, that there had been either a total disregard of the policy or, contrary to it, a lack of inquiry into the circumstances and background of the person, previous offences, general character and so on, by the prosecutor and later by the Crown Prosecuting Service"

Therefore, although the C.P.S. decision may in principle be reviewed, in practice it is rarely likely to be successfully reviewed ... my view as to the position of adults, on the other hand, in this respect is that judicial review of a decision not to discontinue a prosecution is unlikely to be available. The danger of opening too wide the door of review of the discretion to continue a prosecution is manifest and such review, if it exists, must, therefore, be confined to very narrow limits" *ibid.*, pp. 770-771.

To summarise what has been happening on the judicial review front as it relates to actions taken by, or in the name of, the Attorney General, I would describe the underlying constitutional questions as relatively dormant at this time. There have been the occasional skirmishes on the edges of the battleground. The *Gouriet* principle of the Attorney General's total insulation from judicial review in exercising his prerogative authority is no longer sustainable in its entirety. Where the encroachment springs from adherence to the abuse of process doctrine I see no intrinsic reason to bemoan the new order. There are obvious pitfalls of excessive judicial ardour in wanting to oversee every aspect of the administration of justice. The most effective response to such potential excesses is to determine, in advance, the ground upon which the constitutional duties and prerogatives of the Attorney General will be defended on grounds of principle. This paper, in part, has been concerned to provide some guidance in anticipation of these future conflicts.

V Chief Legal Adviser to Government and Guardian of the Public Interest

It remains for me to draw to your attention some features of the Attorney General's additional responsibilities as the government's chief legal adviser and as guardian of the public interest. Public discussion of these roles is rarely undertaken and, as I observe recent developments in certain parts of the Commonwealth, I am forced to wonder as to the level of understanding and commitment that prevails with respect to these important functions. Harking back to the laudable objectives enshrined in the Harare Declaration, with the commitment made by First Ministers to the goal of "just and honest government", I suggest that we not overlook the contributions that are within the grasp of every Attorney General to make when called upon to discharge what, at first glance, might seem like vastly different duties.

It is not difficult to envisage, as a regular occurrence in every Commonwealth country, situations in which the Administration's choice of options calculated to realise

its political objectives will be dictated by what it conceives, or what it claims, to be in the public interest. Such decisions might diverge widely from a non-partisan view of what policy position best represents the public interest. Whether the particular decision is made by the Cabinet, an individual Minister or at the departmental level by senior public servants acting in the name of the Minister, there will always be the possibility of conflicting interpretations as to where the public interest lies, especially in contentious and high profile situations. It is in these kinds of circumstances that the Attorney General must have a clear grasp of his wider constitutional responsibilities. Reference merely to the specific statutory formulation of the Attorney General's duties is not enough. These may be embedded in the country's constitution, in the statute describing the functions of the Minister of Justice and Attorney General (if these are separate portfolios), or by way of a common understanding derived from the history of the office of Attorney General in England and Wales.

Typical of statutory formulations of the duties that are attached to the office would be provisions stating that the Attorney General "shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him by the Government" and "shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies". In some Commonwealth countries it may still be possible to visualise a centralised group of lawyers acting under the personal superintendence of the Attorney General, fulfilling all of the above responsibilities in the most direct and personal manner. More than likely nowadays is the existence of a cadre of legal advisers located within each of the ministries of government. Where this system prevails the legal staff naturally come to regard themselves as specialists in the particular areas of law devoted to that ministry's concerns. Furthermore, the argument is often heard that, in those government departments where law and policy considerations are highly intermingled and where legal advice is expected to reflect that body of experience, it is essential that the departmental lawyer regard himself, and be viewed as such, as a fully integrated member of the departmental team. The contrary perspective expects the professional detachment of the trained lawyer to be maintained alongside his or her readiness to share in the common goal of implementing the ministry's objectives.

In these kinds of contexts what importance should attach to the principles of independence associated with the office of the Attorney General in whose name, constitutionally speaking, all advisory opinions and rulings of a legal character are proffered to the department or agency involved? My growing feeling is that the nature of this important feature of the Attorney General's unique position in government is being threatened by a number of developments, some recent and some of perennial frequency. Among the more recent developments is the move in some countries, of which I single out Australia because of the available documentation, towards the commercialisation of the legal services performed on the civil law side of the federal Attorney General's Department. The Treasury's accent on productivity, cost effectiveness and competitiveness

through the user-pays principle is calculated to fragment still further the unified role traditionally vested in the Attorney General as the chief legal adviser to the Crown, its executive council, its individual ministers and all the branches of government. Reading the Australian papers outlining the purposes of the present commercialisation drive, I am not impressed by attempts to single out certain areas of the Attorney General's responsibilities as possibly requiring a different approach. These special areas, to which economic standards of performance are said not to apply, include policy questions, the drafting of subordinate legislation and other legislative instruments, constitutional issues, treaties and other international questions. This approach towards ad hoc compartmentalising of the Attorney General's disparate functions lacks credibility. The dominance of economic standards is also evident in the New Zealand Justice Department's "Management Plan 1992/93" with its themes of "increased efficiencies", "fiscal responsibility" and "implementing productivity improvement projects".

From my admittedly distant vantage point, there appears to be a lack of appreciation amongst politicians, Treasury mandarins and members of the government legal service alike as to the full scope of the Attorney General's responsibilities in the overall machinery of government, and as to the degree of political independence with which the Senior Law Officer discharges his advisory functions. The truth of the matter is that there exists a widespread perception among ministers and public servants that the Attorney General is nothing more than the government's lawyer, and the Department of the Attorney General is, in effect, the law firm that is always on call to serve the interests of its client, the political party that is in power. To take this reasoning one step further, as reflected in the practice of some Commonwealth jurisdictions, if the deputy minister in the Attorney General's department is appointed by the Prime Minister, the perception exists that this public servant, the Minister's senior adviser, is in the ultimate analysis accountable to the Prime Minister. The practical effects of this "understanding" can lead to all kinds of pressures being applied by the political office of the Chief Minister. This may never be pressed to a showdown but it would be difficult to deny the simple fact that senior public servants are not totally impervious to the realities of their career paths.

It requires a very strong Attorney General, fully cognisant of the history of the office he or she holds and confident of his constitutional position, to withstand the political pressures communicated to his office, no matter how subtle or sophisticated the tone of the messages might be. There should never be any doubt as to the single line of accountability that flows upwards to the desk of the Attorney General, as the accountable Minister of the Crown. This problem of educating ministers and members of the public service is a never ending task that must be shouldered with a greater commitment than current evidence suggests is being undertaken by those who are appointed to this unique office. Regrettably, I am forced to conclude that, perhaps in the majority of cases, the new incumbent comes into the office of the Attorney General with only the vaguest comprehension of the high demands that go with the territory just inherited.

Now another major dimension has been added to the Attorney General's variegated functions. With the advent of human rights as a subject of increased public debate in every part of the Commonwealth, the question I wish to address, in concluding this paper, are the proper principles that should guide an Attorney General in fulfilling his role as "guardian of the public interest" with respect to maintaining fundamental rights and freedoms. The idea of exploring ways and means to expand the judicial enforcement of human rights, by incorporating well established international norms into the domestic laws of each country, has captured the imagination of senior members of the judiciary in several continents. Testimony to this fact is provided by the well attended conferences specifically devoted to this enterprise in such diverse locations as Zimbabwe and Grenada (in 1989), The Gambia (1990), Nigeria (in 1991) and Balliol College, Oxford (in 1992). At the conclusion of their deliberations each conference released for public information a formal statement committing its participant countries towards bringing the principles of fundamental human rights into the daily consciousness of domestic courts and public officials alike. The thinking behind this potentially very significant development in the Commonwealth is captured in the statement issued at the conclusion of the Balliol colloquium in 1992, where the view is expressed:

"The international human rights instruments and their developing jurisprudence enshrine values and principles long recognised by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. They should be interpreted with the generosity appropriate to charters of freedom. They reflect international law and principle and are of particular importance as aids to interpretation and in helping courts to make choices between competing interests. Whilst not all rights are justiciable in themselves, both civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights. They serve as vital points of reference for judges as they develop the common law and make the choices which it is their responsibility to make in a free and democratic society."

Every student familiar with the independence constitutions that heralded the advent of full sovereignty in Commonwealth countries will have noted the list of basic rights that grace those constitutions. Nevertheless, the gulf between theory and practice in the matter of ensuring adherence to human rights precepts is illustrated daily across the Commonwealth, to the point that ordinary citizens may be forgiven if they entertain reservations as to the practical value of legal texts that enunciate rights and freedoms but provide no effective sanctions where violations are shown to have occurred. There are many improvements which could be effectuated given the political or judicial will to do so. This is reason enough to applaud the present initiatives, heralding what is hoped will be a more receptive approach by the courts to legal arguments based on human rights jurisprudence that derives from such sources, for exam-

ple, as the decisions of the European Court of Human Rights in interpreting provisions of the European Convention on Human Rights. When the immediate dispute before the ordinary courts calls for making a choice between conflicting statutory interpretations of a domestic law or the resolving of an ambiguity in the common law, it is encouraging to visualise the prospect of an open-minded judiciary in every part of the Commonwealth willing to draw upon the insights of other legal minds who are daily engrossed in interpreting international conventions that embody universally recognized human rights.

Expressing support for this kind of innovative approach in the atmosphere of a conference is one thing. Adhering to the same approach in the course of performing the regular functions of a trial or appellate judge is a challenge of different proportions. But there is growing evidence that the initial barriers are gradually being removed. Nowhere is this phenomenon being watched more closely than in the older members of the Commonwealth, in Australia, New Zealand and the United Kingdom. In 1960 Canada enacted its Bill of Rights as an ordinary statute. It made little impact on judicial decision making. It will be intriguing to watch what happens in New Zealand which has chosen to reject the entrenched option in favour of a declaratory but unenforceable Bill of Rights (1990, No. 109). New Zealand's experience may well emulate that of Canada in the 1960s and 1970s. This picture changed in Canada with the enactment in 1982 of its constitutionally entrenched Charter of Rights and Freedoms. That momentous event has produced a notable transformation in judicial thinking, both in terms of direction and in the methods of legal reasoning. Furthermore, with several law clerks now available to assist each Justice of the Supreme Court its judgments have become inordinately long. The centrality of the Charter's provisions to all branches of the law has been made manifest in the first decade of its existence. In keeping with the guiding principles contained in section 1 of the Charter which declares:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." and the all pervasive section 7 which states:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

the Justices of the Supreme Court of Canada have revealed unexpected levels of judicial creativity and reformist zeal. In demonstrating their readiness to venture down unfamiliar paths in which the interplay between legal, political and social considerations becomes very apparent, there have been occasions when the predilections of individual Justices have demonstrated, sometimes to an acute degree, the dangers of exaggerating the judicial power to override the will of Parliament. No matter how categorical the language used to express individual rights and liberties, there remains the unexpressed element of balancing conflicting values which even the panoply of the constitution cannot eliminate. The more recent judgments handed

down by the present members of the Supreme Court exhibit a more restrained approach to the judicial task of interpreting the Charter of Rights.

As Canada adjusts to the realities of the entrenchment of fundamental rights in its constitution, as part of the supreme law of the land, Australia and New Zealand seem to be of one mind in resisting what has become commonplace throughout the rest of the Commonwealth. The United Kingdom, it is true, has for many years been engaged in a simmering debate on the question whether or not to adopt a judicially enforceable Bill of Rights. To put this debate into proper perspective, it should be remembered that Britain was a signatory to the European Convention on Human Rights as far back as 1951, and since 1966 it has consistently accepted the jurisdiction of the European Court of Human Rights. Successful recourse by its citizens to that court over the years has been frequent and multi-faceted. Many of the ensuing rulings have compelled the Government of the day to introduce legislation bringing the law of the United Kingdom into line with the decisions of the Court of Human Rights. As one of the present Law Lords has recently written: "It is a most singular feature that the law of this country, which has for so long prided itself on protecting individual freedom, has been found to be in breach of the European Convention on Human Rights on more occasions than any other signatory." (per Lord Browne-Wilkinson, [1992] Public Law 397 at p. 398).

The tedious and cumbersome nature of the present procedures to enforce the provisions of the European Human Rights Convention has been the subject of persistent criticism. That criticism has now been given added weight by the public declarations of the newest appointees to the country's most senior judicial appointments. Speaking extra-judicially on an occasion calculated to attract public attention, Lord Chief Justice Taylor, delivering the 1992 Dimbleby Lecture on British television, expressed his unambiguous support for incorporating the provisions of the European Convention into domestic law by legislation. "Our ratification of the Convention" he declared "obliges us in the end to accept it, but our refusal to incorporate means acceptance occurs only after a decision in Strasbourg, much delay and humiliation." (1993) 19 C.L.B. 323, at p. 329. Speaking in the same vein, Lord Justice Bingham, Master of the Rolls, has stated: "It would be much better if the implementation of the convention at first instance was in the hands of British judges...I take a rather historical view. The traditional protection of the rights of British citizens lay in the hands of British judges. It is a sad thing it should lie somewhere else." (The Times, Aug. 14, 1992) The advent of such a fundamental reform may not be too far distant if one is to judge the current political climate in the United Kingdom.

In the meantime, as I have already pointed out, there are increasing indications of the preparedness of leading spokesmen on the Bench, in different Commonwealth countries, to espouse the need for construing legislative provisions and applying common law doctrines in the light of principles enshrined in established codes including the United Nations' Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Freedoms (1950),

the Inter-American Convention on Human Rights (1969) and the African Charter on Human and Peoples Rights (1981). Whatever route is followed by individual countries would seem to be a matter for their own determination. As the Chief Justice of Pakistan saw fit to remind the participants at the Oxford colloquium in 1992, international human rights norms cannot override national constitutional standards. Whether they can exist comfortably in situations of patent disagreement as to the values at stake may be a more contentious problem.

This review of active judicial participation in the advancement of human rights as a central plank in every legal system has rightly emphasised the opportunities available to the judiciary to demonstrate their commitment to upholding the public interest in situations of conflict between the State and the citizen. Representative of this approach are the words of the Chief Justice of Australia, Sir Anthony Mason, who recently observed: "Human rights are seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power - widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century." ((1988) Aust. Bar Review 79). This kind of message fits naturally within the present expansion in the scope of judicial review of actions by the executive branch of government. New reference points, derived from the wider acceptance of human rights norms, can be anticipated as judicial strategies for interventionist review develop in future years.

The prospect of an increased commitment by the judiciary throughout the Commonwealth to securing adherence to internationally recognised human rights norms is a trend that must be warmly welcomed. At the same time, I would be very remiss if I did not remind you of the Attorney General's expansive role, with historic roots in the common law, as one of the State's principal "guardians of the public interest." In both of my books, *The Law Officers of the Crown* and *The Attorney General, Politics and the Public Interest*, I describe the wide range of circumstances in which the Attorney General is clothed with authority to represent the public interest and to appear *ex officio* in court to protect or enforce public rights. Notwithstanding the more generous approach evinced by the courts and law reform bodies in various parts of the Commonwealth on the subject of *locus standi*, there remains a constitutional responsibility on the part of the Attorney General to intervene directly, in the courts or otherwise, if he deems public rights to be in jeopardy.

Procedural distinctions made in the field of relator proceedings between public rights and private rights, whereby to obtain standing a prospective litigant has to establish a direct pecuniary or other special interest, are not germane to the arguments I wish to make in this paper. Placed in the context of fundamental human rights, whether these are entrenched in a constitution or incorporated by specific reference in the statute book, I maintain that, in every sense of the word, these basic human rights provisions are public rights and not private rights in the procedural sense of conferring standing before the courts. Every individual citizen is entitled, without establishing additional qualifications, to invoke human rights provisions in his own cause. The absence or failure of a citizen to set the human

rights laws in motion, however, in no way precludes the Attorney General from exercising his prerogative powers to ensure conformity with what are quintessentially public rights. Indeed, if the title "guardian of the public interest" is to gain credence as something more than a high sounding but empty formula, it calls for recognition by every Attorney General that his constitutional duties demand a constant regard for the impact of human rights proclamations on every branch of his country's internal laws. In a State where these provisions are constitutionally entrenched they form part of the "supreme law" of the land and, to borrow the words of a former Chief Justice of Canada, this means that "these values are higher, more sacred than other public interests." ((1983) 13 Man. L.J. 175 at p. 185). I believe the message for Attorneys General should be basically the same where something short of constitutional entrenchment exists but there are other forms of national commitment to the principles of universal human rights.

To be more specific, in discharging his role as chief legal adviser to the government, if the issues that give rise to consultation with the Attorney General are strictly matters of law few serious problems can be anticipated in acknowledging the paramountcy of the First Law Officer's opinion. Where, however, legal and policy issues are intertwined and the policy aspects involve adherence or non-adherence to the legal standards incorporated in human rights provisions, the situation may well arise in which the Ministry responsible for the policies at stake, and its legal advisers, take a diametrically different position to that subscribed to by the Attorney General. How should this impasse be dealt with? If I may be permitted to draw upon my previously expressed views on this question, in the context of the Canadian Charter of Rights & Freedoms:

"...the first Law Officer may choose to defer to the policy position taken by the other branch of the Executive. If so, this will be by choice and not through any constitutional obligation to confine himself to expressing a legal opinion in the narrowest sense of that expression. The Attorney General is entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation including discussions with the appropriate cabinet committee or in the cabinet itself. If the full weight of the Attorney General's office is to be sustained it must be seen that the so-called policy imperatives derive from the legal implications of the proposed policy. Nowhere is this likely to be more apparent than if the proposed legislative or executive action is calculated to invite a major Charter challenge. For the government to reject the Attorney General's advice would be quite exceptional and, in my view, should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser. This threat should not be lightly undertaken but if the claim to the title of "guardian of the public interest" is to be reinforced it must be shown that the Attorney General is totally committed to upholding the "supreme law" as the embodiment of society's deepest convictions." ("The Attorney General and the Charter of Rights" in *Charter Litigation*, 1987 (ed. Robert J. Sharpe), 45 at pp. 52-3.)

Should the application of the human rights provisions and related jurisprudence be less than clear and the

prospect is entertained of referring the dispute to the courts for resolution, what further responsibility derives from the special constitutional position occupied by the Attorney General? Viewed from the narrow perspective of his role as the Minister responsible for regulating all litigation involving the government, or any ministry or agency of the government, it will suffice if the Attorney General ensures that the government is represented by counsel in the ensuing litigation. Beyond this minimal stance, in my view, lies the larger constitutional duty to ensure that the wider public interest is adequately represented, particularly in determining the ambit of a hotly contested human rights provision. Furthermore, to quote my previously expressed views on this same subject in the context of the Canadian Charter of Rights:

"It is not enough to assume that a public spirited citizen or interest group will step forward to assert a Charter challenge. Merely ensuring that the necessary funding is forthcoming to maintain such a suit, including the costs of providing legal counsel to represent the citizens' claims, is not sufficient. These alternatives may be sufficient to meet most of the claims deserving support and recognition. The door, however, must be left open, in my judgment, for the extraordinary demonstration of the Attorney General's independent status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.

Steps to ensure that the government's more restricted interests are adequately represented can readily be accomplished through senior departmental counsel. It could be argued that the objective described above could just as readily be discharged by engaging the services of independent counsel, drawn from the ranks of the private Bar. This suggestion is deserving of implementation in appropriate circumstances. My concern, however, is not merely to observe the minimum dictates of adequate representation on behalf of the maligned citizen, or a specially disadvantaged or threatened group in society, but to underline the

significance that attaches to the unique constitutional place occupied by the office of the Attorney General in Canada and in so doing to strengthen in the public mind an awareness of the Attorney General's determination to uphold the essential qualities of this historic office." (op cit., pp. 53-54.)

Those remarks, I suggest, have equal application to every member state in the Commonwealth. It defines what I consider to be the constitutional mandate of the Attorney General to assume a leadership role in sustaining public rights in general and fundamental human rights in particular. Experience to date suggests that, where there is strong evidence of the violation of human rights, the role of public advocate in pursuing judicial remedies has been left to non-governmental organisations or private groups to spearhead. The existence of such bodies, in the various regions of the Commonwealth, has been largely instrumental in generating a heightened public awareness of the whole question of human rights.

There has never been a time in which the judiciary has been more vocal in examining different ways whereby the common law courts themselves can, in the words of one English judge, "insist upon and secure a high degree of priority for those central rights which broadly find their place in the principal substantive provisions of the European Convention on Human Rights and Fundamental Freedoms" ((1993) Public Law 59 at p.60). In posing the question "Is the High Court the Guardian of Fundamental Constitutional Rights?" the same author (Sir John Laws) argues the case for a different approach to that espoused in the various judicial colloquia previously referred to in this paper. Each approach is focused on the judicial initiatives that are now being increasingly recognised. Without in anyway seeking to diminish the significance of that noteworthy development, my purpose is to remind this meeting of the challenge facing every Attorney General throughout the Commonwealth to assert, by personal example, the traditional leading role of the office of the Attorney General as "guardian of the public interest" in upholding the fundamental rights of every citizen and, if necessary, actively representing this noble cause before the courts.

Mutual Legal Assistance, Bank Secrecy and Business Regulatory Agencies

Proposed Commonwealth Scheme for the Protection of the Material Cultural Heritage

PREFACE

Concern for adequate international protection being afforded to items of countries' material cultural heritage has been on the Commonwealth agenda now for over ten years. It was at the 1983 Meeting of Commonwealth Law Ministers, held in Colombo, Sri Lanka, that the New Zealand Minister of Justice and Attorney-General, the Hon Jim McLay, first proposed concerted Commonwealth action to redress the continuing problem of items of deep cultural significance being smuggled out of Commonwealth (and, indeed, other) countries - in circumvention of legislation designed to prevent the problem and enable return but to which courts outside a country were, at times, reluctant to give effect on the grounds of extra-territoriality.

The Minister observed that politics was the art of the possible, and that there was no point in looking back at past misdemeanours, whatever they were and however strongly some might think about them. He stressed that the co-operation he was seeking to engender was not designed to recapture for his own country the many important and irreplaceable Maori items held in museums around the world (which could only be dealt with, if at all, by bilateral negotiations between the governments and institutions concerned). What he asked for was a scheme that would apply only to the future, but one which would be more effective than the UNESCO Convention on the subject, which was widely regarded as having serious shortcomings.

The proposal was endorsed unanimously both by those who spoke and in the communique.

As requested by the Meeting, the Secretariat arranged for the preparation of a draft scheme by expert consultants, which was considered by Senior Officials at their 1986 Meeting, and again by Law Ministers when they met in Harare, Zimbabwe later in the year. It is fair to say that work on the cultural heritage proposal was to some extent delayed by the compelling need to finalise the Commonwealth Scheme for Mutual Legal Assistance in Criminal Matters, the Commonwealth Scheme for the Transfer of Convicted Offenders and the revisions of the London Scheme for the Rendition of Fugitive Offenders. As a consequence, progress was not as rapid as some clearly wished.

When the matter came before Law Ministers in Harare, it was clear that the requisite degree of consensus on what could be done had not yet been achieved. Accordingly the Meeting invited the Secretary-General to establish a small working party to examine and refine the proposal and to make a firm recommendation to the

next Law Ministers' Meeting, in Christchurch, New Zealand, in 1990.

The working party was established, under the chairmanship of Justice Andreas Loizou of Cyprus, and it reported in time for the Christchurch Meeting. However, although there was broad support for the recommendations made by the working party, it was felt that the requisite degree of active support that might be achieved had not yet been evidenced. Accordingly, it was decided to invite the Secretary-General to reconvene the working party and for it to re-examine its recommendations in the light of the discussions at Christchurch. This the Secretary-General has done, and this is its report. The meeting was held in Rome at the headquarters of UNIDROIT, immediately after the UNIDROIT meeting on the revision of the UNESCO convention.

For ease of reference, relevant extracts of the minutes and communiqes of the 1983, 1986 and 1990 Ministerial Meetings, and the Senior Officials Meeting of 1992 are annexed. It will be noted that the working party has now produced a revised scheme which it has recommended be adopted by Law Ministers when they meet in Mauritius in November, 1993.

The Secretariat wishes to express its appreciation to Mr Malcolm Evans, Secretary-General of UNIDROIT, both for his personal and his institutional assistance with the meeting.

*Legal Division
Commonwealth Secretariat
August 1993*

28th June 1993

Mr Emeka Anyaoku
Secretary General
Commonwealth Secretariat
Marlborough House - Pall Mall
London SW1Y 5HX
UNITED KINGDOM

Dear Secretary-General

You will recall that in 1990, Commonwealth Law Ministers when they met in Christchurch, New Zealand, asked that the working group on the protection of the material culture heritage within the Commonwealth reconvene after an appropriate interval.

I now have the honour to submit the Further Report of the Working Party, which met in Rome, Italy on 27 February 1993. Although this letter of transmittal is signed by myself as Chairman, the report has been agreed among all its members.

You will note that the Group concluded that the Scheme which has now been under consideration by Commonwealth governments for ten years, ought now to be considered for adoption as a Commonwealth Scheme so that those governments who wish to further co-operation in this most important area could do so within a commonly-agreed Commonwealth framework.

It is my hope that this matter will be concluded when it comes before Commonwealth Law Ministers when they meet in Mauritius in November of this year.

Each member of the Working Group has greatly enjoyed the privilege afforded to them by working on behalf of the Commonwealth on this most important area of potential cooperation.

Yours sincerely,



Andreas N Loizou
Chairman

Enc

/AvPh

Further Report of the Working Group on the Protection of the Material Cultural Heritage within the Commonwealth

1. The further Meeting of the Working Group on the Protection of the Material Cultural Heritage within the Commonwealth, requested by Commonwealth Law Ministers when they last met, in Christchurch, New Zealand in 1990, was held on 27 February 1993 at the offices of UNIDROIT, Rome, Italy.

2 The meeting was attended by -

Australia

Dr. Rosalie Balkin
International Law Division,
Attorney-General's Department

Canada

Ms Marion Haunton
Legal Counsel,
Department of Communications

Cyprus

The Hon. Andreas Loizou
President of the Supreme Court
of Cyprus

India

Mr. R. S. Agarwal
First Secretary
Embassy of India (Rome)

Malaysia

Ms Noraini Bt. Abdul Rahman
Deputy Head of Advisory and International Division,
Attorney-General's Chambers

Malta

The Hon. Dr. Anthony Borg-Barthet
Attorney-General

Mauritius

Mr. E. Balancy
Parliamentary Counsel
Attorney-General's Office

Papua New Guinea

Mr. Peter Peraki
Principal Legal Officer
Ministry of Culture and Tourism

New Zealand

Mrs Janice Lowe
Chief Legal Adviser
Department of Justice

Nigeria

Mrs. Henrietta U. Didigu
Principal State Counsel
Attorney General's Chambers

United Kingdom

Ms Carolyn Morrison
Head of Cultural Property Unit
Department of National Heritage

Mr. Charles Bird
Treasury Solicitors' Department

Also present -

Mr. Malcolm Evans,
Secretary General
UNIDROIT
Mme Marina Schneider,
UNIDROIT
Dr. Lyndell Prott
UNESCO
Mr. Jeremy Pope
Commonwealth Secretariat.

AGENDA ITEM 1: ELECTION OF CHAIRPERSON AND ADOPTION OF AGENDA

3. The meeting elected The Hon. Mr. Justice Andreas Loizou of Cyprus as its Chairman.

4. The attached Draft Agenda was adopted as the agenda for the meeting.

AGENDA ITEM 2: ADDRESS AND BRIEFING BY UNIDROIT SECRETARY-GENERAL

5. At the invitation of the Chairman, Mr. Malcolm Evans, Secretary-General of UNIDROIT, briefed the meeting on the weeks' developments within the UNIDROIT Forum. He was gratified by the number of Commonwealth countries present at those deliberations, and expressed particular pleasure at the decision of the Governments of Cyprus and Malta to join the Organisation shortly. He noted that in recent years there had been three initiatives within the same field - the European Directive (in an association with institutional links between 12 countries) the Commonwealth (with shared values and legal traditions within 50 countries) and within UNIDROIT (on a global basis). These involved different groups but the aims were largely the same and there were no real inconsistencies that could not be resolved.

6. He explained that the UNIDROIT initiative had been taken in response to an invitation from UNESCO and had to be seen in the light of the 1970 UNESCO Convention, and in particular the cleavage between civil law and the common law on the question of a purchaser of stolen property in good faith.

7. He felt that the European Directive was a signpost for at least part of the way ahead. He was pleased to be cooperating with the Commonwealth, and with the measure of cooperation his Organisation was receiving from it.

AGENDA ITEM 3: CONSIDERATION OF BACKGROUND PAPERS

8. The meeting then considered the attached background paper prepared by Dr. Patrick O'Keefe, Consultant to the Commonwealth Secretariat. Dr. O'Keefe's paper was introduced by Dr. Prott who emphasised the common features of all three initiatives. She detected no significant differences between the various schemes. In particular, none of the three was retrospective in effect.

AGENDA ITEM 4: CONSIDERATION OF THE PROPOSED SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH

9. The Chairman noted that the Scheme, in certain respects, might need scrutiny to bring it into line with international developments and understandings reached subsequent to the 1989 revision of it.

10. The Commonwealth Secretariat tabled additions to **Paragraph 1 (3) and additional paragraph 3(3)**.

11. The first amendment was accepted without discussion. On the second, Britain noted that the suggested wording appeared to be designed to accommodate a British position. However, Britain faced a wider problem: it was a member of a single market designed to promote freedom of trade in goods with no internal customs controls. The movement of cultural items within the EEC was governed by a Directive, and the level of co-operation required that return could only be requested within certain cash limits and defined categories. Britain would have to examine the application of any arrangements for export to third countries in the light of its obligations within Europe. The EEC had reached agreement, proportionate to the problem perceived by it, that would enable protection of another Member State's "national treasures".

12. If Britain were to consider becoming party of a Commonwealth Scheme, it would have to question the ability of so doing as the Scheme would singularly restrict Britain's freedom of trade within the EEC, thus uniquely discriminating against traders in the U.K. and therefore liable to command the attention of the Commission as imposing restrictions on free trade within the community. Such a problem would not exist under the proposed UNIDROIT Convention, if all 12 countries were covered by it.

13. There would be no means by which Britain could control exports until an application was made for an export permit. However, if an item had been illegally removed from a Commonwealth country to say, France, and then brought to the U.K. it would have required a "certificate of free circulation" from the French authorities (which would have only asked and answered the

question "Is this a French national treasure?") which would then have automatically conferred a licence to export that item anywhere within the Community.

14. In reply to a question as to how EEC member States who were parties to the 1970 UNESCO Convention were managing to square both sets of international obligations, the delegate said that she was unable to offer an explanation as Britain was not a party to the UNESCO Convention.

15. There was, too a question of political will, she continued. If Britain were to participate under a Commonwealth Scheme then it would be to disadvantage trade in Britain destined for third countries. This raised political difficulties, and also for the Commission.

16. In reply to a question as to whether Britain could argue within the EEC that it had a moral and historic special duty to provide such assistance, the delegate asked in turn whether the European Court of Justice would adopt such a viewpoint, as art traders in Britain could mount a Court challenge to such arrangements as they would consider themselves to be uniquely affected by them.

17. A delegate stressed that the Commonwealth Scheme was not an international treaty, but a flexible framework for domestic legislation.

18. Britain drew attention to the fact that at Singapore its delegate had mentioned that there was probably only an opportunity in Britain to enact legislation once in every ten years. She endorsed this as being the position. A Statutory Instrument would implement the EEC Directive, which contained important principles, and this was a difficult piece of legislation, although not primary legislation, and not particularly agreeable in some political circles. In particular, powers of entry and search had been criticised. The problem was whether it might be politically possible in terms of both concept and of legislative time.

19. It was suggested by another delegate that the suggested Clause 3 (3) might usefully be included for the time being on the basis that this might be helpful to Britain should it need time to consider. It could be inserted in the Scheme for the time being, and amended if and when necessary.

20. On this basis the Chairman noted agreement that the amendment be incorporated.

21. It was suggested that the validation system provided under **Paragraph 4** should become optional rather than mandatory under the Scheme, as this would make it more palatable to some countries and would certainly expedite the Scheme coming into practical effect.

22. This was agreed.

23. There followed discussion on the time limit for the issue of a Validation Certificate under **Paragraph 4 (3)**. One delegate suggested that six months was a rath-

er high time limit and that it would prefer two months for its part. However, another noted that the process could take somewhat longer and would have been minded to suggest a longer time frame.

24. On this basis no change was recommended.

25. As to the operation of the Scheme, provided for by Paragraphs 5 and 13 inclusive, discussions took place in respect of **Paragraph 5(2)** and the extent of the obligation on a country to prohibit the import of items covered by the Scheme. The criminalisation of the import of items unlawfully exported by other countries did not present a problem to some delegates. Indeed it reflected their present legal position. For others, legislation would be required and the question was asked whether the sub paragraph required a criminalisation of such conduct or whether it would be open for there to be a civil sanction. It was common ground that criminalisation was an option, not a pre-condition, and that arrangements for the return of such items could be administrative. However, the deterrence factor was also noted. In order to clarify the situation it was agreed that Paragraph 5 (2) should be amended "each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export".

26. On the question of **Paragraph 7 (3)** attention was drawn to the reference to a certificate and it was agreed that as this would take the form of documentation other than a certificate, the words "a certificate" should be replaced by the words "an official notification". A consequential amendment to **Paragraph 7 (4)** was agreed with the words "The Certificate being replaced by the words "Such notification". There followed discussion on **Paragraph 9**.

27. It was noted that under Paragraph 16 of the Scheme, a requesting State was to meet the costs of a requested State. Nevertheless, attention was drawn to the fact that **Paragraph 9 (1)** was silent as to whether court proceedings in the country of location should be commenced by the government of that country or by that of the country of export.

28. Following agreement, the view of the meeting was that there was an element of discretion and that what might be done in any particular case would be governed largely by the circumstances of that case. The British delegation asked that the British view be recorded, namely that it envisages that normally Britain would expect a country of export to take the proceedings.

29. It was agreed that Paragraph 9 (1) be amended in the following respects:-

- (a) that "(a)" be inserted before the word "give";
- (b) that "(b)" be inserted before the words "institute proceedings"; and
- (c) that the phrase "or advise the country of export to institute proceedings" be inserted after the words

"or institute proceedings," and before the words "with a view to".

30. A consequential amendment was agreed to **Paragraph 9 (2)** by inserting the words "or of export" after the words "in the country of location". It was further agreed that the word "or" should be inserted at the end of **Paragraph 9 (2)(b)** after the words "export permit";.

31. There was then a discussion on the question of the compensation payable, provided for by **Paragraph 9(3)**.

32. It was noted that there was no specific reference to a successor to an innocent purchaser for value of an item, but it was accepted that the Scheme was "broad brush" in nature and that the omission of any reference did not imply exclusion.

33. On the question of whether a Court should be required to order compensation rather than simply have a discretion, in cases where the court had determined that the holder of the item was "an innocent purchaser for value having taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme", the point was made that UNIDROIT draft now required fair and reasonable compensation and that to so provide in the Commonwealth Scheme would not only bring it into line with developments in other fora, and so reflect international consensus, but would markedly increase the political attractiveness of the Scheme. After some discussion it was agreed that the words "the Court may determine what, if any, compensation shall be payable" be deleted from **Paragraph 9 (3)** and the following words substituted "the Court will order that fair and reasonable compensation be payable".

34. An amendment was agreed to **Paragraph 9 (4)** consequential to the amendments previously agreed to Paragraph 4 by deleting the word "the" where it appears before the words validation system under the Scheme and that it be substituted with the words "any relevant".

35. There was then a discussion on the limitation period provided for by **Paragraph 14**. It was noted that the five year period was an upper limit but that the Scheme would need to recognise the fact that different countries had different limitation periods. The limitation periods prescribed by the internal law of the countries would generally apply to claims here as in other matters. It was noted that the five years maximum period suggested in Paragraph 14 was there for the protection of an innocent possessor of an item. It was further noted that the draft, UNIDROIT Convention gave the choice between three and five years, and that the one year provided for in the European Directive was essentially geared to European conditions. It was agreed that the time provided should not be too short in order to allow time for adequate inquiries to be made. It was agreed that no change was called for.

36. There was also a discussion of criminal proceedings provided for under **Paragraph 15** for the sake of clarity, it was agreed that the following amendments should be made to Paragraph 15 (a):-

(i) that the words "its own" be inserted immediately before the words "cultural heritage"; and

(ii) that the words "from its territory" be inserted before the words "an item of".

37. It was further agreed that the expression "shall" was more appropriate to the language of treaties rather than to Commonwealth schemes and so should be replaced by the word "will" wherever it appeared in the draft Scheme.

Recommendation to Law Ministers

38. The Chairman then put the question as to whether the working group would recommend adoption of the Scheme to the forthcoming Meeting of Commonwealth Ministers in Mauritius.

39. The delegate from New Zealand expressed her country's abiding interest in the Scheme from 1983 when it was first put forward by her then Law Minister. They had been heartened in Singapore by the remarks of the British delegate, who had acknowledged the problem as being both serious and soluble. The strong view had been expressed by other delegates that the time had come for further action and it was her hope that Britain as a major art importer might find a way to afford the Commonwealth some assistance in this area. She urged that the Law Ministers Meeting in Mauritius was an appropriate place for that action to take place. She asked that, in a spirit of long standing Commonwealth cooperation, that the Scheme go forward to Law Ministers for consideration for adoption and that in the interim that it be carefully considered by Governments ahead of the meeting in Mauritius.

40. The British delegate said that in a spirit of consultation its delegation would take the matter back to its capital as a serious concern but would have preferred the recommendation by the meeting to be not that the Scheme be adopted but be considered by Senior Officials at Mauritius.

41. The Chairman, speaking for Cyprus, expressed the view that the Scheme should be adopted as soon as possible in order to protect others from the plight that Cyprus had suffered in this area.

42. The Chairman noted that the decision of the Group was that, with the reservation expressed by the delegation of the U.K., the Scheme should be considered for adoption at Mauritius.

ITEM 5: REPORT TO SENIOR OFFICIALS AND LAW MINISTERS

43. The Chairman invited the Secretariat to prepare

and distribute a draft report as soon as possible so that it could go to the Secretary-General for him to forward to governments well ahead of the meeting in Mauritius.

ITEM 6: ANY OTHER BUSINESS

44. A delegate asked that the Commonwealth Secretariat investigate ways in which it might be able to provide more support for Commonwealth countries in their endeavours to locate and obtain the return of illicitly exported items of their material cultural heritage. It was suggested that this might include:

(i) Compilation of a list of suspected collectors and dealers of items of cultural heritage, based on information available to governments;

(ii) Compilation by the Commonwealth Secretariat of a list of collectors and dealers in items of cultural heritage for circulation to member countries; and

(iii) Maintenance by member countries of an index on stolen works of art and the circulation thereof to other members.

45. In the discussion that followed it was pointed out that there were a number of initiatives dealing with aspects of the concern expressed. Among them was the Canadian Government database of stolen objects.

46. The meeting felt that the Secretariat should avoid duplication of existing efforts, but that a discussion by Law Ministers would be useful to identify a possible role for the Secretariat's Commercial Crime Unit in providing a liaison facility. To facilitate an informed discussion, it was suggested that the Secretariat consider organising the preparation of relevant background papers for the Ministerial meeting.

47. The Secretariat expressed its thanks to Mr. Malcolm Evans and staff of UNIDROIT for their co-operation and assistance in making the meeting in Rome possible. It also recorded its gratitude to Dr. Prott and to Dr. O'Keefe for the assistance given to the undertaking.

48. A vote of thanks to the Chair was carried by acclamation.

Revised Draft Agenda

1. Election of Chairperson.
2. Address and briefing by Mr Malcolm Evans, UNIDROIT, Secretary-General, on the UNIDROIT consultations.
3. Consideration of papers:
 - (a) Background paper by Dr Patrick O'Keefe, Consultant
 - (b) Other papers
4. Consideration of proposed Scheme for the Protection of Cultural Heritage within the Commonwealth.
5. Report to Senior Officials and Law Ministers.
6. Any other business.

SCHEME FOR THE PROTECTION OF CULTURAL HERITAGE WITHIN THE COMMONWEALTH (with amendments recommended by the Working Group in Rome underlined)

OBJECTIVES OF THE SCHEME

1. (1) The provisions of the Scheme govern the return by one Commonwealth country of an item of cultural heritage found within its jurisdiction following export from another Commonwealth country contrary to its laws.

(2) The provisions of the Scheme will apply to the export and import of items which take place after the adoption and implementation of the Scheme. The Scheme adds to and in no way derogates from future and existing means of recovery of items of cultural heritage.

(3) The Scheme is intended to be complementary to, and does not in any way exclude, full participation in other international arrangements such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, the European Communities directive on the return of cultural objects unlawfully removed from the territory of a member State and the regulation on the export of cultural goods from member States of the European Community.

DEFINITIONS

2. For the purposes of the Scheme -
 - (a) "country" means:
 - (i) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
 - (ii) each country within the Commonwealth which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.
 - (b) "country of export" means the country from which an item covered by the Scheme has been unlawfully exported.
 - (c) "country of location" means the country where an item which has been unlawfully exported is located at the time the provisions of the Scheme are invoked by the country of export for the return of the item.
 - (d) "unlawful export" in relation to any country means an item which was exported from that country in contravention of its law: it includes an item which has been taken out of the country of export under a conditional permit and where there has subsequently been a breach of the conditions of the permit, in which event "unlawful export" is deemed to have occurred as of the date of the breach of the condition.

ITEMS COVERED BY THE SCHEME

3. (1) The Scheme covers all items of cultural heritage so classified by, and subject to export control by, the country of export.

(2) Items classified should be of national importance by virtue of one or more of the following criteria -

- (a) the close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;
- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;
- (f) the archaeological significance of the item.

(3) Where a country is unable by reason of laws pursuant to other international obligations to extend protection to all such items it shall be open to other countries similarly to restrict the protection they afford to that country under this Scheme.

VALIDATION SYSTEM

4. (1) As part of the Scheme, a system of validation may be introduced whereby an intending purchaser of an item of cultural heritage or any other interested person is enabled to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country.

(2) Such a validation certificate would constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

(3) Where an application is made for a validation certificate in respect of any item, the application should be granted or refused within six months of receipt of the application. If the application is not granted or refused within that period, the country of export should be precluded from claiming that the item has been unlawfully exported from that country.

OPERATION OF THE SCHEME

5. (1) Each country will prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit.

(2) Each country will take the measures necessary to ensure the return of items covered by the Scheme to the country of export.

6. (1) Each country will designate a central authority for the making and the receiving of requests for the return of items covered by the Scheme.

(2) Each country will notify the Commonwealth Secretary-General of its central authority.

7. (1) When the country of export learns of the whereabouts of an item covered by the Scheme, it may request the country of location for assistance in the recovery and return of that item.

(2) Where two countries of export make a request for the return of the same item, the request of the country from which the item was last exported will be proceeded with; but that will not prejudice further requests in respect of the item.

(3) The request will give sufficient detail to clearly identify the item and where possible its location and shall be accompanied by an official notification from the country of export to the effect that the item is covered by the Scheme and has been unlawfully exported.

(4) Such notification will be prima facie evidence of the matters stated therein.

8. Upon receipt of a request, the country of location will take appropriate steps in accordance with its laws to secure or safeguard the item.

9. (1) The authorities in the country of location may either -

(a) give notice to the holder of the item that unless court proceedings are commenced within a stipulated period, the item will be returned to the country of export, or

(b) institute proceedings or advise the country of export to institute proceedings with a view to securing an order for the return of the item to the country of export.

(2) In any proceedings instituted either by the holder of the item or by the authorities in the country of location or of export the court will determine whether the item is covered by -

(a) the Scheme;

(b) an export permit; or

(c) a validation certificate.

If the item is covered by the Scheme and such a permit or certificate has been issued, or if the item is not covered by the Scheme, the court may order that the item be returned to the holder. If the item is covered by the Scheme and such a permit or certificate has not been issued, the court will order that the item be returned to the country of export.

(3) Prior to ordering the return of the item the court will determine whether the holder of the item is an innocent purchaser for value having exercised due care and attention in acquiring the item and, if it is proved that the holder is such an innocent purchaser with valid title to the item, the court will order that fair and reasonable compensation be payable by the country of export to the holder as a condition for the return of the item to the country of export. All other questions of title and compensation will be determined by proceedings in the country of export.

(4) In any proceedings in the country of location, the holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value if he has neglected or failed to utilise any relevant validation system under the Scheme.

10. The central authority in the country of export to which an item is returned will be required to hold the item for a period of twelve months. During this period it will be open for any person to take proceedings in the country of export to determine any question of title and compensation.

11. In the event that proceedings to establish title are not commenced within the twelve month period, the central authority will deal with the item in accordance with the law of the country of export.

12. In any proceedings in a country of location, the court will have due regard to the relevant laws of the country of export.

13. The person adjudged to have title in the item will not have any right to remove the item from the

country of export otherwise than by the process of applying for and obtaining an export permit.

LIMITATION PERIOD

14. No claim for the return of an item alleged to have been unlawfully exported may be made under the Scheme more than five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

CRIMINAL PROCEEDINGS

15. Each country -

- (a) will make it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme; and
- (b) may make it an offence to unlawfully import an item of cultural heritage covered by the Scheme unlawfully exported from another country.

COSTS

16. (1) The country of location in implementing the Scheme may require the country of export to meet the expenses necessarily incurred in implementing the request of the country of export for the return of any item of cultural heritage.

(2) If in the opinion of the country of location the expenses required in order to comply with the request are of an extraordinary nature, that country will consult with the country of export as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the country of location may refuse to comply further with the request.

STANDARD FORMS

17. In implementing the Scheme, each country will as far as is practicable use standard forms which will be settled by consultation through the Commonwealth Secretariat.

ANNEX 1

UNLAWFUL EXPORT OF CULTURAL HERITAGE; THE COMMONWEALTH SCHEME -

THE UNIDROIT DRAFT AND THE EEC DIRECTIVE AND REGULATION: A COMPARISON

*A paper prepared for the Commonwealth Secretariat
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Commonwealth Scheme

Ten years ago the Law Ministers of the Commonwealth resolved that it was necessary to combat the "unhealthy market is smuggled and stolen cultural objects". A

"Scheme Relating to the Protection of the Cultural Heritage within the Commonwealth" was drafted. This failed to achieve a consensus. A refined version is on the agenda for consideration by the Law Ministers at their 1993 meeting.

It must be recognised that the Scheme does not stand alone. It takes a place in an evolving world-wide network of international arrangements all designed to prevent the depredations of those who would steal and smuggle cultural heritage. Two of these are particularly relevant in that they were not in existence when the Law Ministers last considered the Commonwealth Scheme in detail. The changes they are bringing about show that the Scheme lies in the mainstream of current developments. Any past objections to the Scheme should be reconsidered.

International Developments

In point of time the first of these two developments is the Draft Convention on Stolen or Illegally Exported Cultural Objects produced by the International Institute for the Unification of Private Law (referred to hereafter as the "UNIDROIT draft"). The original draft was prepared by a study group of international specialists on the subject during the years 1988 to 1990. Two meetings of governmental experts have been held to consider the draft and a third is scheduled for February 1993. When agreement is reached on the text it will be submitted to a diplomatic conference for consideration and eventual adoption.

The second development is the preparation by the European Community (EEC) of a Directive and Regulation on European trade in cultural heritage. On 1 January 1993 a free internal market came into effect within the European Community countries - currently Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom. However, under the Treaty Establishing the European Economic Community 1957 (Treaty of Rome) Member States are able to maintain regulations on the import and export of "national treasures possessing artistic, historic or archaeological value". With the disappearance of customs controls there was anxiety that existing regulations would be evaded.

Consequently, in the late 1980's the Commission of the European Communities commenced work on a new legal regime. In November 1992 the Council of Ministers agreed on a "Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State" and a "Regulation on the Export of Cultural Goods" from the EEC. The Directive has still to be considered by the European Parliament and then returned to the Council of Ministers for approval. If the Parliament makes no changes, the earliest date for adoption of the Directive is the end of March 1993. It then has to be enacted into national law. In the case of Belgium, Germany and the Netherlands this must be

done within 12 months of the date of adoption; for the other Member States within nine months. The Regulation comes into force (i.e. becomes part of national law) three days after publication of the Directive. Both measures are retrospective to 1 January 1993. They are intended to supplement existing national legislation rather than replace it.

The only Commonwealth country affected by the Directive and Regulation is the United Kingdom. However, in view of that country's position in the international trade in cultural heritage, its implementation of these instruments should have a considerable flow-on effect for arrangements such as the Commonwealth Scheme, particularly if the latter can be seen as complementing the EEC arrangements.

The following discussion will concentrate on the Directive as it is this instrument which makes provision for return of material unlawfully exported - the same objective as has the Commonwealth Scheme. Almost invariably, if stolen cultural heritage is exported, it will be done unlawfully and consequently will be subject to the procedures for return. Some argue that theft is more reprehensible than unlawful export and should be subject to a more restrictive regime for return. This view appears in the UNIDROIT draft but will not be discussed further in this paper apart from noting that the procedure for return under the Directive is stated to be without prejudice to any civil or criminal proceedings that may be brought in respect of stolen cultural objects.

This paper must be read on the basis that all three arrangements under discussion are liable to change. The EEC Directive may be changed by the European Parliament e.g. the Greek delegation at the Council of Ministers meeting in November voted against the Directive and Regulation. Both the UNIDROIT Draft and the Commonwealth Scheme have yet to be subject to scrutiny at the political level. The UNIDROIT draft currently has numerous alternatives for each Article. Some of these are mutually conflicting.

Cultural Heritage Affected

The Commonwealth Scheme "covers all items of cultural heritage so classified by, and subject to export control by, the country of export". The items classified "should be of national importance by virtue of" the following criteria:

- (a) the close association of the item with the history or life of the country;
- (b) the aesthetic qualities of the item;
- (c) the value of the item in the study of the arts or the sciences;
- (d) the rarity of the item;
- (e) the spiritual or emotional association of the item with the people of the country or any group or section thereof;

- (f) the archaeological significance of the item.

Although "should" is used and not the imperative "shall", in the context of a voluntary Scheme such as this, the country of export has an obligation to comply with the spirit of the arrangements and restrict its controls to cultural heritage which is of real importance. On this basis the country of location knows that claims under the Scheme are restricted to important items.

The UNIDROIT Draft refers to "cultural objects" which were defined originally to mean "any material object of artistic, historical, spiritual, ritual or other cultural significance". The current Draft has a number of alternatives to this but basically they divide into those which use an objective criteria as above and those which allow the State concerned to specify what, for it, is a "cultural object". Under the original Draft not all cultural objects would be subject to return after illegal export. The requesting State would have had to prove that one or more vital interests from a given list was impaired. Nevertheless, the thrust is still toward restricting the operation of return procedures to significant material.

The Directive contains a mixture of the two approaches. The term used is "cultural object". This is any object classified by a Member State, "before or after its unlawful removal from the territory" of that State, as being among its "national treasures possessing artistic, historic or archaeological value". In addition, the object must belong to one of 14 categories listed in an Annex and have a minimum monetary value as set out in that Annex. For example, archaeological objects more than 100 years old and coming from archaeological sites are included irrespective of their monetary value. Pictures and paintings executed entirely by hand are only included if their value exceeds 150,000 ecus. Even though an object does not fall within one of the 14 categories, it may still be a "cultural object" if it forms an integral part of a public collection "listed in the inventories of museums, archives or libraries' conservation collection" or the inventories of ecclesiastical institutions.

Comparison

The crucial part of the Directive definition is the Annex which qualifies the concept of "national treasure" as adopted by Member States. The 14 categories are obviously designed for European conditions. Nevertheless, they would appear to cover most of the material that Commonwealth States would want to include under the Scheme with the exception possibly of ethnographic items. Some of these could be included under categories such as "original sculptures" and category 12(b) which includes collections of ethnographic interest. The application of monetary values would, on the face of it, appear to mark the greatest difference between the two systems. Most Commonwealth countries do not at present use monetary criteria for establishing what cultural heritage cannot be exported - exceptions are Aus-

tralia and Canada for particular types of material such as paintings. However, in practical terms any object that a Commonwealth country is likely to seek the return of will be significant. It is simply not worth the effort in time and cash to seek the return of insignificant material. But significance means that the object will usually have a high monetary value and thus bring it, for practical purposes, into line with the criteria of the Directive. Consequently, we would argue that, while the Directive is much more specific in establishing its coverage, in practical terms it and the Commonwealth Scheme would cover much the same sort of material.

Retrospectivity

All three arrangements *prima facie* eschew retrospectivity. The Commonwealth Scheme specifically states that it applies only to the export and import of cultural heritage taking place after the adoption and implementation of the Scheme. The UNIDROIT Draft only applies to claims in respect of a cultural object stolen or illegally exported after both Contracting States concerned had become parties to the Convention. The Directive applies "only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993". The Directive does state that Member States may apply its provisions to material removed earlier if they so wish, as does the UNIDROIT draft.

Prohibited Export

Operation of the UNIDROIT Draft in respect of unlawful export is based on Member States having laws prohibiting certain exports. On the other hand, the Commonwealth Scheme requires each Member Country to actually "prohibit the export of items covered by the Scheme except in accordance with the terms of an export permit". For most Commonwealth countries this provision would pose no problems. Some 32, including the United Kingdom, already have export prohibitions for cultural heritage. The Directive talks of "cultural objects which have been unlawfully removed", meaning thereby those which have been "removed from the territory of a Member State in breach of its rules on the protection of national treasures" or in breach of the Regulation - it also includes those not returned at the end of a period of temporary removal.

There would not seem to be any significant differences between the Commonwealth Scheme and the other two arrangements in respect of prohibiting exports. All three recognise the right of States to impose controls on export of particular cultural heritage.

Prohibited Import

The Commonwealth Scheme requires each country to "prohibit the import of items covered by the Scheme which have been unlawfully exported from another country". This was inserted to provide a legal basis for the process whereby the authorities first secure or safe-

guard the item and then institute proceedings for its return. It was felt that, without such provision, the constitutions of many member countries would not allow action to be taken for return. It was also designed to overcome arguments that laws prohibiting export are public laws and the courts of one country will not enforce the public laws of another country.

There is no requirement in the Directive or under the UNIDROIT draft to prohibit imports. Article 2 of the Directive states:

Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in the Directive.

The Directive has to be implemented in national law. In some countries constitutional law and the rules of private international law may be such that a simple provision requiring return of "cultural objects" unlawfully exported from another Member State of the EEC would be sufficient. In others, imports may have to be prohibited in order to provide the necessary legal basis for return. This is a matter each State will have to consider in light of its law.

The Commonwealth Scheme's requirement that imports be prohibited should thus not be regarded as something distinguishing it from the arrangement under the Directive. It may be that the United Kingdom itself will have to introduce such a provision in order to effectively implement the Directive.

Administration

The Commonwealth Scheme and the Directive both require designation by parties of a central authority to carry out the tasks set by the respective instruments. In the case of the former, the Commonwealth Secretariat is to be notified of the designated authority; in the case of the latter, the Commission.

In certain other respects, the Directive goes much further than the Commonwealth Scheme. For example, under the latter the country of export may request the country of location for assistance in the recovery and return of an item, when the country of export learns of its whereabouts. The country of location, on receipt of the request, must "take appropriate steps in accordance with its laws to secure or safeguard the item". This does not necessitate actual searching for an item.

By contrast, the requested State (the country of location in the terminology of the Scheme) under the Directive, must play a more active role. Firstly, when a request is made, the requested State must take positive action to "seek a specified cultural object which has been unlawfully removed from" the territory of the requesting State, "identifying the possessor and/or holder". That this requires an actual search is clear from the requirement that the "application must include all information

needed to facilitate this search, with particular reference to the actual or presumed location of the object". Secondly, the Directive obliges a State to notify another Member State where a cultural object is found in its own territory and there are reasonable grounds for believing that it had been unlawfully removed from the territory of that other State. If this does happen, a procedure comes into operation whereby the requesting State must be given access to the object to check that it is a cultural object; measures for physical preservation of the object must be implemented and any action to evade the return procedure prevented. The last two measures are not available if the requesting State takes no action to check the object within two months of notification by the requested State. It is thus clear that the obligations cast on the requested State under the Directive are greater in degree than those on the country of location under the Scheme.

Return

The procedures for return lie at the heart of all three arrangements we are discussing. The basic objective from the point of view of the State that has lost cultural heritage is to get it back in the simplest possible way and at the least cost. The State where the cultural heritage has been found may have conflicting objectives: protection of its art market particularly where this contributes substantially to national income; a desire not to tie up the bureaucracy in costly procedures; a need to maintain good relations with other States.

The Commonwealth Scheme and the Directive are identical in requiring proceedings to be implemented by presentation of a document stating that the object concerned is one covered by the arrangement and that it has been unlawfully removed or exported from that State. The original UNIDROIT draft goes further in that the requesting State must provide information "regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State". Proposed amendments would indicate that this requirement will be dropped in the final version.

The Directive does indicate the possibility of the requested State facilitating the implementation of arbitration under its laws provided the requesting State and the possessor or holder give their formal approval. The Scheme does not refer to arbitration but there would be nothing to stop the parties using it if they so desired. Recourse to arbitration would mean the loss by the requesting State or country of export of the right to the court procedures under the respective arrangements.

The initiation of proceedings reveals what could be, depending on the circumstances, a significant difference

between the arrangements. Under the Directive, the "requesting State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory". On the other hand, the Commonwealth Scheme provides for institution of proceedings either by the authorities in the country of location or by the holder of the item. The latter would be given notice by the authorities that, unless he commences proceedings, the item will be returned to the country of export.¹ Who is required to institute proceedings can be very significant. Although proceedings would need to be conducted by lawyers in the requested State, the time of senior officials would be needed for briefing and preparation of evidence. There could be psychological reluctance to commence proceedings in a foreign country. Costs would not matter, as both arrangements in effect provide for them to be paid by the State requesting return.

Apart from the above, the Commonwealth Scheme and the Directive have broadly similar approaches to the actual process for return although the former is more detailed. The latter merely states that, subject to time limitations, "the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of Article 1(1) and to have been removed unlawfully from national territory". The Scheme refers to the documentation that the court must consider and the effect if any of this is defective. The UNIDROIT draft also requires the court to order return of the cultural object to the requesting State, but only if that State "proves that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;
- (d) the use of the object by a living culture;
- (e) the outstanding cultural importance of the object for the requesting State".

The issue of compensation is differently treated in the Directive as opposed to the other two arrangements. All three arrangements provide for the payment of compensation, in certain circumstances, as a condition precedent to return. If the possessor was bona fide in acquiring the object then compensation is payable. The Directive requires the court to award the possessor fair compensation provided "that it is satisfied that the pos-

¹ The current wording of the Scheme appears to leave either action at the option of the authorities. However, the underlying basis of the Scheme indicates that the authorities should be required to undertake one of the actions. This should be made explicit.

essor exercised due care and attention in acquiring the object". Various types of evidence may be relevant on this point e.g. whether databases of stolen cultural heritage were consulted; whether the provenance of object was discussed with experts in the field. More important is the question of the burden of proof. It is much easier for the possessor if the requesting State has to prove that he was not bona fide than if he has to prove he was.

The Directive leaves this issue to the legislation of the requested Member State. The Scheme requires the holder to have been innocent at the time of purchase i.e. he "must have taken all reasonable steps to satisfy himself that the item was not an unlawful export under the Scheme". Although it is not specifically stated in the Scheme, the context indicates that in practice it would be for the holder to convince the court that he had made all reasonable investigations. Failure to use the validation system provided by the Scheme means that the "holder of an item may, unless the contrary be proved, be presumed not to be an innocent purchaser for value". The Scheme requires that, in addition to the above, the holder has to prove that he has "valid title to the object". The Scheme does not expressly regulate the question of title. Presumably, the issue of whether title was valid would be determined by the *lex situs* including its rules of private international law. A determination of whether the title was valid goes only to the question of compensation and not to whether the item will be returned.

All three arrangements under discussion require payment of compensation to be made by the requesting State, which need not be the owner of the object. The Directive states that such payment is without prejudice to the requesting State's right to take action to recover the amount from the persons responsible for the unlawful removal. The Scheme and the UNIDROIT draft have no provision on this.

Both the Directive and the UNIDROIT draft have provisions stating, in effect, that a possessor who acquires by gift or inheritance is in no better position than the person from whom he made the acquisition. The Scheme has no provision on this.

After Removal

Under the Directive and the Scheme, proceedings in the requested State go only to the issue of whether the object is covered by the arrangement in question and to the payment of compensation. Ownership is not at issue. The Directive provides that ownership "of the cultural object after return shall be governed by the law of the requesting Member State". The Scheme broadly provides to like effect although there is more detail. For example, the State is to hold the item for 12 months during which

time any proceedings regarding title must be commenced. If no claims are made during this time, the country of export deals with the item in accordance with its law.

Time Limitations

It is difficult to compare the Directive and the Commonwealth Scheme in respect of the time limitations they impose on the right to bring proceedings for return of the object, although the former is probably more restrictive than the latter. Under the Directive, such proceedings must be brought no more than one year "after the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder". Under the Commonwealth Scheme, the period is five years "after the date the country of export had knowledge of the whereabouts of the item in the country of location". One year is obviously a very short period of time for the machinery of government firstly, to decide on the institution of proceedings, and then to actually take action. On the other hand, the one year dates from the State becoming aware of the identity of the possessor or holder. In the case of the Scheme, the five year period dates from State having knowledge of the whereabouts of the item in the country of location - a vaguer concept.

Under both arrangements, difficulties will arise in establishing the date when the State gained the knowledge. The wording seems to suggest that subjective knowledge is necessary - that knowledge cannot be imputed to the State e.g. a diplomat seeing the object in a museum would not be sufficient to ground the State with knowledge.

The Directive is more restrictive than the Scheme in that it provides for maximum time limitations. No proceedings for return may be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State. In the case of objects forming part of public collections and "ecclesiastical goods in the Member States where they are subject to special protection arrangements under national law" the period is 75 years except in those Member States where proceedings are not subject to a time limit.² An early version of the Scheme contained an overall limitation period, at one time 30 years, but it has now been omitted.

The Directive provisions on time limitations owe much to those proposed for the UNIDROIT draft. The original draft proposed five years from the time the "requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object" together with an overall period of 20 years from the date

2 The provisions of the Directive are obviously based on those of the original UNIDROIT draft although the limitation periods are different. The latter now contains many suggested time periods.

of export. There is a distinction from both the other arrangements in that the UNIDROIT draft fixes the State with an objective standard of knowledge - "ought reasonably to have known" - as well as the subjective standard. The current draft contains various proposals. The time periods are three or five years from the gaining of knowledge and six, ten, 20 and 30 years overall.

Validation Certificates

The Commonwealth Scheme has a provision not found in the Directive or the UNIDROIT draft - that dealing with validation certificates. These reflect a practice which has grown up whereby certain museums and similar institutions write to a country when they are considering making a purchase of cultural heritage to enquire whether the administration there has any knowledge of the provenance or previous ownership of an item. Under the Scheme, intending purchasers of cultural heritage would be able "to request of the central authority of the country of export a validation certificate to the effect that the item is not an unlawful export from that country". As indicated above, a validation certificate is said to constitute a complete defence to any claim by the country of export that the item had been unlawfully exported.

Conclusion

The above analysis shows that there are five points of possible significant difference between the Directive and the Commonwealth Scheme.

1. Administration - the Directive requires authorities in the requested State to take a more active role compared to that under the Commonwealth Scheme - pp.10-12.
2. Institution of Proceedings - these are more onerous for the requested State under the Commonwealth Scheme - pp.13-14.
3. Compensation - it should be more easy for the holder to obtain compensation under the Directive but only in those countries where the plaintiff has to prove lack of bona fides - pp.15-16.
4. Time Limitations - in general these favour the possessor and the requested State under the Directive as opposed to the Commonwealth Scheme - p.17.
5. Validation Certificates - these are unique to the Commonwealth Scheme - pp.18-19.

It is impossible to state that one arrangement is inherently superior to the other. The above shows that certain aspects of both the Directive and the Commonwealth Scheme favour the requested State and others the requesting State. It would be possible to create an arrangement which favoured wholly one State at the expense of the other. This would not be a political or practical solution. The Commonwealth Scheme must be considered in the light of the other two arrangements. Although the earliest of the three, it will be seen

to be within the mainstream of international developments, offering a practical solution to a problem that is clearly of concern to Commonwealth countries.

ANNEX 2

EXTRACTS FROM MINUTES AND COMMUNIQUE OF 1983 COMMONWEALTH LAW MINISTERS MEETING, COLOMBO, SRI LANKA

Protection of Cultural Heritage

20. Ministers acknowledged the central place occupied by cultural property in the national heritage. Historically, many major cultural items had been removed from their country of origin.

21. They firmly believed that, whatever the position with regard to matters in the historical past, it was now widely recognised in Commonwealth jurisdictions that the protection of significant items of national heritage was a legitimate concern of the State. Most countries had legislation which attempted to provide protection, but this could be immediately frustrated when items were smuggled abroad. To this end it would be desirable for the Commonwealth to take affirmative steps to facilitate the protection of cultural property and, in particular, combat the unhealthy market in smuggled and stolen cultural objects.

22. The practical and legal problems involved in attempting to retrieve cultural property once it had been illegally removed from the relevant national jurisdiction were acknowledged. The problem was essentially one of jurisdiction, and Ministers considered that a Commonwealth solution should be sought.

23. The discussions indicated that the UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 had not proved to be a wholly satisfactory solution, as many countries had experienced difficulty in implementing its provisions.

24. Ministers felt that the special ties within the Commonwealth association provided a promising basis for more effective action. Accordingly they asked the Commonwealth Secretary-General to initiate consultation with Governments directed towards this end.

Mr McLay (New Zealand) said that before introducing Paper LMM(83)38, he wanted to make it clear that he did not wish to repeat material in the Paper itself.

Rather, what he wanted to make was some suggestions as to possible lines of further action, and hoped that these suggestions, together with the issues raised in the Paper, would form the basis of a constructive discussion.

The Ortiz case was before the House of Lords and he was anxious not to say anything, even privately, which might be seen as designed to influence the outcome.

Nonetheless, he could provide some interesting side-lights on the Ortiz case itself, but again only to ministerial colleagues. The carvings in question were sold in 1973 by the original owner who had found them in a swamp, for about £3,000. They were almost immediately resold to Ortiz, a Swiss citizen, for over £40,000. Today they could be valued at something more than £1.5 million. The issue involved was one of considerable moment to all parties involved, not the least of which was Sotheby's, who had to store them pending resolution of the matter.

The second matter of interest to delegates was that Mr Ortiz only offered the carvings (and a number of other artefacts from his collection) for sale because, in 1978, his daughter had been kidnapped and he had had to raise a very substantial ransom. Happily, she had been released without the need to sell these particular carvings, and they continued to be held by Sotheby's pending the decision of the House of Lords. In considering the Agenda item he believed that the Meeting had to bear in mind a number of points. First, cultural property was an integral part of a nation's heritage, and as such, representatives of individual governments with particular responsibility for the administration of their countries laws, they all had an obligation to see that their jurisdictions provided laws that protected that heritage. Equally, cultural property was also the heritage of mankind of large, and an appreciation and understanding of the cultural heritage of other countries could make a very important contribution towards achieving understanding between peoples, particularly in the cause of peace.

From those two observations flowed a third. One could not assume that in every single case the removal of an artefact from its country of origin was necessarily objectionable, whether in national or in international terms. What was objectionable was the illegal removal of such artefacts, without the prior knowledge and consent of the appropriate national authority. He personally could derive some considerable personal satisfaction from the fact that a visitor to the Smithsonian Institute in Washington was able to see Maori artefacts, however they got there which demonstrated that six hundred years before Columbus, at a time when Europeans still thought the world was flat, Polynesian navigators were leading major migrations right across vast reaches of the Pacific Ocean. At the risk of attributing views to others, he suspected that the Sri Lankans might derive some satisfaction from the fact that visitors to many museums around the world could be informed of their country's very long history of civilisation.

Finally, at the risk of incurring the wrath of the Lord Advocate, there were some Greeks who could gain amusement from the fact that in the British Museum there was irrefutable evidence to support the view that the Scots were not the inventors of the bag-pipes! So

there was something to be gained from the fact that all of them could look, see and endeavour to comprehend the artefacts of other countries in their own museums.

The fourth point he wished to make was that any solution reached at the international level would have to combine political and legal elements.

Politics was the art of the possible. Accepting that definition, he suggested that the Meeting had to accept that there was no point in looking back at past misdemeanours, whatever they were and however strongly Ministers might individually feel about them. If they tried to remedy past wrongs, Ministers would be condemning this particular exercise from the outset. No one should suppose that as a result of these discussions, New Zealand would seek the return of Maori artefacts held in overseas museums, or for that matter the return of Polynesian artefacts held in New Zealand museums to the particular island countries from whence they had come. Any such returns would occur only as a result of arrangements made either between the relevant Governments or, where necessary, between those non-governmental organisations which now had possession of the items in question.

Nor could the discussions affect the outcome of the Ortiz case. For better or for worse, what had been done in the past had been done. As Law Ministers they could look only to the future. That offered the best chance of achieving the politically possible, and of devising a scheme that would resolve such problems for the future. He looked for a possible Commonwealth scheme to protect cultural property.

He recognised the very difficult definitional problem of what was in fact "cultural property". This was not something that could be ignored. But the first need was to encourage Commonwealth countries to enact laws that required prior government consent for the export of cultural property. Most Commonwealth countries already had such laws. The second step was that, in addition to providing for local penalties whether by fine or imprisonment, the law should also provide for the automatic forfeiture to the State of any goods exported without prior consent. Again, many states had laws to that effect. Thirdly - and this was the difficult part - because the illegal export of such cultural property inevitably meant that the objects were no longer within the jurisdiction to which they have been forfeited, the effect of such laws was going to have to be backed up either by an international convention or, perhaps initially, by a Commonwealth Scheme, pursuant to which participating countries would enact legislation that provided for the reciprocal recognition of forfeitures. That, in essence, was the solution hinted at by Lord Denning in his judgment in the Court of Appeal decision in Ortiz, he said frankly that the laws of various countries were inadequate to deal with the problem, and it had to be dealt with at the international level.

Such a scheme would have to apply only to the future. It could not in any way be retrospective. It would have to avoid the legal and political shortcomings of the UNESCO Scheme referred to in the Paper. It would have to address itself to the problems of definition that he had glossed over, and the question of compensation for bona fide purchasers. It would also have to deal with the obligations of the States to which the smuggled objects have been taken. What did they have to do in order to actively secure the return of these objects to the country from which they had been taken? And it would also have to provide some element of safeguard against vexatious claims being made. Those seemed to be the essential elements which the Meeting needed to address.

This was a problem that affected each and every one of the countries present. Every Commonwealth country both received and lost cultural property. Some lost more than they gained, others vice-versa. But none was immune from the problem. They could only protect their own cultural heritage if they were also prepared to reciprocate and protect that of others as well. The Meeting had a chance to take a step in the direction of affording that protection.

Mr Justice Loizou (Cyprus) recalled that the protection of the cultural heritage of a country was a subject to which Cyprus attributed the utmost importance, as its own national heritage had been the object of plundering, looting, tomb-robbing and smuggling from time immemorial in times of peace, but mostly when it had come under conquest in its past and very recent history.

No doubt this was a problem of universal concern and it was with great interest that he had read the document LMM(83)38 entitled "Protection of Cultural Property", a paper prepared by the Minister of Justice of New Zealand. He did not intend to refer to the details of recent incidents of antiquities smuggled from Cyprus abroad, but he could not but refer with appreciation to the British Customs and the British Police and to the authorities of the Netherlands and the Federal Republic of Germany, on account of whose efforts a great number of Byzantine ikons, amphora and other antiquities which had been taken from the Northern occupied part of his Island had been recovered and returned to the rightful owners the Church and the Museum of Cyprus, as well as to the owner of a Registered Collection which he had left in his home in the northern part when he had fled in a hurry.

The Chairman, in opening the discussion, had remarked humorously about the anxiety that the debate on the question of the repatriation of artefacts might cause to the British Delegation as regards the fate of the British Museum! He might alleviate their fears by assuring them that he had not come to raise claims to the contents of the British Museum but to discuss and find solutions of the serious problem regarding happenings

during the recent past, the present and the future. Credit, however, had to be given to the British, who had furnished the Cyprus Museums and introduced the first legislation to protect the antiquities of the Country as from the end of the 19th century.

It appeared that the cornerstone for the protection of the national heritage of each country was the establishment of a universal system of legal standards for the international protection of cultural property by clarifying as international offences of a number of acts directed against such cultural property.

No doubt this was necessitated by the fact that national legislation of many states revealed diversity between the existing legal systems in the field of protection of cultural property, particularly as regards the criminal prosecution and punishment of offences of such property which was likely to hamper any effort to ensure an adequate protection at an international level. Therefore, the "internationalisation" by means of a Convention of offences against cultural property appeared to be the obvious way. In that case a duty for the contracting States to adjust their legislation could arise, not only from the precise conventional obligations which they explicitly accepted, but more generally also from the widely accepted principle of the supremacy of international law over domestic law. This became obvious from the fact that in all the cases to which he had just referred, no criminal prosecution had been instituted against anyone.

He referred briefly to the various efforts that had been made at the international level as far back as the 19th century to protect the cultural heritage of countries, at least in time of war, and which had never met the problem. The last was the UNESCO Convention on the Means of Prohibiting and Preventing Import, Export and Transfer of Ownership of Cultural Property, in 1970, but which, however, had not proved to be as effective and satisfactory solution as its authors had intended it to be. It was because of this, and the seriousness of the problem that was posed, that he wished that an effort be made within the Commonwealth. In that respect they could draw from the experience of the Council of Europe and its efforts made in this respect where a draft Convention had already been prepared, namely, the Convention on the Suppression of Offences Against Cultural Property (Document CDPC(81)16).

Mr Mokama (Botswana) (in the Chair) cautioned distinguished delegates, that he would call upon the UK to reply should they be making too many claims on the British Museum!

Lord Mackay of Clashfern (Britain)

Finally, with regard to the protection of cultural property, he much appreciated the constructive and forward-looking spirit in which the Attorney-General of New Zealand had dealt with this difficult issue. He entirely

agreed that past controversies in this field must be left to the historians, and present disputes to the judges. Their concern as Law Ministers should be with the future. Accordingly, the United Kingdom was very willing to join in discussions that aimed to seek an agreed basis for the harmonisation of legislation in this field. The UK had been taking part in such discussions within the Council of Europe - discussions which had demonstrated how difficult some aspects of the subject can be, particularly the question of defining the property to be protected and of making just provision for the protection of *bona fide* purchasers. But the problem was one that needed to be discussed, and they looked forward to joining in discussions for that purpose with other Commonwealth countries.

The distinguished delegate from New Zealand had been so bold as to suggest that there existed irrefutable evidence that the bag-pipes were not invented in Scotland. He would not wish to join issue with him on that question, and would content himself with the claim on behalf of Scotland for having perfected their use!

Dato Haji Suhaimi (Malaysia) strongly supported the suggested Commonwealth Scheme for Mutual Assistance in Criminal Matters. The strategy for establishing such a Commonwealth system ought to be on the line of the Commonwealth Scheme on the Rendition of Fugitive Offenders, and as they had been comparatively successful in establishing that Commonwealth Scheme he saw no reason why they ought not to be successful, if not more successful, in establishing such a new Commonwealth Scheme.

He felt the need for international co-operation for the protection of cultural property. The relevant law in Malaysia was the Antiquities Act 1976, which covered both antiquities and historical objects. "Antiquities" were defined generally as being any object of human or animal remains which is at least 100 years old. It also included any objects of any age which were gazetted as being "antiquities". "Historical objects" were defined as being any artefact or other object to which religious, traditional or artistic or historical interest was attached.

Section 3 of the Act provided that every antiquity discovered in West Malaysia on or after the date of coming into force of the Act, and all undiscovered antiquities, were the absolute property of the Government. There was also provision for the Government to pay reasonable compensation to the finder of an antiquity and to the owner of land on which it was discovered. The Government had no property in historical objects. The export of any antiquity out of Malaysia was prohibited unless the exporter was licensed so to do.

In the case of historical objects, the approach was somewhat different. There was no requirement for an export licence, probably because by definition such object was comparatively indeterminate in character. However, an authorised officer could detain an object about to be ex-

ported if he had reason to believe it was or would be of lasting national importance or interest. If the Director General of Museums so confirmed, the object could be prohibited from being exported.

In the case of both antiquities and historical objects, the owner was entitled to reasonable compensation if an article could not be exported.

The statutory position was such that it was very easy to export historical objects. The Government's right to a particular object only began when it prohibited the export and paid compensation for it. The position was stronger in the case of antiquities. There, export provisions applied to all antiquities, both those discovered before the Act was passed and those discovered afterwards.

It was obvious that there was an urgent need for international legal co-operation in this matter. The question, as he saw it, was whether Ministers should start with Commonwealth co-operation in the first instance or move at once to include non-Commonwealth members in any possible convention.

Shri Azad (India) thanked the Secretariat for the excellent papers on the subject. The distinguished delegate from Malaysia had made some eminently sensible and concrete suggestions based on practical experience, and if the Meeting were to take positive action on this matter, the points made by him deserve detailed consideration, particularly the suggestion that Ministers might have to make a new departure from the normal principle of private international law that a State does not recognise the judgments passed by the criminal courts of another State. This principle had been evolved at a time when the activities of states were very limited and when problems of this nature, dimension and magnitude were unknown. It was for serious consideration whether this principle should not be modified in the light of practical experience, subject, of course, to certain safeguards.

He also expressed his wholehearted agreement with the delegate from Bangladesh who had highlighted the problems being experienced in many countries, particularly in Asia. He, too, had given support for the need for a different approach and for concrete action. India particularly endorsed the suggestion that there be detailed and elaborate study of the position and that a study team go into the matter not only in broad principle but also in detail. This was a matter of urgency and great practical importance, and it was proper that the Commonwealth Secretariat's Legal Division, apart from ensuring that the matter was considered at later gatherings, should also keep Member countries posted with the developments on the subject both in the national and international sphere.

Mr MacGuigan (Canada) wished to emulate the distinguished representative of India in making very brief

comments on two of the issues that had been raised. First, with respect to the question of cultural property. It seemed to Canada that the beginning of wisdom in this field was adherence to the 1970 UNESCO Convention. That, of course, was not perfect, as he understood that it was limited to prosecution in respect of the import of cultural property where it had been taken from a museum or a public monument. But nevertheless it was to that extent rather effective, and there were few countries in the Commonwealth which had chosen to adhere to that treaty.

At the present time there was a case involving a Nigerian sculpture which was brought into Calgary from New York. The main evidential problem faced was that the artefact had not been documented in Nigeria. But as far as the law was concerned, if certification could be provided the position was very clear. In fact, Canadian law went beyond the provisions of the UNESCO Conven-

tion. It provided that where such an artefact came out of a country, whatever its source, it would be equally proscribed. But the legislation was used as a trigger to adhere to the UNESCO Convention.

If New Zealand were an adherent to the Treaty, and if the Maori carvings were in Canada instead of in London, they would be subject to being returned to New Zealand. He urged all countries to examine the effectiveness of the UNESCO Convention.

The Chairman observed that they had all had a most interesting discussion on a very important subject, with many valuable ideas being put forward. He suggested that it would be the collective wish that the Secretariat examine these in detail for future consideration by Ministers, but that in the meantime all countries should endeavour to do what they could to assist the other countries in these matters.

Extracts from Minutes and Communique of 1986 Commonwealth Law Ministers' Meeting, Harare, Zimbabwe

PROTECTION OF THE CULTURAL HERITAGE

27. Ministers acknowledged the central importance of the cultural heritage to the life and identity of each nation. It was thus the duty of each government to protect items of its cultural heritage from illegal exportation. A flourishing illicit market existed in antiquities, cultural artefacts and religious treasures which threatened to impoverish further the national heritage.

28. Officials had considered a possible Scheme intended to facilitate the return of illegally exported items while establishing a validation system to protect *bona fide* purchasers, but a meaningful consensus had not yet been achieved.

29. Ministers reaffirmed the need to remedy the situation and therefore asked the Secretary-General to invite a small number of representative countries to form a group to examine further all aspects of the problem and report in time for the next meeting of Senior Officials, and Ministers looked forward to examining the matter further when next they meet.

5(g) Protection of the Cultural Heritage

The Chairman said that the meeting of Senior Officials held in Marlborough House in January 1986 had settled two draft schemes which had already been adopted. Its work on a third scheme relating to the protection of cultural heritage did not reach that stage, but senior officials had produced a revised text which was reproduced in paper LMM(86)13, the report of the Chairman of the Meeting, the Hon M D Mokama, Attorney-General of Botswana. He invited Mr Justice Loizou of Cyprus, who had chaired the meeting's deliberations on the protection of the cultural heritage, to open discussions.

Mr Justice Loizou (Cyprus) said that his task to introduce the item on the protection of the cultural heritage had been made an easy one in view of the wealth of precise information contained in the documents that had been made available in preparation for this conference. However, a brief reference had to be made to certain aspects of the matter.

The Senior Officials at their meeting in January 1986, which he had the honour to chair, considered and revised a draft scheme, which was now tabled for the resolution of and directions on certain matters on which further progress could not be made without more detailed instructions from Governments.

The first item to be addressed was the non-retroactivity of the scheme. The drafting committee, as pointed out in the chairman's report, found that the method of im-

port prohibition could not without fundamental difficulties be suitably adapted to cover items already transferred. Strong views were expressed by some delegates for extending the Scheme to cover exports going back many years. In fact, Law Ministers in their communiqué of the conference at Colombo, had addressed themselves to future dealings and left open the issue of the past for further reconsideration. It was therefore decided at the meeting of the Senior Officials to leave the possibility of a separate scheme to cover these aspects to Law Ministers for further action if they so wished. So Article 1(2) provided that 'the Scheme adds to and in no way derogates from future and existing means of recovery of items of culture heritage.' The non-retroactivity, therefore, of the Scheme did not affect existing claims arising out of the unlawful possession of items in the past.

He then turned to the operation of the Scheme, and addressed the three alternatives to be found in section 8(2) which referred to the question of where the judicial proceedings relating to the return of the items should be held. Those three alternatives were indicative of the divergent views advanced at the Senior Officials Meeting.

The first alternative was to be found in section 8(2)(A) that the only matters to be discussed in the courts of the country of location would be whether the item was subject to the Scheme and if so whether it was covered by an export permit or validation certificate. If the item was covered by the Scheme and no such permit or certificate had been issued, the item would immediately be returned to the country of export and any other questions relating to the item such as any question of title and compensation to the innocent purchaser would be determined there. Proceedings in that respect would have however to be commenced within 12 months.

The second alternative set out in section 8(2)(B) was to provide that the courts of the country of location should first determine whether the item was subject to the Scheme and whether an export permit or validation certificate had been issued. If both existed, the court would order its return to the holder. If it was not covered by a permit or a certificate, the court of the country of location would order its return to the country of export. An innocent purchaser, however, might seek an order for compensation prior to the return of the object to the country of export. This would be the only issue of title cognizable in the courts of the country of location, and the person would have the burden of proving that he had taken all reasonable steps to satisfy himself that the item was not an unlawful export, unless he has used the validation procedure which was set out in section 13,

and which was intended to give purchasers additional protection.

The third alternative which was embodied in section 8(2)(C) was for the court of location to determine whether the item was covered by the Scheme and whether an export permit or validation certificate had been issued and whether the holder had established that he was an innocent purchaser of the item and if so whether he had acquired good title to it under the law of the country of location. If the court determines that he had so acquired the title then the item was returned to the country of export which was however obliged to recognise the title so determined. The holder could enjoy the item in the country of export or he could apply for an export licence in the normal way, or of course he might decide to sell it there.

The innocent purchaser was safeguarded by all three alternatives. First, there was the validation certificate procedure. By that means he was given the opportunity to remove any doubts about the export requirements regarding the object. Under the first alternative, the innocent purchaser would have the protection accorded to him by the existing law of the country of export. Under the second alternative, his status as innocent purchaser would be assessed in the country of location and then the appropriate compensation would also be assessed there as a condition for the return of the object to the country of export. If the latter decided not to pay that compensation, he would retain the object.

Under the third alternative, he would retain his title and could either enjoy the object in the country of export, apply for an export licence and export it, or, if that were refused, sell it. Under the first and third options, the item would at all events, find its way back to the country of export provided of course it was covered by the Scheme and no permit or certificate had been issued. Under the second alternative, many small countries might never be able to have material returned to them as the payment of compensation at the rate which was likely to be assessed in a country which was an important international art market, might prove an insurmountable obstacle. Under the third alternative, a country might have to recognise the title of the innocent purchaser, although according to its own legislation, the state itself had title in the object.

What was an innocent purchaser might also be established in several ways. Under the first alternative, it was left to the country of export. In the case of the second and third alternatives, those factors fell to the decision of the country of location. In the case of the third alternative, however, countries of export which were bound to recognise the title of an innocent purchaser, who by the standards applied in its courts would not have been regarded as innocent, might raise some objections.

The Scheme did not make provision as regards the measure of compensation. The issue, however, was set-

tled by deciding which courts were to have jurisdiction to decide which issues. There existed three possibilities: first, the value which the item would have in the open market in the country of export; secondly the sum which the purchaser actually paid for the item; third, the value of the item in the open market.

There was a wide diversity of views expressed on the issue of the limitation period at the meeting of Senior Officials. One was that it should be left to the normal rules of limitation. Another that there should be no limitation and another that there should be a relatively short period. The consultants had suggested a period of thirty years, which was a period of one generation and was also recommended by Professor Chatelain in a Council of Europe consultative document. However, such a limitation was not finally included in the European Convention on Offences relating to Cultural Property 1985.

It had to be concluded therefore that in each of the three alternative modes of operation of the scheme, there was an element of compromise. That was why a decision of Law Ministers was essential. Such a decision would be a major step forward and would allow a further development of an operative scheme. Likewise, a decision had to be taken on the question of non-retroactivity of the scheme. These were the more serious problems that had to be resolved.

He suggested that the meeting authorise the Commonwealth Secretary-General to set up a working group or a team of representatives to proceed with the matter further. The preservation of the cultural heritage of every country was an obligation to the next generation which also had the right to know their roots, and to link with that their own creative developments.

Mr Liveras (Cyprus) said that the Island of Cyprus had an historical past of over 9,000 years and vestiges of civilisation of various periods were scattered throughout its territory. There were Neolithic settlements, Bronze Age towns, Classical palaces, Hellenistic and Roman public buildings, Byzantine and mediaeval churches. This rich cultural heritage, some of which UNESCO had included in the World Heritage List because of its importance, was protected by the Antiquities Law, which was enacted in 1935. At the same time the Department of Antiquities was created, which was entrusted with the task of looking after their antiquities.

In 1974, Turkey had invaded Cyprus and continued to occupy ever since nearly 40% of the island's territory. The invasion and subsequent occupation caused human, political, economic and other problems, and serious violations of human rights. The Government of Cyprus and the Department of Antiquities were prevented by the Turkish Military Force from having access to the occupied area of the island where, incidentally, lay the most famous relics of ancient Cypriot civilisation. The Antiquities Law could not be ef-

fectively enforced in the occupied area and the monitoring of numerous violations was impossible in the prevailing circumstances. Moreover, the Turks had persistently refused to consent to the establishment of a permanent UNESCO representation in the occupied area of Cyprus with the view of safeguarding the cultural property of the island. By reason of the circumstances now prevailing in the occupied area of Cyprus and the exacerbation of international crime in relation to antiquities, desecration of churches and tombs, looting of museums and private collections, and the illicit trafficking of antiquities had reached alarming levels.

The Cyprus Government wished to extend its appreciation for the co-operation of museums and other institutions abroad in combating the illicit export and trading of Cypriot antiquities. Special mention had to be made of the British Museum and the Louvre for their valuable assistance.

They believed that it was the utmost duty of every national government to preserve its history and civilisation and the protection of antiquities was the most effective and successful method of achieving that objective. Therefore they welcomed the initiative of the Commonwealth Law Ministers in promoting a scheme for co-operation between member states for the suppression and elimination of the illicit export and trading in items of the cultural heritage.

Sir Patrick Mayhew (Britain) believed that everyone would have listened with understanding and deep sympathy to what had been so movingly said by the distinguished delegate from Cyprus. All who knew and loved the world of art and antiquities would have sympathised deeply with his account of the problems which the draft scheme was intended to solve. Britain had given the scheme careful study and we deplored the illegal export items of its natural cultural heritage. This discussion was therefore about ways and means, about mechanics, rather than about the objective.

It had to be recognised that the art market was of substantial advantage to all the economies of Commonwealth countries in various degrees, and only a tiny minority of transactions were illegitimate. They had a constructive proposal to make, but the draft scheme did present them with such difficulties that they felt they could not accept it, grateful as they were for the removal from the Scheme of the element that was originally there. They would be greatly concerned about its conflict with their existing legal practice in matters of title for example, matters of seizure, the recognition of foreign laws and regulations, entitlement to compensation and other matters. That certainly did not mean that they did not wish to see practical progress made in the problem. It was customary in the United Kingdom to rely heavily on systems of self-regulation. Such self-regulation in the art trade was already an established reality. It had been so for many years.

He referred to what the distinguished delegate from Cyprus had said about the British Museum's approach to these matters. But he believed it to be a representative approach amongst museums and art trade in Britain. Of course inevitable abuses did occur but there were existing avenues for redress. It was possible to bring a case for the return of cultural property in the courts, and in addition they could point to very recent cases where the voluntary codes adopted by the art trade and museums had been invoked with success. They proposed building upon that with a resolution that Commonwealth countries should agree without reservations to secure the urgent exchange of information regarding the illegal export of cultural property. An agreement of that kind would have the effect of putting the museums and art traders on notice that the object was of dubious origin or illegal export, and it would be accompanied by the active involvement of the Government of the country of location. The Government would transmit full information about means of identification, legal status, export, and the whereabouts of the illegally exported property, and it would fall on the Government of the country of location to use its best practical measures, whether legal or administrative, to induce the return of the requested property. Britain would undertake to deal as promptly and effectively as possible with requests from other Commonwealth countries. In their implementation of the arrangement, they would rely primarily upon the established codes of practice which worked well, and which regulated the acquisition and handling of items of dubious origin.

A copy of the proposal had already been circulated to Commonwealth officials. This was a different approach from the one advocated in the draft Scheme, but it was a realistic one which all countries could subscribe to without delay. The text of the proposal read as follows:

"Commonwealth countries agreed to use diplomatic channels to advise urgently the appropriate authorities in other Commonwealth countries of the illegal export of cultural heritage of outstanding significance in respect of which they require assistance in their recovery. In such cases they agreed to supply full information about the provenance, legal status, export, means of identification and whereabouts of the items in question. Each Commonwealth country undertook to use its own good offices to induce the return of any such property, and to keep the requesting country fully informed of the progress and of the outcome. In this context, each Commonwealth country undertook to use the best practicable means available to this end, including existing formal and informal provisions, whether legal or administrative."

They knew in Britain from experience that approaches from government to government could work and they knew in this forum particularly that they could work.

They could work efficiently and effectively. He hoped that he had succeeded in persuading his distinguished colleagues that this alternative approach proposed by Britain did not derive from any lack of sympathy with the objectives of the scheme as advocated by the distinguished delegate of Cyprus. Being half Irish himself, he reacted particularly warmly towards his account of the depletion of the cultural heritage of his island.

Dr Amerasinghe (Sri Lanka) said that Sri Lanka had a draft Bill prohibiting the export of all cultural property except on licence. Export was already controlled under section 361 of their Antiquity Law number 9 of 1940. But the new Bill sought to streamline the law and make it more comprehensive.

With regard to the Commonwealth Scheme, they found the criteria to be quite acceptable although in their proposed legislation, they had by and large, followed the UNESCO definition of cultural property. The prohibition of imports was a desirable provision which they would recommend for inclusion in their proposed legislation.

In this connection, they noted that section 308 of the United States Public Law Number 97/446 of January 12, 1983 provided as follows: "No article of cultural property documented as appertaining to the inventory of a museum or similar institution in any State Party, which is stolen from such institution after the effective date of this title, or after the date of entry into force of the Convention for the State Party, whichever date is the later, may be imported into the United States." Their delegation welcomed the suggestion that a committee be appointed to further consider these matters.

Mr Palmer (New Zealand) said that New Zealand had a special interest in this matter. Their own inability to recover Maori carvings of great spiritual, aesthetic and historical significance highlighted the great defects that existed in the law around the Commonwealth on this subject. In 1973 a dealer in art had come to New Zealand and purchased some exquisitely carved Taranaki panels for \$NZ6,000. The dealer took them out of New Zealand contrary to New Zealand law, particularly the Historic Articles Act of 1962. The dealer sold them to a collector, that collector later sent them to Sothebys to be sold at auction. When the catalogue came to the attention of the New Zealand Government, they issue a writ in the United Kingdom claiming a declaration that the carvings belonged to the New Zealand Government since they had been smuggled out of New Zealand, contrary to New Zealand law. That case was litigated through the courts, and ended up in the House of Lords. The New Zealand Government lost because only if forfeiture was automatic would the Government of New Zealand have become the owner of the panels. That case showed dramatically the defects that presently existed in this matter. He could not accept that the re-

sponse of the United Kingdom Government was a sufficient one in these circumstances.

He cited Lord Denning in the Court of Appeal in the *Ortiz* case who said: "Best of all, there should be an international convention on the matter, where different countries can agree and pass the necessary legislation. It is a matter of such importance that I hope steps can be taken to this end." So even though New Zealand lost its case in the United Kingdom's courts, it nevertheless was seen by Lord Denning, to have some justice on its side. In those circumstances, they strongly favoured the scheme which was being developed. They believed that while it was not perfect, it was certainly better than the existing situation, and it was a matter of urgency that some progress be made on this matter.

They agreed that it ought not to be retrospective. Of the various options available in relation to *bona fide* purchasers, they preferred the second option, option (B): that the court in the country of location determined the compensation payable to the *bona fide* purchaser as a precondition for the return of the item to the country of export. They also preferred the proposal which was in the consultative document for a period of thirty years as the limitation period. They thought that that had the great advantage of certainty.

But since there seemed not to be the necessary degree of consensus on the matter they would support the view that a working group be set up, by the Commonwealth Secretary-General, to try to make some further progress on this matter. While he accepted that the proposal of the United Kingdom Government was put forward in an attempt to make some progress in this matter, the Commonwealth should continue to strive to arrive at systematic arrangement that could perhaps be embodied in an international convention of the type that Lord Denning had in mind. The Commonwealth might very well make progress more easily and more rapidly than UNESCO on this question.

Mr Liveras (Cyprus) reiterated their proposal, supported by other delegates, that a committee should be appointed to inquire further into the matter, in the hope and in an effort to find mutually acceptable ground for a uniform agreement that would allow for the issues raised. Whilst they appreciated the effort made by the British Delegation they were not absolutely happy with it. He felt that it could be improved and the best forum for that was not this forum, but a committee that would really look into the matter in more detail.

Dr Shahabuddeen (Guyana) said that the advocacy of the United Kingdom's Solicitor-General had been so very persuasive as to make him feel rather graceless to disagree. But having regard to the deep-seated consideration underlying this matter, there was really no option for him but to support the Scheme, in the terms in which it had been presented. They were dealing with

the identity of countries, the very soul of peoples, and of nations. The features of those very subtle and indefinable elements of national personality were spread out and distributed in a number of artifacts, works of art, and other bits of cultural heritage. A connection between these items and the identity of a nation made the issue so very urgent and pressing. The entitlement of a nation to its cultural heritage was a matter of paramountcy, which should at all times prevail, whatever might be the other competing interests. Certainly, there might be cases in which it would be just to provide for compensation to someone who might have suffered injury in the course of the contorted processes of the market place. But it would be wrong, whilst seeking in proper circumstances to provide for compensation, to do this in a way which subordinated the entitlement of the state of export to the item in question to any other claim, whether by compensation or otherwise.

He then gave a hypothetical example of the theft of the crown jewels, being traded on the open market and bought by an innocent purchaser. He hoped that the state of the law as it stood would support the paramount title of the United Kingdom to items of that kind.

Taking that approach, he examined the three options referred to and explained by the distinguished delegate of Cyprus. Two previous speakers had opted for the second option. Under this second option, the court of location, if it decided in favour of the state of export, might make an order for compensation in favour of an innocent purchaser. But this seemed to imply that compliance with that compensation order was a condition precedent to the realisation by the state of export of its theoretical entitlement. He found this approach defective, because it did not honour the supreme and paramount entitlement of the state of export to its cultural heritage. He would therefore favour the first option, but would accept the second option if it were the consensus. He would also support the establishment of a working group.

Mr Lubuva (Tanzania) said that protection of the cultural heritage was a matter which transcended national boundaries, and Tanzania was no exception to that. Tanzania would suggest that the matter be deferred for further studies by a committee, taking into account the various aspects raised in these discussions.

The Chairman suggested that, as a preliminary matter, the meeting examine whether or not they found the British proposal acceptable, and, if so, to incorporate it in the communiqué, while having it clearly understood that the more detailed scheme would be referred by the Commonwealth Secretary-General to a committee of experts.

Mr Palmer (New Zealand) said that the New Zealand Government was against the British proposal and thought it should not be adopted. Therefore all the meeting needed to do, having discussed it, was to refer

the whole matter back to a small working group.

Mr Chigaga (Zambia) thought that the meeting should agree to defer the subject and send it back to the officials to consider it and study it and make recommendations. It would be premature to put up something as agreed at this stage. That would be the right procedure and it would cause nobody inconvenience. The consensus was that the matter should be referred to the officials.

Mr Liveras (Cyprus) said that very often people thought that when a matter was to be killed it was best sent to a committee. It was bad enough that the proposition entailed reference to a committee. If the meeting were in addition to risk referring matters to the committee, having already adopted an interim proposal, that would make matters worse. The matter should be left open so that all countries could try to reach agreement.

Shri Sen (India) felt that the proposal of the New Zealand Government was worthy of consideration. India had been very badly affected. Recently a valuable temple statute had been taken away and they had been hunting all over the world. There were many cases which had yet to be finalised. Therefore, in order to achieve a comprehensive scheme which would be worthy of being applied with effectiveness, it would be better to set up a very small working group to devise rules for the purposes of combating this particular problem.

Sir Patrick Mayhew (Britain) saw the force of what had been put forward firstly by the distinguished delegate of New Zealand and then by the distinguished delegate from Zambia. There was an element of prematurity in adopting the British proposal if they then went on to set up a committee to consider the whole subject. The United Kingdom would therefore be quite content with the proposals as formulated by the distinguished delegate from Zambia that the whole subject be referred to a small committee to see whether progress could be made.

The Chairman noted that the decision was that this agenda item should be referred to a small group by the Secretariat and that this group would make a proposal.

Extracts from Minutes and Communique of 1990 Commonwealth Law Ministers' Meeting, Christchurch, New Zealand

Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth

18. The Meeting had before it the Report of a Working Group which had been appointed by the Commonwealth Secretary-General, as requested by Ministers when they last met. The Group had examined and revised the Proposed Scheme for the Protection of the Cultural Heritage within the Commonwealth in an effort to accommodate the views expressed by governments.

19. Ministers expressed their gratitude to the Working Group. They acknowledged that a number of them were not yet in a position to express a final view on the proposal as processes of consultation with other interested ministries were not yet concluded. The Meeting asked that once this process was complete, the proposal should come before Senior Officials when they next met, so that Law Ministers would be in a position to take a firm decision on the matter at their next Meeting.

Agenda Item 2(e): Draft Scheme for the Protection of the Cultural Heritage

The Chairman recalled that when Law Ministers had met in Harare in 1986 they had asked for a Working Party to be convened by the Commonwealth Secretary-General to examine the proposed Scheme for co-operation in this area and to report back to Ministers. The report of that group made it plain that unanimity had proved elusive, although the Working Party had been able to make considerable progress at their meeting. When their report had come before Senior Officials on Sunday, the view had been expressed by a number of delegations that there had been insufficient time for the necessary policy decisions to be taken in capitals.

Thus, this Meeting was not in a position to adopt the Scheme formally. Senior Officials noted in their report that the matter required further consideration and consultation with other ministries responsible for the protection of cultural property. This being the case, he suggested that the Meeting consider remitting the Scheme back to Senior Officials. It could then be considered by them in the light of those further consultations so that Ministers would be in a position to come to a final decision when next they met.

The Hon Christodoulos Chrysanthou (Cyprus) believed the question of the proposed Scheme for the protection of cultural heritage was of the utmost importance to them all.

As was well known, the cultural heritage of Cyprus had been subjected to plundering and there had been illicit exports of antiquities throughout the centuries. Items so

taken could be found in collections in practically every museum in the world. He stressed that the recent destruction of monuments, churches, and other archaeological structures and items of the cultural heritage of Cyprus stolen and being the subject of illicit sales throughout the world from the area occupied by Turkish troops since the invasion in 1974, was destruction and plunder of unprecedented magnitude.

He recalled the background of the subject. The matter had been discussed with the assistance of two experts, Dr Patrick O'Keefe and Dr Lyndel Prott, as a result of the mandate for the consideration of the subject which came directly from the Law Ministers at their 1983 meeting in Colombo, at which they had asked the Commonwealth Secretary-General to initiate consultation with Governments towards finding effective solutions and, as they put it, "to take affirmative steps to facilitate the protection of cultural property and in particular combat the Commonwealth market in smuggled and stolen cultural objects."

It was a problem not devoid of difficulties, especially in the field of jurisdiction, but it had been believed that a Commonwealth solution should be sought. He recalled the paper prepared by the Hon JK McLay, MP, the then Attorney-General and Minister of Justice of New Zealand, for the Colombo Meeting. He had - and rightly so - stressed that in the absence of international co-operation backed up by agreed legal measures, purely domestic legislation might be of limited efficacy in curbing the illicit transfer of cultural property or securing its return. He and his country had had a bitter experience in the matter as manifest in the *Ortiz* case, which found in the House of Lords a sad end for New Zealand and for all of them and which had been ringing a bell ever since for the need for international co-operation and action for combating this kind of international crime, which was second in extent only to that of narcotics trafficking.

His own country had also been compelled to engage in the United States in similar litigation. Precious Byzantine mosaics of the early sixth century AD, were removed from a church in the occupied north of Cyprus and, through illicit trading, found their way to Indianapolis where proceedings were successfully pursued by the Government of Cyprus and the Greek Orthodox Church of Cyprus before the Indianapolis Division of the District Court of the State of Indiana. On 3 August 1989 judgement was given in favour of the Cyprus authorities, but this first instance judgement was now under appeal and the mosaics were still in a bank vault. The issues before the courts of the United States were

those that Cyprus would like to see simplified and made less costly through the adoption of a Commonwealth Scheme.

Reverting to the successive efforts made to that end, he mentioned that the concept of a Commonwealth Scheme was also pursued at the Zimbabwe Meeting in 1986 of the Law Ministers at which New Zealand's present Prime Minister as a Law Minister then, had taken a strong stand and had argued vigorously the case for the proposed Scheme. In view of the difficulties that were encountered, once more Law Ministers asked the Secretary-General to invite a small number of representative countries to form a group to examine further all aspects of the problem and to report in time for this meeting in New Zealand.

The report of the working group, which the Hon Justice Loizou had the honour to chair, was now before delegates. Cyprus supported this report. They looked forward to having such a Scheme agreed to at this meeting, which would facilitate at least within the Commonwealth the repatriation of stolen items and which might be a model for other regional or international organisations to adopt.

In this connection he reminded the meeting that the General Assembly of the United Nations, on 7 November 1989, had adopted a resolution in favour of the return of the cultural heritage to their place of origin, confirming by it the view that such a return support international co-operation and the preservation and blooming of universal cultural values. Cyprus had hoped that what was started by New Zealand on account of its own bitter experience could have come to a happy end here in their host country. Bearing in mind the views already expressed at the Senior Officials Meeting on account of the matter not having been given the opportunity for exhaustive discussion, he suggested the following:

1. That the meeting express gratitude for the work done by the working group.
2. That the meeting acknowledge the fact that a number of Governments were not yet in a position to express a final view on the proposal as it now stood, but should be within the next few months.
3. That once Governments had formulated their policies in respect of the proposal, the proposed Scheme as amended by the working group should be considered by Senior Officials so that when Law Ministers next meet they would be in a position to make a firm decision on the matter.

Prince Bola Ajibola (Nigeria) said that unfortunately, the issue of cultural heritage was the only one left untackled on their agenda when they had last met, in Harare. Four years had now elapsed and they had not been able to do anything concrete. He commended the efforts of the working party chaired by our Justice

Loizou. However, regrettably one could see that progress had not been as expected.

Comparatively, they had been able to make considerable progress on all other Schemes except this particular one, despite some countries being very keen to ensure that Ministers instituted a Scheme of this nature.

He suggested that the time had come when this body of Law Ministers should meet more often than it did now. He felt that waiting four years for resolutions and decisions about urgent and important matters allowed many of them to lapse. Since he would not be able to be present as he might have to leave, he suggested that Ministers seriously consider on Friday the possibility of their meeting more often than they do now. He appreciated the fact that their Senior Officials met more often than Ministers did, however, there was a lot to be said for Ministers meeting more often perhaps every two years or so - in order to be able to approve, ratify, or make use of the suggestions and recommendations of their Senior Officials.

The Hon DR G W Kanyeihamba (Uganda) understood that the item would be postponed for future discussion. He shared the views expressed by the distinguished delegate from Nigeria that matters of this kind should be dealt with expeditiously.

Having said that, he would like to mention one or two points about the report. First, in relation to the certificate which authorises the items to be taken out of the country, the Scheme should provide for fraud. Certificates could be obtained by fraud, and he thought there should be a defence for the country claiming back the object to show that fraudulent dealings were involved in the matter. Second, the six months time period after the object had been obtained was too short. The period should be extended to enable the country of origin to make the necessary searches and investigations to ensure that the objects of art were not taken from the country illegally or fraudulently.

The Chairman observed that his government had a strong view on this issue in favour of reform, and he gave an example of what had happened to them. New Zealand lost an item of cultural heritage - it was a letter written by Captain James Cook, and all would appreciate the historical importance of that personality to all in the Pacific. Captain Cook had written a letter to his second-in-command in 1776 and it had fallen into the hands of a club in New Zealand. In April 1988, the New Zealand Government was advised that the club which owned the letter had sent it to England for sale. The club was duly convicted of the charge of removing a document of special value from New Zealand without reasonable excuse and without the necessary certificate of permission from the relevant government authority, contrary to the Antiquities Act. The government did not take action in the English courts to have the letter returned because previous experience suggested the prin-

ciple that English courts would apply would be not to uphold the penal or public laws of another country, as foreshadowed in the Ortiz case. However, the episode had had a happy ending. Through the great generosity

of the City of London, the Cook instruction had been purchased by it and returned to New Zealand as a 1990 gift.

The CHAIRMAN then put the suggestion and this was adopted.

Annexe 3

Extracts from Discussions at Senior Officials' Meeting, Singapore, 1992

The Hon Tan Boon Teik (Chairman) in introducing the next agenda item said that it concerned the material cultural heritage and was set out in paper SOLM(92)20 which had been circulated. The paper contained the proposed scheme on the material cultural heritage within the Commonwealth. This was a matter that had become caught up in both the efforts of UNIDROIT to effectively redraft the UNESCO Convention and with moves within the European Community to afford protection to material cultural heritage in advance of the single market that was to come into being in 1993. Paper 20 was submitted by New Zealand and it might therefore be appropriate for the distinguished delegate from New Zealand to introduce the discussions.

Mrs Janice Lowe (New Zealand) said that New Zealand had a long standing interest in the matter going back to 1983. The purpose of the draft scheme for the protection of the cultural heritage within the Commonwealth was to secure legislation in the Commonwealth that would enable the return of cultural property that had been lost or stolen or unlawfully exported from the country of origin. To that extent it was not dissimilar to other Commonwealth arrangements such as that relating to extradition. Items of cultural heritage continued to be lost at an alarming rate to the countries of origin because of inadequate international cooperation to secure their return. It seemed fairly clear to her that the situation would not improve until there was much greater mutual assistance between countries to attack the problem. They therefore felt that the draft scheme on the protection of the cultural heritage fitted in very well with the rest of the Commonwealth programme on mutual assistance. They believed that it was actually a very advanced document of its kind. Nonetheless they also felt that it was perhaps a little too advanced and probably its time had not yet come. Whatever the reason their assessment was that it had not yet achieved the degree of support necessary for it to be implemented at this particular stage but that equally it was important to make some progress on the matter because cultural property continued to be lost to its country of origin. There were, as the Chairman had indicated, some very encouraging developments going on in other forums - the Commission for the European Communities had recently issued a draft directive for consideration by member states of the community to give some protec-

tion in the light of the pending move to a single European market at end of 1992.

The second development was that UNIDROIT, the Institute for the Unification of Private Law based in Rome, had actually prepared a draft treaty on the return of stolen and illegally exported cultural objects. As she understood it the proposal being developed by UNIDROIT was however expected to proceed only quite slowly with perhaps an outer limit of about 1995 for something to be finalised. Against this particular background New Zealand had made some proposals in Paper No. 20. There were 2 proposals which appeared on page 8 of that paper. She wanted to make it clear at this stage that proposals A and B on page 8 were actually a package. They were meant to be taken together and were not meant to be alternatives and she apologised if there was some lack of clarity there which may have confused some delegates. The 2 proposals were to be taken together as a package.

The first proposal, proposal A, was that further consideration of the draft Commonwealth Scheme should be deferred for the time being and the position reviewed at the next regular meeting of Senior Officials, that is to say, the next meeting of this nature after the Mauritius Meeting of Law Ministers. As she had just mentioned the question of providing adequate protection for cultural property was being discussed elsewhere and there could well be advantages in awaiting developments on those processes without necessarily regarding them as a solution to all the problems. The second proposal, proposal B, was meant to complement the first proposal and it would ask Law Ministers Meeting in Mauritius to consider the desirability of promoting not the draft Commonwealth Scheme at this stage because it seemed rather premature for that but some more basic, less ambitious, legislation that would at least assist the return of unlawfully exported items within the Commonwealth in the meantime. Some states around the table had adequate legislation already and she believed Australia was one of them. The legislation contemplated in proposal B would deal with the situation where an item of cultural property had been unlawfully exported to another country within the Commonwealth. Essentially the legislation would allow the courts in the country of import i.e. the place where the cultural property was found, to recognise and deal with claims for the return

of that property to the place from which it had been stolen or from which it had been unlawfully exported. That was the essence of proposal B, that domestic legislation in each Commonwealth country would empower the courts of that country to deal with claims from other countries for the return of unlawfully exported or stolen cultural property. The legislation would have to address some other matters as well and among these would be what was meant by cultural property, time limits within which claims for the return of cultural property would have to be made, and also very importantly the prospect of compensation for *bona fide* purchasers of stolen or illegally exported property.

The Appendix to paper 1 sets out in very tentative form only an example of what the legislation might look like but she could not stress too strongly that there were obviously different ways of legislating on the matter and what was set out in the appendix was merely an example of how one might tackle the problem. She believed that the precise content of the legislation would be a matter for the domestic law and practice of each Commonwealth jurisdiction. New Zealand was very relaxed about the scope of any such legislation might take so long as it was effective enough to achieve its purpose and that would be to secure the return of cultural property lost from now on to its country of origin. She wanted to clarify that there was no question politically at this stage of making such legislation retrospective in the sense of picking up articles that were removed long ago. The critical factor was that the operation of any such legislation should not have to be dependent on the existence of a treaty relationship between the country where the property turned up and the country claiming it back. She thought that if it was based on treaty relationships it would become cumbersome and unworkable. In other words, the legislation would operate in a similar way to the legislation that gave effect in each country to the Commonwealth Scheme on the Rendition of Fugitive Offenders. No treaty would be necessary. Nor did she think that the legislation should be based on strict reciprocity in what countries were prepared to offer. In other words she thought it would be rather unfortunate if country A would only return items to country B if country B gave exactly the same facility on the basis of reciprocity. If one allowed more flexibility in the nature of the legislation there would be more prospect of getting legislation around the Commonwealth on the books somewhat more quickly.

Finally they in New Zealand believed that it was urgent to take some action as soon as possible to stem the tide of current losses of cultural property. They did not think it was really a matter on which the Commonwealth could afford to wait until schemes in other forums were completed because the time frame for that could be quite lengthy. Their proposals were put forward in a spirit of compromise with a real desire to make progress

and if it should find favour, New Zealand would be very happy to participate in a small committee of interested countries which could work on the details of a suitable paper that could go to Law Ministers in Mauritius. Essentially she contemplated that the paper would be a recommendation for legislation along the lines of proposal B but that could be subject to development as well.

The Hon Tan Boon Teik (Chairman) invited delegates who wished to make comments to do so.

Dr V K Agarwal (India) said that India fully supported the proposal of the New Zealand Government. The problem of the protection of cultural property was of significant magnitude in some of the Commonwealth jurisdictions and India was one such country facing problems in this area. Earlier a working group had been constituted to look into the problem and to prepare a draft scheme. Much time, labour and money had gone into it and a scheme had been prepared but somehow the scheme did not find wider support from some jurisdictions and had to be kept pending. He felt that the present proposal by the New Zealand Government to promote basic legislation for the purpose of protection of cultural property deserved serious consideration by Senior Officials and they supported proposal B and he suggested Law Ministers be asked to consider the desirability of promoting legislation the details of which could be worked out by another working group after the proposal had been accepted in principle.

Mr Amjad Ali (Pakistan) said that as the distinguished delegate from India had just commented, Pakistan was also one of the countries which was suffering because of the transfer of cultural heritage. It was not just the cultural heritage but they were also losing some rare birds such as the eagle and certain other birds that were being exported out of Pakistan. They fully supported the passing of legislation which should be considered as part of mutual assistance. They also supported the proposal that the matter should be placed on the agenda of the next Law Ministers Meeting.

Mr Petros Clerides (Cyprus) said that his country strongly supported the proposal by New Zealand. As delegates knew Cyprus had been consistent in supporting every proposal of this kind. As the distinguished delegate from New Zealand had said the topic was receiving attention elsewhere and he felt that the Commonwealth should not be the last to take measures for the protection of its cultural heritage. This matter had been discussed in 1983 in Colombo and then again in 1986 at Harare and yet again in 1990 at New Zealand. He therefore thought that it was about time for measures to be taken as the delegate of New Zealand has proposed.

Mr P B Herat (Sri Lanka) said that it was a matter of great concern to Sri Lanka since it was proposed in Co-

lombo. They strongly supported the proposal by New Zealand and wanted the matter to be placed on the agenda for the Law Ministers Meeting in Mauritius.

Dr Silvio Camilleri (Malta) said that he was sure that New Zealand's proposal would find support among all the countries around the table because after all this matter should be considered as an appeal for solidarity between member states of the Commonwealth, solidarity in so far as cultural matters were concerned. The only reasons he could think of which might have caused postponement of the scheme and he remembered discussing the scheme in London and had thought that some progress had been made but which apparently had now stalled would be the technical aspects involved like certification procedures, classification and the question of title and compensation. These were all technical matters and he did not see any reason why in principle there should not be basic agreement on the possibility of such a scheme and he could not see any problem as far as Malta was concerned even though there had been a number of instances where attempts had been made to illegally export items of important historical value out of Malta and there had been a public outcry. Nevertheless he supported agreement on the basic principle of the scheme namely that all efforts should be made to see that cultural items illegally exported from their country of origin were returned to the country of origin and he did not see that there should be any disagreement of principle and why discussions and further attempts should not be made to try to avoid these technical difficulties which were causing obstacles to finalisation of a scheme of this sort.

Mr Don Piragoff (Canada) said that Canada's position was one of qualified support for the proposals by New Zealand. They supported the first proposal but were concerned that the matter not be deferred for as long as New Zealand had proposed, namely to the next meeting of Senior Officials which would essentially not be for another three years and that it not be discussed by Law Ministers at their meeting in Mauritius except in principle. Secondly, he felt that a rose was a rose by whatever name one wished to call it. Proposal B talked about the creation of draft model legislation and Canada did not really see that as being any different from the notion of the original draft model scheme which had been developed over the last couple of years, in particular, by a working group that had consisted of representatives of Britain, Canada, Cyprus, India, Malaysia, New Zealand and Nigeria and which last met in November 1989. The draft model scheme which was currently on the table was not necessarily treaty based. It was not necessarily reciprocity based. It was essentially a scheme, a model being recommended to Commonwealth countries to implement the scheme. They all knew the way in which schemes were currently implemented within the Commonwealth; that is, each Com-

monwealth jurisdiction passed legislation and provided some sort of reciprocal benefits or direct benefit to other Commonwealth countries. So whether one was talking about draft model legislation or completion of the scheme already in the process of being drafted, they were really talking about the same thing. The way the scheme was to be implemented was for each country to follow the principles of the scheme and adopt legislation. Therefore, he did not see the need to drop the scheme and start drafting model legislation because the principles that would be in a draft model legislation would be the same principles that would be in the scheme.

That brought him to the second point where his delegation had great concern with the proposal on the table. This was on the draft model legislation proposed by New Zealand, and he took it that New Zealand had indicated that this was not necessarily a firm proposal but that this was merely an example of how it could be done, and there could be other ways in which the legislation could be done. Canada was supportive of further work being done on the draft model scheme and that it be completed. They preferred the type of scheme which existed currently in the draft model, which was a scheme essentially based on the notion that a country designated classes of property that it considered to be of cultural heritage and importance to it and that another country, and courts of another country, would recognise that designation, and there would be 2 questions or 3 questions for the court of the other country to determine:

1. Was the property in question a member of a class designated by the other country?
2. Had the property been exported illegally out of that country? and
3. Determine the question of compensation or any third party rights that may exist.

The concern that Canada had about the proposal in B was that it was not based on a designation scheme but rather on a scheme based on legal title, determining legal title, i.e. that the courts of the requesting state should have the power and the jurisdiction to determine issues of legal title. In their opinion, questions of legal title and trying to determine return of property based on legal title really complicated the matter and it was a sure way to ensure that the property was not returned. Questions of who had legal title were difficult. Who had legal title if an artifact was dug out of the ground and found. Was it the individual who found it? Was it the employer of that individual? Was it the financier who had embarked upon an archeological expedition to dig, or was it the lease holder who leased the land, or was it the property owner of the land upon which the artifact was found? Was it, perhaps the mortgage holder of the property because the property was mortgaged to the bank, or was it some other institution within the government? Was it the government of the requesting state

which had the proper legal title, or was it some third party? These were all questions of legal title that had to be resolved by the requesting state. To ask of the court of the requested state to start applying foreign law, which was totally foreign to it, in order to determine questions of legal title as to whether the property should be returned merely complicated the matter. He thought that the scheme which was currently being developed was a much simpler scheme, which essentially was that the requested country did not really care about who had title; i.e. was it the tenant, was it the government, was it the church, was it some special cultural agency in their country? What it was concerned about was that that country had designated the property as being of cultural importance to it, that the property had been illegally exported and that it was sufficient for the requested country to determine that the property be returned subject to questions of compensation for innocent third party purchasers. That was the scheme that has been developed to date and they would not like to see the simplicity of that scheme tied up with murky legal concepts such as title.

Having said that, they would like to see further work undertaken on the scheme, whether it was called the scheme or model legislation or whether it was called the basis upon which countries may draft model legislation. That was a question of a rose being a rose. To that extent, if New Zealand was indicating that what they would really like to see was that countries enact legislation and that the Commonwealth should devise a basis for what the commonality of the legislation should be, they were in support. Their point of difference was that they were not in agreement with the scheme which was attached as an annex to the New Zealand paper. In terms of the principle, they were in support of that but their recommendation would have been that another meeting of the small experts body meet possibly in a year's time from now, after UNIDROIT had met in October 1992. The expert body could look at the results of what had happened at the UNIDROIT Meeting to see if there would be any need for further amendments to be made to the draft scheme. If the draft scheme was not ready for ministers to adopt at their meeting since there might not be an intervening Senior Officials Meeting, at least there would be a progress report which would say that officials had done some more work, that they had looked at what had happened at UNIDROIT and other meetings and had made some recommendations and that that was a status report for the Law Ministers Meeting. The next Senior Officials Meeting would have a more advanced discussion and a product to look at.

He would also refer to a brochure that been distributed the day before containing some information on protecting movable cultural property which tied in with the computerisation project, both in terms of the online and

also the advantages of the CD-Rom. Canada had made an offer to the United Nations at the 8th UN Congress to make available to the United Nations, and essentially the world at large, access to a computerised data base which was currently in operation in Canada on a commercial basis to a number of museums and a number of countries around the world. The idea was that the data base was a repository of various artifacts that had either been classified by countries as being of importance or missing or had been stolen. The data base could be used by police agencies to try to find out if an object which had come into their possession was stolen or had been illegally exported, because they could have quick reference to the data base to determine whether it had been stolen. Museums could have quick access to the data base to determine if something which they had acquired, or were about to acquire, was illegally exported or had been stolen from another country.

The scheme operated or could operate in two different ways: one by online access to the data base for which the current costs were approximately US\$40 an hour. The time to access the data base took only a few minutes of online time in order to get on to do a search. The other more economical way was that CD-Roms would be produced, the CDs would be sent to individual countries who could then use an ordinary PC and they would have their own repository of the exact data base so that they could check locally as opposed to doing it by means of telecommunications. The plan was that the CDs would be updated periodically, once or twice a year, such that, like the law reports and the idea of maintaining a CD data base of legislation and jurisprudence of the Commonwealth, there would be a CD-Rom library of a list of artifacts which have been stolen. The material which he had distributed provided greater detail than he had just recited and also details where one could write in order to seek further information concerning the proposal. On that basis he would close by saying that they were supportive of the matter moving forward, but that they did not wish to lose a lot of the work that had already been accomplished on the basis of the draft model by merely shifting gears and moving to another type of scheme which was based on something different from what the experts had already been working on over the last few years within the Commonwealth.

Mrs Janice Lowe (New Zealand) said that she wanted to clarify one or two matters arising from what the delegate from Canada had said. Proposal B did not in fact suggest model legislation at all. All it proposed was that Law Ministers look at the desirability of promoting some basic legislation without indicating that there was to be any model or uniform legislation. The idea was to enable each individual country to go as far as they wished and felt able to in protecting cultural property without feeling hamstrung by the existence of a formal model or scheme. That was the philosophy behind pro-

posals B. It was not aimed at setting out a piece of model legislation in opposition to a draft scheme that they already had but of enabling countries to do what they could to help other countries who have lost cultural property. That led on to the second proposal that she mentioned when discussing the item and that was there should be a small group to settle before Mauritius the exact nature of the paper that would go to Mauritius and that would enable consideration to be given to what developments there had been in both the European Communities forum and UNIDROIT forum. She hoped that this clarified matters and she did not know that there was too much difference in the light of that explanation between the position of New Zealand and that of Canada and she was heartened to hear the support of Canada for the draft scheme. She also wished to add that if in pursuance of proposal B countries wished to implement the draft scheme in their law then proposal B was quite flexible enough to accommodate that also, because what it was saying to countries and what it would be suggested that Ministers consider, would be that countries legislate in whatever manner they felt comfortable with and appropriate to their own legal systems in order to achieve the goal of securing greater protection for cultural property.

The Hon Tan Boon Teik (Chairman) suggested that instead of forming another group to look into the matter to progress it, it might be better to ask the already existing group that has done some work on the matter to take on the lead role and perhaps meet after UNIDROIT and EEC have come up with their own recommendations. He thought it would be to the advantage of this working group that they wait for the results of the deliberations by these two other bodies and some others that may be in existence before meeting again so that some concrete proposals could be made for consideration at some later meeting by Law Ministers. He did not think it would be sufficient to wait for the next meeting of Law Ministers. Perhaps this working group should convene as suggested by Canada about a year from now by when the reports by UNIDROIT and the EEC group would be available.

Ms Segopolo (Botswana) said that Botswana would like to support the suggestion put forward by New Zealand that work on this particular scheme should not stop and that efforts should continue to be made to resolve the problems that face a lot of Commonwealth countries among which was Botswana from which a lot of cultural objects had been removed unlawfully. They found out that if they were not careful there would be no cultural objects left to talk about. They would therefore support any moves towards solving this problem. She would agree with the delegate from Canada that the matter of legal title was one that should be looked at very carefully because it could get very complicated if this issue took on a complexion which made it difficult

for requested countries to determine who owned the property. Basically what they were concerned about was the return of those objects in the manner suggested broadly under the scheme by designating what was a cultural object for the purposes of the country concerned and obtain assistance from the state in which the object happened to be. She agreed that the scheme in its present form needed a bit of modification so that everybody could reach a point of agreement and then move forward from there.

Mr Austin Wilson (Britain) said that he would say a few words about the United Kingdom position generally and then comment on the New Zealand proposal. On the UK position generally he wanted to make it as clear as he could that the United Kingdom fully recognised that what they had been discussing over the last few years was a very real and distressing problem. They did not believe this was a problem that could not effectively be tackled. Indeed they were of the opposite view and that was why they had participated in good faith in a number of international cooperative efforts to deal effectively with it. At the same time however they had recognised that the problem was one which, if it was to be effectively addressed, could only be so addressed if there was an effective legislation within each state. They recognised they were one of those states to which cultural property had a habit of coming and therefore they would need to have in place effective legislation. That was not technically easy or technically impossible either because they did not think there were any problems that could not be overcome. They would like to do something and it was their intention to do so.

However they also recognised that this was a problem that was not confined to the Commonwealth. There were countries not within the Commonwealth who had experienced some of the difficulties and depredations to which reference had been made. As the meeting had been reminded, there was across the world community, going wider than the Commonwealth, an attempt being made to deal with the problem - indeed in the UNIDROIT negotiations to which reference had been made, and, as he had indicated, the U.K. was playing its part in those discussions which were ongoing. The last discussions were in January 1992 and some of the delegates around the table would know because their countries were represented and there would be another UNIDROIT meeting in October 1992 and the United Kingdom hoped very much that within the UNIDROIT umbrella they would find some effective means of dealing with the problem which they saw as being beyond the Commonwealth.

The other area, in which the United Kingdom, and he was using that expression geographically, was involved was the European Community where there was another complication facing them. Like all member states in the European Community, the United Kingdom had an ob-

ligation under the Treaty of Rome to promote what is described as legitimate trade in cultural goods within the single market. As everyone knew the internal barriers within that market would be finally removed at the end of 1992 on 1 January 1993. That created the possibility that those barriers could facilitate the removal of cultural objects illegally within the community from one country to another.

To meet that problem the Commission of the community had produced a draft directive which although still a draft, could provide a mechanism, a court based mechanism, which would provide for the return of national treasure unlawfully removed after 1 January 1993. By a little later on in 1992, about the time the UNIDROIT second meeting took place, he thought the United Kingdom would be in a much better position to know what its obligations were likely to be under the European Community framework and they would also know where they were at the end of the UNIDROIT discussions. Against that background the United Kingdom was very ready to give what he thought the Canadian delegate described as qualified but not in fact very qualified support to the New Zealand proposal. They agreed very much with the New Zealand delegate's view that they had not quite reached the time when it could be said that the moment for the Commonwealth Scheme had come but they were in favour of making progress and they believed it would be worthwhile for Commonwealth Ministers when they meet in Mauritius to at least take stock of where they were at that point when they would know on the United Kingdom side where they stood in relation to Europe. Other countries would also know the stage of the UNIDROIT discussions so that by the time of Mauritius it should be possible for Law Ministers to reach some view on what would be the best way forward. That might be a view that concludes that the right way would be for the Commonwealth to go on its own with a Scheme or it might be a conclusion that it might be best for everybody to get under the umbrella of the UNIDROIT multilateral arrangement. The United Kingdom saw no special benefit in there being a Scheme confined simply to the Commonwealth unless the view is taken that there would be no progress on a wider front, in which case the value of a Commonwealth Scheme becomes the greater.

In conclusion, the United Kingdom agreed that there was a problem that should be tackled. It wanted to play its part in tackling that problem. It did not believe that they were ready yet to take action which in their terms could only mean legislation which had to be got right as they would have only one chance to legislate in the next ten years or so and it would be best to get it right the first time. They thought Mauritius in about eighteen months time would be the right time to take stock and if the New Zealand proposal could be interpreted in that way, without any preconceptions as to where they might be,

they would be very glad to see the item included as an item in that Meeting's agenda.

The Hon Tan Boon Teik (Chairman) proposed a short break before continuing the discussion to consider whether the matter should be placed before Law Ministers in Mauritius.

The Chairman called the Meeting to order and invited the distinguished delegate from Nigeria to speak.

Mr Yemi Osinbajo (Nigeria) said that he wished to express the support of Nigeria for the proposal by New Zealand. In particular they would like to say that having regard to the slow pace at which the Scheme had been moving the proposal for specific legislation by individual member states was a worthwhile one and they thought that it should be considered whether such legislation should be in the form already proposed by New Zealand or in whichever form individual nations would rather have such legislation. He would also suggest that the issue should be placed again before Ministers in Mauritius. He noticed that it was not on the draft proposals for Mauritius but hoped it would be included.

The Hon Tan Boon Teik (Chairman) said that he believed this would be done and invited more views.

Mrs Priscilla Madzonga (Zimbabwe) said she believed that when the last small group met in 1989 they were mainly concerned with producing a draft Scheme on this subject and she wondered whether when the group would meet again after the UNIDROIT meeting in October they would again be concerned with producing a Scheme. She would propose that there should be a draft to be put before Law Ministers for their consideration and perhaps if there was time the draft should be circulated before the Senior Officials Meeting so that they could consider it ahead of their meeting.

The Chairman invited the distinguished delegate from New Zealand to respond.

Mrs Janice Lowe (New Zealand) said she had not envisaged the small group meeting as actually a drafting meeting but more as a meeting to settle the shape of the proposals that would go to Ministers in Mauritius. She thought it would be difficult at this stage to say what should be the brief of the small group meeting because there were developments going on which might influence the shape of the agenda the small group would have. She would however suggest that the broad nature of the work of the small group could perhaps be clarified towards the end of 1992 and at any rate after the UNIDROIT meeting. She hoped that would meet the concerns of the distinguished delegate from Zimbabwe.

Mrs Priscilla Madzonga (Zimbabwe) said that for the sake of progress on this issue there needed to be something to be put before Law Ministers for their consideration otherwise there was a risk that the matter will again be deferred at the next meeting.

The Hon Tan Boon Teik (Chairman) agreed that the distinguished delegate had made a valid point but said he was certain the group would not allow that to happen as there was already a draft, but it should not be called a draft model as otherwise Law Ministers might feel they were being presented with a *fait accompli*.

Mrs Priscilla Madzonga (Zimbabwe) commented further that a lot of work had gone into that draft and if the small group was to meet before the Mauritius Meeting they should be able to present to Law Ministers at least what was there and what was being proposed after a revision.

The Hon Tan Boon Teik (Chairman) agreed that that was what would be done and the brief would be a broad one so that the group would not be tied.

Mr Austin Wilson (Britain) said that his understanding of what the meeting would be agreeing to was simply that they should have as proposed, as soon as convenient after the UNIDROIT meeting in October, a meeting of the small working group which would in effect take stock of the position that had been reached following the two developments to which the New Zealand delegate referred to at the beginning, one being the European Community initiative and secondly the UNIDROIT discussions. That meeting should decide in principle in so far as it would be able and in so far as they were 5 member states what would in effect be a proposal to put to the meeting in Mauritius, not necessarily with any preconception that that proposal would be an invitation to the ministers to agree on a draft scheme because it would be possible, and he put it no higher than that, that the meeting of that small working group might conclude, in the light of progress made at the UNIDROIT discussion, that what was required at the ministers' meeting was not so much endorsement of a Commonwealth scheme but an invitation to members of the Commonwealth to adhere to the UNIDROIT scheme. He therefore thought that it was as open as that but that there should be available to ministers in Mauritius, in good time, picking up the point made by the distinguished delegate from Zimbabwe, a proposal on the way forward. There was general agreement on that but not as to the precise nature of the proposal.

Mrs Janice Lowe (New Zealand) said that she did not think New Zealand would wish to necessarily preclude the possibility of doing some drafting in the small group, nor would it wish to say at that stage that the small group must have as part of its brief a draft in the sense suggested by Zimbabwe. They would prefer the terms of reference of the group to be kept comparatively flexible, not to close off any options whatsoever and to take stock when the group met which she understood would be not later than March 1993 so that there would be plenty of time before the Ministers' Meeting for the paper to be prepared in whatever form it was thought

desirable or necessary having regard to those developments.

The Hon Tan Boon Teik (Chairman) observed that he shared the anxieties of the distinguished delegate from Zimbabwe. All he was concerned with was to see the matter progressed and that Senior Officials did not go from Meeting to Meeting determining the scope of the inquiry they were embarking upon.

Mr P B Herat (Sri Lanka) wanted to know whether there was any possibility of any other interested country participating in the group.

The Hon Tan Boon Teik (Chairman) said that if he wished to volunteer his services his participation would be gladly accepted.

Dr V K Agarwal (India) said that in view of the proposal by the distinguished delegate from Zimbabwe which had been accepted as well as those by the UK and New Zealand, he wondered whether a specific item could be added to the document SOLM(92)24 Annex B as an item of agenda on this particular subject because at present it was not included in the draft agenda for the Law Ministers Meeting.

The Hon Tan Boon Teik (Chairman) confirmed that this would be so and in summarising said that he believed it was the desire of the meeting that the matter should be progressed further and that the working group would meet not later than February or March 1993 and that a definite approach be proposed for consideration by Law Ministers at their meeting in Mauritius in 1993.

Illustrative Draft of Proposed Guidelines for the Treatment of Prisoners within the Commonwealth

Memorandum by the Commonwealth Secretariat

Background

For some time it had been put to the Secretariat that it would be advantageous, and very much in accord with Commonwealth practice and ideals, for the Commonwealth to have its own minimum standards or rules for the treatment of prisoners. The suggestion was that the feasibility and desirability of having a Commonwealth regime should be explored. With the Commonwealth increasingly active in the field of human rights, it was felt that such standards would be wholly consistent with the objectives of Commonwealth leaders as set out in their Harare Declaration of 1991.

The suggestion was made in full cognizance of the fact that UN Standard Minimum Rules are subscribed to by Commonwealth correctional administrations; and that in addition to having their own domestic minimum standard rules, a number of countries also subscribe to regional arrangements. It was therefore recognised from the outset that any such Commonwealth standards would in large measure reflect the provisions of existing instruments.

However, it was put to the Secretariat that the existing UN Rules, although very largely appropriate, nonetheless do present difficulties in some areas even to the most accommodating administrations. Thus it was felt that a set of Commonwealth standards (however styled) could be formulated which might meet these difficulties, and would result in a wholly achievable set of sound and humane standards fully consistent with the experience of the last thirty-six years since the UN Rules were promulgated by the General Assembly.

Working draft "guidelines"

Against this background the Secretariat invited two consultants - Mr Anthony Webb, QC (former Attorney-General of Kenya) and Mr Tom Garner (former Governor of the Hong Kong Prison Service) - to examine existing rules and standards and to produce a working draft for consideration by the Conference of Commonwealth Correctional Administrators. Before commissioning the working draft, the Secretariat had ascertained from the Crime Prevention and Control Branch of the United Nations in Geneva that they had no present plans to revisit or revise the UN Rules. The Branch was wholly supportive of the Commonwealth

re-examining the matter in the light of experience and producing a set of standards (based on the UN Rules) which might in turn lend impetus to an eventual revision of the UN Rules themselves.

Consideration by Correctional Administrators

The Webb/Garner draft rules was duly considered by the Conference of Commonwealth Correctional Administrators at their meeting in Harare, Zimbabwe, in May 1992. In the discussions a number of delegates expressed strong support for the proposed draft standards in the form of a set of Commonwealth "Rules". They were considered congruent with other sets of rules and the general view was that it should be possible for the Commonwealth as a more homogeneous group to go further with the proposed standards than perhaps other global groups.

A smaller number of delegates questioned the need for the Commonwealth to introduce another set of "Rules", as some countries were already subscribing to two sets of rules under the UN system and the Council of Europe.

In the light of the discussions it was agreed that the working draft should not be given the status of "rules", but rather that of an "illustrative draft" proposing "guidelines". It was further agreed that these might be modified by the Commonwealth Secretariat after receiving comments from delegates, the Secretariat then to submit the "illustrative draft" for consideration by Law Ministers.

It was considered desirable for Law Ministers to mandate the exercise before any redrafting was attempted. The view was expressed that while it would aid the deliberations and working of the Conference of Commonwealth Administrators for them to have a set of principles to discuss and to develop, any such document would need the endorsement of an appropriate Commonwealth ministerial meeting.

Proposal

The Meeting is not being asked to adopt the draft attached to this memorandum, nor to discuss its contents. Rather, Law Ministers are invited simply to consider the illustrative draft and to determine whether the Conference of Commonwealth Correctional Administrators should be given the political mandate to develop an

appropriate document for consideration by a future Law Ministers' Meeting.

In the event of Law Ministers giving such a mandate, it is anticipated that a drafting committee will examine the illustrative draft in the light of the proceedings and the decisions taken by Law Ministers in Mauritius and by Correctional Administrators at their meeting in Harare last year.

At Harare, Canada, New Zealand, Trinidad & Tobago and Zimbabwe all indicated a wish to serve on such a drafting committee. The Commonwealth Secretariat is in a position to provide the support services in the normal way. It would be open to any other country to join the drafting committee. The committee would submit any draft to be produced for consideration by the Conference of Commonwealth Correctional Administrators at their next meeting, in the Kingdom of Tonga in 1995.

INTRODUCTION

These **Guidelines** have their origin in proposals made by the International Penal and Penitentiary Commission between 1929 and 1933 and recommended to Governments by the Assembly of the League of Nations in 1934 and 1935. After the war the United Nations convened, in 1949, a body of international penologists to consider the rules, and their revised draft, and after approval by all the Regional Groups within the organisation, was adopted and promulgated on 30th August 1955 at the First United Nations Congress on the Prevention of Crime and Treatment of Offenders. Since then much progress has been achieved by many countries in the implementation of the rules, and at each succeeding Congress they have been the subject of discussion.

In 1968 the European Committee on Crime Problems, which had been established by the Council of Europe in

1957, was invited to adapt the United Nations rules to the needs of contemporary penal policy and to further their effective application in Europe. European Governments adopted a revised version in 1973. This Committee has reviewed the European rules every five years in the light of reports on their application and relevance from Governments and from directors of prison administrations and of contemporary developments in penal philosophy and practice. In 1987 the Council of Europe approved an improved version, taking into account all this information.

While recognition must be given to those countries that have standards and practices far in advance of most of the rules, the implementation of all of them does present difficulties to some authorities. Such factors as overcrowding or crowding (depending on presentation), the high costs of building and staffing prisons and other types of correctional facilities, particularly in the face of other demands on government financial resources in such fields as medical, educational, social welfare etc., usually leaves a correctional service having to face, with little support, fierce competition for limited funds.

Taking the Council of Europe rules as a basis, it is proposed that the Commonwealth consider the feasibility of adopting a code which can be applicable to all the countries within the Commonwealth. The attached **illustrative draft** also has had regard to the Beijing Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly of the United Nations in 1985 (**Clause 12**), and to developments in the possibility of transferring convicted foreign offenders to their home countries, particularly the Commonwealth Scheme for the Transfer of Convicted Offenders (**Clauses 99 to 107**).

In a number of the **Clauses** alternative versions are enclosed in square brackets [].

Proposed Guidelines for the Treatment of Prisoners within the Commonwealth

PREAMBLE

The purposes of these **Guidelines** are:

- (a) to establish a range of minimum standards for all those aspects of prison administration that are essential to humane conditions and the positive treatment of prisoners in modern and progressive systems;
- (b) to serve as a stimulus to prison administrations to develop policies and management style and practice based on good contemporary principles of purpose and equity;
- (c) to encourage in prison staff professional attitudes that reflect the importance of their work and to create conditions in which they can optimise their own performance to the benefit of society in general, the prisoners in their care and their own professional satisfaction;
- (d) to provide realistic basic criteria against which prison administrations and those responsible for inspecting the conditions and management of prisons can make valid judgments of performance and measure progress towards higher standards.

The **Guidelines** are not intended to describe in detail a model system. In view of the great variety of legal, social, economic and geographical conditions in different countries in the Commonwealth, it is evident that not all of the **Guidelines** are capable of application in all countries and at all times. Wherever there are difficulties or practical problems to overcome in the application of the **Guidelines**, the Commonwealth Secretariat has the machinery and the expertise available to assist with advice and the fruits of the experience of the various prison administrations within its sphere.

In these **Guidelines**, emphasis has been placed on the precepts of human dignity, the commitment of prison administrations to humane and positive treatment, the importance of staff roles and effective modern management approaches. They are set out to provide ready reference, encouragement and guidance to those who are working at all levels of prison administration.

PART I

The basic principles

1. The deprivation of liberty shall be effected in physical and psychological conditions which ensure respect for human dignity and are in conformity with these **Guidelines**.
2. The **Guidelines** shall be applied impartially. There shall be no discrimination on grounds of race,

colour, sex, language, religion, political or other opinion, national or social origin, birth, economic or other statutes. The religious beliefs and moral precepts of the group to which a prisoner belongs shall be respected.

3. The purposes of the treatment of persons in custody shall be such as to sustain their health and self-respect and, so far as the length of sentence permits, to develop their sense of responsibility and to encourage those attitudes and skills that will assist them to return to society with the best chance of leading law-abiding and self-supporting lives after their release.

4. There shall be regular inspections of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular, to monitor whether and to what extent these institutions are administered in accordance with existing laws and regulations, the objectives of the prison services and the requirements of these rules.

5. The protection of the individual rights of prisoners with special regard to the legality of the execution of detention measures shall be secured by means of a control carried out, according to national, State or Provincial rules, by a judicial authority or other duly constituted body authorised to visit the prisoners and not belonging to the prison administration. [This shall not inhibit the prison administration from conducting its own investigation].

6. 1. These **Guidelines** shall be made readily available to staff in the national languages.
2. They shall also be available to prisoners in the same languages so far as is reasonable and practicable.

PART II

The management of prison systems

Reception and registration

7. 1. No person shall be received in an institution without a valid commitment order.
2. The essential details of the commitment and reception shall immediately be recorded.
8. In every place where persons are imprisoned a complete and secure record of the following information shall be kept concerning each prisoner received:
 - (a) information concerning the identity of the prisoner;
 - (b) the reasons for commitment and the authority therefor;

- (c) the day and hour of admission and release.
9. Reception arrangements shall conform with the basic principles of the **Guidelines** and shall assist prisoners to resolve their urgent personal problems.
 10. 1. As soon as possible after reception and after a prisoner has been medically examined in accordance with **Clause 30**, a programme of treatment and training in an appropriate institution shall be prepared for each prisoner with a sentence of suitable length in preparation for ultimate release, in the light of medical and other reports and personal information, including personality, individual needs, capacity and personal situation, especially proximity to relatives, and submitted to the Director for information or approval.
 2. Such programmes shall always include reports by a medical officer and the personnel in direct charge of the prisoner concerned.
 3. Reports and information concerning prisoners shall be maintained with due regard to confidentiality on an individual basis, regularly kept up to date and only accessible to authorised persons.

The allocation and classification of prisoners

11. 1. In allocating prisoners to different institutions or regimes, due account shall be taken of their judicial and legal situation (untried or convicted prisoner, juvenile, first offender or habitual offender, short sentence or long sentence), of the special requirements of their treatment, of their medical needs, their [sex] and age [and previous history].
2. Males and females shall in principle be detained separately, although they may participate together in organised activities as part of an established treatment programme.
3. In principle, untried prisoners shall be detained separately from convicted prisoners [unless they consent to being accommodated or involved together in organised activities beneficial to them] [unless there is a demonstrable benefit to the unconvicted prisoner].
12. 1. Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.
2. The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.
3. Juveniles in institutions shall receive care, protection and all necessary assistance - social, educational, vocational, psychological, medical and

physical - that they may require because of their age, sex, personality and in the interest of their wholesome development.

4. Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.
 5. In the interest and well-being of juveniles in institutions, the parents or guardians shall have a right of access [in accordance with local visiting arrangements unless restricted by a court order].
 13. The purposes of classification or re-classification of prisoners shall be:
 - (a) to separate from others those prisoners who, by reasons of their criminal records or their personality, are likely to benefit from that or who may exercise a bad influence; and
 - (b) to assist in allocating prisoners to facilitate their treatment and social resettlement taking into account the management of different treatment regimes or the allocation of specific categories of prisoners.
 14. So far as possible separate institutions or separate sections of institutions shall be used to facilitate the management of different treatment regimes or the allocation of specific categories of prisoners.
- #### *Accommodation*
15. 1. Prisoners shall normally be lodged [during the night] in individual cells [except in cases where it is considered that there are advantages in sharing accommodation with other prisoners] [unless for medical or other sufficient reason it is [necessary] [desirable] for prisoners to be associated].
 2. Where accommodation is shared it shall be occupied by prisoners suitable to associate with others in those conditions. There shall be supervision by night, in keeping with the nature of the institution.
 16. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially the cubic content of air, a reasonable amount of space, lighting, heating and ventilation.
 17. In all places where prisoners are required to live or work:
 - (a) windows shall be large enough to enable the prisoners, to read or work by natural light in normal conditions;
 - (b) windows shall be so constructed that they allow the entrance of fresh air except where there is an ade-

quate air conditioning system;

- (c) windows shall, with due regard to security requirements, present in their size, location and construction as normal an appearance as possible; and
- (d) artificial light shall satisfy recognised health and technical standards.

18. The sanitary installations and arrangements for access shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in clean and decent conditions.

19. Adequate bathing and showering installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week.

Wherever possible there should be free access at all reasonable times.

20. All parts of an institution shall be properly maintained and kept clean at all times.

Personal hygiene

21. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

22. For reasons of health and in order that prisoners may maintain a good appearance and preserve their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

Clothing and bedding

23. 1. Prisoners who are not allowed to wear their own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep them in good health. Such clothing shall in no manner be degrading or humiliating.

2. All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene.

3. Whenever prisoners obtain permission to go outside the institution, they shall be allowed to wear their own clothing or other inconspicuous clothing.

4. In this **Clause** and in **Clause 24** "clothing" includes footwear.

24. On the admission of prisoners to an institution, adequate arrangements shall be made to ensure that their personal clothing is kept in good condition and fit for use.

25. Every prisoner shall be provided with a separate bed or bed-space and separate and appropriate bedding

which shall be kept in good order and changed often enough to ensure its cleanliness.

Food

26. 1. In accordance with the standards laid down by the health authorities, the administration shall provide the prisoners at the normal times with food which is suitably prepared and presented, and which satisfies in quality and quantity the standards of dietetics and modern hygiene and takes into account their age, health, the nature of their work, and so far as possible, religious or cultural requirements.

2. Drinking water shall be available to every prisoner at all times.

Medical services

27. 1. At every institution there shall be available the services of at least one qualified general medical practitioner. The medical services should be organised in close relation with the general health administration of the community or nation. They shall include wherever practicable a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

2. The services of a qualified dental officer shall be available to every prisoner.

3. Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided at an institution, their equipment, furnishings and pharmaceutical supplies shall be suitable for the medical care and treatment of sick prisoners, and there shall be a staff of suitably trained officers.

28. Prisoners may not be submitted to any experiments which may result in physical or psychological injury.

29. 1. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. However, unless special arrangements are made, there shall in penal institutions be the necessary staff and accommodation for the confinement and post-natal care of pregnant women. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

2. Where infants are allowed to remain in the institution with their mothers, special provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

30. The medical officer shall see and examine every prisoner as soon as possible after reception and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all measures necessary for medical treatment; the segregation of prisoners suspected of infectious or contagious

conditions; the noting of physical or mental defects which might impede resettlement after release; and the determination of the fitness of every prisoner to work.

31. 1. The medical officer shall have the care of the physical and mental health of the prisoners and shall see, under the conditions and with a frequency consistent with hospital standards, all sick prisoners, all who report illness or injury and any prisoner to whom attention is specially directed.
2. The medical officer shall report to the director whenever it is considered that a prisoner's physical or mental health has been or may be adversely affected by continued imprisonment or by any condition of imprisonment [or appears to constitute a risk to the welfare of the prison staff or other prisoners].
32. 1. The medical officer or a competent authority shall regularly inspect and advise the director upon:
- (a) the quantity, quality, preparation and serving of food and water;
 - (b) the hygiene and cleanliness of the institution and prisoners;
 - (c) the sanitation, heating, lighting and ventilation of the institution;
 - (d) the suitability and cleanliness of the prisoners' clothing and bedding.
2. The director shall consider the reports and advice that the medical officer submits according to **Clause 31**, paragraph 2, and paragraph 1 of this **Clause**, and, when in concurrence with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within the director's competence or if the director does not concur with them, the director shall immediately submit a personal report and the advice of the medical officer to higher authority.
33. The medical services of the institution shall seek to detect and shall treat any physical or mental illnesses or defects which may impede a prisoner's resettlement after release. All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner to that end.

Discipline and punishment

34. Discipline and order shall be maintained in the interests of safe custody, ordered community life and the [treatment] [correctional] objectives of the institution.
35. 1. No prisoner shall be employed, in the service of the institution, in any disciplinary capacity.
2. This **Clause** shall not, however, impede the proper functioning of arrangements under which specified social, educational or sports activities or

responsibilities are entrusted under supervision to prisoners who are formed into groups for the purposes of their participation in regime programmes.

36. The following shall be provided for and determined by law or by the regulation of the competent authority:
- (a) conduct constituting a disciplinary offence;
 - (b) the types and duration of punishment which may be imposed;
 - (c) the authority competent to impose such punishment;
 - (d) access to, and the authority of, the appellate process.
37. 1. No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same act.
2. Reports of misconduct shall be presented promptly to the competent authority who shall decide on them without undue delay.
3. No prisoner shall be punished unless informed of the alleged offence and given a proper opportunity of presenting a defence.
4. Where necessary and practicable prisoners shall be allowed to make their defence through an interpreter.
38. Collective punishments, corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment shall be completely prohibited as punishments for disciplinary offences.
39. 1. Punishment by disciplinary confinement and other punishment which might have an adverse effect on the physical or mental health of the prisoner shall only be imposed if the medical officer, after examination, certifies in writing that the prisoner is fit to sustain it.
2. In no case may such punishment be contrary to, or depart from, the principles stated in **Clause 38**.
3. The medical officer [or a health care professional] shall visit daily prisoners undergoing such punishment and shall advise the director if the termination or alteration of the punishment is considered necessary on grounds of physical or mental health.

Instruments of restraint

40. The use of chains and irons shall be prohibited. Handcuffs, restraint-jackets and other body restraints shall never be applied as a punishment. They shall not be used except in the following circumstances:
- (a) if necessary, as a precaution against escape during a transfer, provided that they shall be removed

when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise;

- (b) on medical grounds by direction and under the supervision of the medical officer;
- (c) by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

41. The patterns and manner of use of the instruments of restraint authorised in the preceding paragraph shall be decided by law or regulation. Such instruments must not be applied for any longer time than is strictly necessary.

Information to, and complaints by, prisoners

- 42. 1. Every prisoner shall on admission be provided with written information about the regulations governing the treatment of prisoners of the relevant category, the disciplinary requirements of the institution, the authorised methods of seeking information and making complaints, and all such other matters as are necessary to understand the rights and obligations of prisoners and to adapt to the life of the institution.
- 2. If a prisoner cannot understand the written information provided, this information shall be explained [orally] [in some other manner comprehensible to the prisoner].
- 43. 1. Every prisoner shall have the opportunity every day of making requests or complaints to the director of the institution or the officer authorised to act in that capacity.
- 2. A prisoner shall have the opportunity to talk to, or to make requests of or complaints to, an inspector of prisons or to any other duly constituted authority entitled to visit the prison without the director or other members of the staff being present. However, appeals against formal decisions may be restricted to the authorised procedures.
- 3. Every prisoner shall be allowed to make a request or complaint, under confidential cover, to the central prison administration, the judicial authority or other authorities.
- 4. Every request or complaint addressed or referred to a prison authority shall be promptly dealt with and replied to by this authority without undue delay.

Contact with the outside [world] [community]

- 44. 1. Prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or rep-

resentatives of outside organisations and to receive visits from these persons as often as possible.

2. To encourage contact with the outside world [community] there shall be a system of prison leave consistent with the treatment objectives in Part IV of these **Guidelines**.

45. Prisoners shall be allowed to keep themselves informed regularly of the news by reading newspapers, periodicals and other publications, by radio or television transmissions, by lectures or by any similar means as authorised or controlled by the administration.

Religious and moral spiritual assistance

46. So far as practicable, prisoners shall be allowed to satisfy their religious and spiritual needs by attending the services or meetings provided in the institution and by having in their possession, or by having access to, any authorised books, literature or religious objects.

47. 1. If the institution contains a sufficient number of prisoners of the same religion, and subject to demand, a qualified representative of that religion shall be appointed and approved. [If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis].

2. A qualified representative appointed and approved under paragraph 1 shall be allowed to hold regular services and activities and to pay pastoral visits in private to prisoners [of his religion] at proper times.

3. Access to a qualified representative of any religion shall not be refused to any prisoner. If any prisoner should object to a visit of any religious representative, the prisoner shall be allowed to refuse it.

Retention of prisoners' property

48. 1. All money, valuables, and other effects belonging to prisoners which under the regulations of the institution they are not allowed to retain shall on admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition. If it is found necessary to destroy any article, this shall be recorded and the prisoner informed.

2. On the release of the prisoner, all such articles and money shall be returned except insofar as there have been authorised withdrawals of money or the authorised sending of any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article. The prisoner shall sign a receipt for the articles and money returned.

3. As far as practicable, any money or effects received for a prisoner from outside shall be treated in the same way unless they are intended for and permitted for use during imprisonment.

4. If a prisoner brings in any medicines, the medical officer shall decide what use shall be made of them.

Notification of imprisonment, transfer, illness or death

49. 1. All prisoners shall have the right to inform their families at once of imprisonment or transfer to another institution [unless such information is restricted [for security reasons]].
2. Upon the death or serious illness of or serious injury to a prisoner, or removal to an institution for the treatment of [mental illness or abnormalities,] [mental or psychiatric illness] the director shall at once inform [the spouse, if the prisoner is married, or the nearest relative and shall in any event inform any other] [a] person previously designated by the prisoner.
3. A prisoner shall be informed at once of the death or serious illness of any near relative. In these cases and whenever circumstances allow, the prisoner should be authorised to visit this sick relative or see the deceased either under escort or alone.

Removal of prisoners

50. 1. When prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form.
2. The transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship or indignity shall be prohibited.
3. The transport of prisoners shall be carried out at the expense of the administration and in accordance with duly authorised regulations.

PART III

Personnel [Human resource management]

51. In view of the fundamental importance of the prison staff to the proper management of institutions and the pursuit of their organisational and [treatment] [correctional] objectives, prison administrators shall give high priority to the fulfilment of the **Guidelines** concerning personnel.
52. Prison staff shall be continually encouraged through training, consultative procedures and a positive management style to aspire to humane standards, higher efficiency and a committed approach to their duties.
53. The prison administration shall regard it as an important task continually to inform public opinion of the

roles of the prison system and the work of the staff, so as to encourage public understanding of the importance of their contribution to society.

54. 1. The prison administration shall provide for the careful selection on recruitment or in subsequent appointments of all personnel. Special emphasis shall be given to their integrity, humanity, professional capacity and personal suitability for the work.
2. Personnel shall normally be appointed on a permanent basis as professional prison staff and have civil service status with security of tenure subject only to good conduct, efficiency, good physical and mental health and an adequate standard of education. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.
3. Whenever it is necessary to employ part-time staff, these criteria should apply to them as far as that is appropriate.
55. 1. On recruitment or after an appropriate period of practical experience the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests unless their professional qualifications make that unnecessary.
2. During their career, all personnel shall maintain and improve their knowledge and professional capacity by attending courses of in-service training to be organised by the administration at suitable intervals.
3. Arrangements should be made for wider experience and training for personnel whose professional capacity would be improved by this.
4. The training of all personnel should include instruction in the requirements and application of these **Guidelines** and the Commonwealth Scheme for the Transfer of Convicted Offenders.
56. [All personnel shall be expected at all times so to conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect]. [All personnel shall be expected at all times to conduct themselves and to perform their duties in a professional manner. The setting of good example in the performance of their duties will assist in the effective management of prisoners].
57. 1. So far as possible the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers, trade, physical education and sports instructors.
2. These and other specialist staff shall normally be employed on a permanent basis. This shall not preclude part-time or voluntary workers when that

is appropriate and beneficial to the level of support and training they can provide.

58. 1. The prison administration shall ensure that every institution is at all times in the full charge of the director, the deputy director or other authorised official.
2. The director of an institution shall be adequately qualified for that post by character, administrative ability, suitable professional training and experience.
3. The director shall be appointed on a full-time basis and be available or accessible as required by the prison administration in its management instructions.
4. When two or more institutions are under the authority of one director, each shall be visited at frequent intervals. A responsible official shall be in charge of each of these institutions.
59. The prison administration shall introduce forms of organisation and management systems to facilitate communication between the different categories of staff in an institution with a view to ensuring co-operation between the various services, in particular, with respect to [the treatment and re-socialisation of prisoners] [correctional programmes for prisoners].
60. 1. The director, deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.
2. Whenever necessary and practicable the services of an interpreter shall be used.
61. 1. Arrangements shall be made to ensure at all times that a qualified and approved medical practitioner is able to attend without delay in cases of urgency.
2. In institutions not staffed by one or more full-time medical officers a part-time medical officer or authorised staff of a health service shall visit regularly.
62. The appointment of staff in institutions or parts of institutions housing prisoners of the opposite sex is to be encouraged.
63. 1. Staff of the institutions shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to an order based on law or regulations. Staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.
2. Staff shall as appropriate be given special technical training to enable them to restrain aggressive prisoners.

3. Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been fully trained in their use.

PART IV

Treatment objectives and [regimes] [management]

64. Imprisonment is by the deprivation of liberty, a punishment in itself. The conditions of imprisonment and prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate [the suffering inherent in] this.
65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as:
- (a) to ensure that the conditions of life are compatible with human dignity and acceptable standards in the community;
 - (b) to minimise the detrimental effects of imprisonment and the differences between prison life and life at liberty which tend to diminish the self-respect or sense of personal responsibility of prisoners;
 - (c) to sustain and strengthen those links with relatives and the outside community that will promote the best interests of prisoners and their families;
 - (d) to provide opportunities for prisoners to develop skills and aptitudes that will improve their prospects of successful resettlement after release.
66. To these ends all the remedial, educational, [moral], spiritual and other resources that are appropriate should be made available and utilised in accordance with the individual treatment needs of prisoners. Thus the regimes should include:
- (a) spiritual support and guidance and opportunities for relevant work, vocational guidance and training, education, physical education, the development of social skills, counselling, group and recreational activities;
 - (b) arrangements to ensure that these activities are organised, so far as possible, to increase contacts with and opportunities within the outside community so as to enhance the prospects for social resettlement after release;
 - (c) procedures for establishing and reviewing individual treatment and training programmes for prisoners after full consultations among the relevant staff and with individual prisoners who would be involved in these as far as is practicable;

- (d) communications systems and a management style that will encourage appropriate and positive relationships between staff and prisoners that will improve the prospects for effective and supportive regimes and [treatment] [correctional] programmes.

67. 1. Since the fulfilment of these objectives requires individualisation of treatment and, for this purpose, a flexible system of allocation, prisoners should be placed in separate institutions or units where each can receive [the appropriate treatment and training] [correctional programmes].
2. The type, size, organisation and capacity of these institutions or units should be determined essentially by the nature of the [treatment] [correctional programmes] to be provided.
3. It is necessary to ensure that prisoners are located with due regard to security and control but such measures should be the minimum compatible with safety and comprehend the special needs of the prisoner. Every effort should be made to place prisoners in institutions that are open in character or provide ample opportunities for contacts with the outside community. In the case of foreign nationals, links with people of their own nationality in the outside community are to be regarded as especially important.
68. 1. Within the regimes, prisoners shall be given the opportunity to participate in activities of the institution likely to develop their responsibility, self-reliance and to stimulate interest in their own [treatment] [programmes].
2. Efforts should be made to develop methods of encouraging co-operation with and the participation of the prisoners in their [treatment] [programmes]. To this end prisoners shall be encouraged to assume, within the limits specified in **Clause 35**, responsibilities in certain sectors of the institution's activity.
69. 1. The preparation of prisoners for release should begin as soon as possible after reception [in a penal institution]. Thus, [the treatment of] [correctional programmes for] prisoners should emphasise not their exclusion from the community but their continuing part in it. Community agencies and social workers should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners particularly maintaining and improving the relationships with their families, with other persons and with the social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

2. [Treatment] [correctional] programmes should include provision for prison leave which should also be granted to the greatest extent possible on medical, educational, occupational, family and other social grounds.

Work

70. 1. Prison work should be seen as a positive element in [treatment, training and institutional management] [prisoner management].
2. Prisoners under sentence may be required to work, subject to their physical and mental fitness as determined by the medical officer.
3. Sufficient work of a useful nature, or if appropriate other purposeful activities shall be provided to keep prisoners actively employed for a normal working day.
4. So far as possible the work provided shall be such as will maintain or increase the prisoner's ability to earn a normal living after release.
5. Vocational training in a useful trade shall be provided for prisoners able to profit thereby and especially for young prisoners.
6. Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of employment in which they wish to participate.
71. 1. The organisation and methods of work in the institutions shall resemble as closely as possible those of similar work in the community so as to prepare prisoners for conditions of normal occupational life. It should thus be relevant to contemporary working standards and techniques and organised to function within modern management systems and production processes.
2. Although the pursuit of financial profit from industries in the institutions can be valuable in raising standards and improving the quality and relevance of training, the interests of the prisoners and of their treatment must not be subordinated to that purpose.
72. Work for prisoners shall be assured by the prison administration:
- (a) either on its own premises, workshops and farms; or
- (b) in co-operation with private contractors inside or outside the institution [in which case the full normal wages for such shall be paid by the persons to whom the labour is supplied, account being taken of the output of the prisoners].
73. 1. Safety and health precautions for prisoners shall be similar to those that apply to workers outside.

2. Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, [on terms not less favourable than those extended by law to workers outside].
74. 1. The maximum daily and weekly working hours of the prisoners shall be fixed in conformity with local rules or custom in regard to [the employment of free workmen] [workers in the community].
2. Prisoners should have at least one rest-day a week and sufficient time for education and other activities required as part of their [treatment and training for social resettlement] [correctional programme].
75. 1. There shall be a system of [equitable] remuneration [of the work of prisoners] [for the work performed by prisoners].
2. Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to allocate a part of their earnings to their family or for other approved purposes.
3. The system may also provide that a part of the earnings be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on release.

Education

76. A comprehensive education programme shall be arranged in every institution to provide opportunities for all prisoners to pursue at least some of their individual needs and aspirations. Such programmes should have as their objectives the improvement of the prospects for successful social resettlement, the morale and attitudes of prisoners and their self-respect.
77. Education should be regarded as a regime activity that attracts the same status and basic remuneration within the regime as work, provided that it takes place in normal working hours and is part of an authorised individual [treatment] [correctional] programme.
78. Special attention should be given by prison administrations to the education of young prisoners, those of foreign origin or with particular cultural or ethnic needs.
79. Specific programmes of remedial education should be arranged for prisoners with special problems such as illiteracy or innumeracy.
80. So far as practicable, the education of prisoners shall:
- (a) be integrated with the educational system of the country so that after their release they may continue their education without difficulty;
 - (b) take place in outside educational institutions.

81. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with a wide range of both recreational and instructional books and journals, and prisoners shall be encouraged to make full use of it. Wherever possible the prison library should be organised in co-operation with community library services.

Physical education, exercise, sport and recreation

82. Prison regimes shall recognise the importance to physical and mental health of properly organised activities to ensure physical fitness, adequate exercise and recreational opportunities.
83. A properly organised programme of physical education, sport and other recreational activity should be arranged within the framework and objectives of the [treatment and training regime] [correctional programmes]. To this end space, installations and equipment should be provided.
84. Prison administrators should ensure that prisoners who participate in these programmes are physically fit to do so. Special arrangements should be made, under medical direction, for remedial physical education and therapy for those prisoners who need it.
85. Every prisoner who is not employed in outdoor work, or located in an open institution, shall be allowed, if the weather permits, at least one hour of walking or suitable exercise in the open air daily, as far as possible, sheltered from inclement weather.

Pre-release preparation

86. All prisoners should have the benefit of arrangements designed to assist them in returning to society, family life and employment after release. Procedures and special courses should be devised to this end.
87. In the case of those prisoners with longer sentences, steps should be taken to ensure a gradual return to life in society. This aim may be achieved, in particular, by a pre-release [regime] [programme] organised in the same institution or in another appropriate institution, or by conditional release under some kind of supervision combined with effective social support.
88. 1. Prison administrations should work closely with the social services and agencies that assist released prisoners to re-establish themselves in society, in particular with regard to family life and employment.
2. Steps must be taken to ensure that on release prisoners are provided, as necessary, with appropriate documents and identification papers, and assisted in finding suitable homes and work to go to. They should also be provided with immediate means of subsistence, be suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination.

3. The approved representatives of the social agencies or services should be afforded all necessary access to the institution and to prisoners with a view to making a full contribution to the preparation for release and after-care programme of the prisoner.

PART V

Additional guidelines for special categories

89. Prison administrators should be guided by the provisions of the **Guidelines** as a whole so far as they can appropriately and in practice be applied for the benefit of those special categories of prisoners for which additional **Guidelines** are provided hereafter.

Untried prisoners

90. Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners, who are presumed to be innocent until they are found guilty, shall be afforded the benefits that may derive from **Clause 89** and treated without restrictions other than those necessary for the penal procedure and the security of the institution.

91. 1. Untried prisoners shall be allowed to inform their families of their detention immediately and given all reasonable facilities for communication with family and friends and persons with whom it is in their legitimate interest to enter into contact.

2. They shall also be allowed to receive visits from them under humane conditions subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

3. If an untried prisoner does not wish to inform any of these persons, the prison administration should not do so on its own initiative unless there are good overriding reasons such as, for instance, the age, state of mind or any other incapacity of the prisoner.

92. Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser, and to receive, confidential instructions. On request, they shall be given all necessary facilities for their purpose. In particular, they shall be given the free assistance of an interpreter for all essential contacts with the administration and for their defence. Interviews between prisoners and their legal advisers may be within sight but not within hearing, either direct or indirect, of the police or institution staff. The allocation of untried prisoners shall be in conform-

ity with the provisions of **Clause 11**, paragraph 3.

93. Untried prisoners shall normally be lodged [during the night] in individual cells [except in cases where it is considered that there are advantages in sharing accommodation with other prisoners] [unless for medical or other sufficient reason it is [necessary] [desirable] for prisoners to be associated].

94. 1. Untried prisoners shall be allowed to wear their own clothing if it is clean and suitable.

2. Prisoners who do not avail themselves of this facility shall be supplied with suitable clothing.

3. If they have no suitable clothing of their own, untried prisoners shall be provided with civilian clothing in good condition in which to appear in court or on authorised outings.

4. In this **Clause** "clothing" includes footwear.

95. Untried prisoners shall, whenever possible, be offered the opportunity to work but shall not be required to work. Those who choose to work shall be paid as other prisoners. If educational or trade training is available, untried prisoners shall be encouraged to avail themselves of these opportunities.

96. Untried prisoners shall be allowed to procure at their own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of this institution.

97. Untried prisoners may be visited and treated by their own doctor or dentist if there is reasonable ground for the application. Reasons should be given if the application is refused. Such costs as are incurred shall not be the responsibility of the prison administration.

Civil prisoners

98. In countries where the law permits imprisonment by order of a court under any non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall not be less favourable than that of untried prisoners, with the reservation, however, that they may be required to work.

Foreign prisoners

99. 1. The following principles are designed to apply to foreign prisoners, that is to say to prisoners of different nationality who, on account of such factors as language, customs, cultural background or religion, may face specific problems. As far as prisoners awaiting trial or extradition are concerned, these principles should, however, be applied only to the extent that their implementation does not impair the purpose of the detention.

2. In implementing these principles, account

should be taken of the requirements of the prison administration, including prison security, and the availability of resources.

3. The principles should be applied so as to ensure that the treatment of foreign prisoners is conducive to their social resettlement. This might require adopting particular measures in relation to particular categories of foreign prisoners, taking into account such factors as nationality, language, religious precepts and customs, cultural background, length of sentence and liability to expulsion. Every reasonable effort should be made to ensure that the treatment of foreign prisoners does not lead to their being disadvantaged.

100. The allocation of a foreign prisoner to a prison establishment should not be effected on the grounds of nationality alone. If the allocation to a prison establishment is likely to alleviate a situation of isolation and to facilitate treatment, it may be effected according to specific needs, particularly with regard to communication with persons of the same nationality, language, religion or culture. This possibility should be envisaged in particular where the national penitentiary system takes account of the wishes of prisoners when allocating them to prison establishments.

101.1. Foreign prisoners should be informed without delay of their right to request contacts with their consular authorities, the possibilities of assistance which might be accorded by these authorities and any action concerning them which is to be taken by the competent authorities having regard to existing consular treaties. If a foreign prisoner wishes to receive assistance from a diplomatic or consular authority, including action for social resettlement in case of expulsion, the latter should be informed promptly.

2. Foreign prisoners should be informed without delay if there is any possibility of repatriation to their own countries by virtue of any existing international agreements such as, in particular, the Commonwealth Scheme for the Transfer of Convicted Offenders.

3. Consular authorities should be invited to consider the production of information leaflets for their detained nationals. These leaflets should indicate the location and telephone number of the nearest consulate and inform prisoners of the possibilities of assistance which may be granted by consulates, such as visits providing information as regards their defence, supplying literature and reading material, and suggesting possibilities of repatriation, particularly as regards transfer by virtue of existing international agreements. Such leaflets should be made available to prisoners at the earliest possible stage of their detention.

102.1. To alleviate a feeling of isolation, a foreign prisoner's communications with other persons of the same nationality, language, religion or culture should be facilitated, for example, by permitting them to work, spend their leisure time or take exercise together.

2. Every effort should be made to give foreign prisoners access to reading material in their language. To that end, prisons might seek the assistance of consular services and appropriate private organisations.

3. Where a foreign prisoner is likely to be able to remain in the country of detention and wishes to be assimilated into the culture of that country, the prison administration should assist to this end.

4. Foreign prisoners should, where practicable, have the same access as national prisoners to education and vocational training. In order that foreign prisoners may have access to courses designed to improve educational and professional qualifications, consideration should be given to the possibility of providing them with necessary special facilities.

5. Visits and other contacts with the outside community should be so arranged as to meet the foreign prisoner's special needs.

6. Ordinarily foreign prisoners should be eligible for prison leave and other authorised exits from prison according to the same principles as nationals. The assessment of the risk that a foreign prisoner may leave the country and escape punishment should always be made on the merits of the individual case.

103.1. Foreign prisoners should be informed promptly after reception into a prison, in a language which they understand, of the main features of prison routine, of available training and study facilities, and of possibilities, if any, for requesting the assistance of an interpreter. This information should be supplied in writing or, where this is not possible, orally or in some other manner comprehensible to the prisoner.

2. Foreign prisoners, who have no command of the language of the country in which they are detained, should be provided with translation or interpretation concerning sentence, any right of appeal, and any judicial decision taken in the course of their detention.

3. To enable foreign prisoners to learn the language spoken in the prison, appropriate opportunities for language training should be provided for them.

104.1. The religious beliefs and customs of foreign prisoners should be respected. So far as practica-

with them.

2. Account should also be taken of problems which might arise from differences in culture.

105. Foreign prisoners, who in practice do not enjoy all the facilities accorded to nationals and whose conditions of detention are generally more difficult, should be treated in such a manner as to counter-balance, so far as may be possible, these disadvantages.

106.1. Prison administrators and community agencies working in the field of aid and resettlement of prisoners should, in collaboration, pay particular attention to foreign prisoners and their specific problems.

2. Prison administrators should ensure that information about assistance which may be offered to foreign prisoners by community agencies is easily accessible to them.

3. Contacts of foreign prisoners with community agencies should be facilitated.

4. With a view to according adequate assistance to foreign prisoners, prison administrators should grant community agencies all necessary opportunities for visits and correspondence, provided that the prisoner consents to these contacts. Where only a limited number of visits can be made, consideration should be given in appropriate cases to extending visiting times and to making restrictions on sending or receiving letters more flexible.

5. The address of the national contact bureau as well as that of any diplomatic or consular authority should be communicated by the director to any foreign prisoner at the time of reception into the prison.

107.1. Training for prison officers and other categories of staff to support their work with foreign prisoners should be encouraged and incorporated in the normal training programmes. In general, such training should seek to improve understanding of the difficulties and cultural backgrounds of foreign prisoners so as to prevent prejudiced attitudes from arising.

2. Consideration should be given to having certain staff available for more intensive work with foreign prisoners and enhancing their ability to do so through the provision of more specialised training focusing, for instance, upon the learning of a language or particular difficulties occurring in relation to particular groups of foreign prisoners.

Insane and [mentally abnormal prisoners]

108.1. Persons who are found to be insane should not be detained in prisons and arrangements shall be made to remove them to appropriate establishments for the mentally ill as soon as possible.

2. Specialised institutions or sections under medical management should be available for the observation and treatment of prisoners suffering gravely from other mental disease or abnormality.

3. The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all prisoners who are in need of such treatment.

4. Action should be taken, by arrangement with the appropriate community agencies, to ensure where necessary the continuation of psychiatric treatment after release and the provision of social psychiatric after-care.

Bank Secrecy and Mutual Assistance in Criminal Matters

A memorandum by the Commonwealth Secretariat

Background

As member countries make more use of formal and informal means of obtaining international assistance with the investigation and prosecution of offences questions increasingly arise as to whether, or when, the concept of what is now colloquially called *bank secrecy* should be invoked to refuse a request.

The Commercial Crime Unit of the Secretariat works with law enforcement and prosecution agencies in many Commonwealth countries both in relation to specific cases and, where appropriate, in the general area of policy and legislative development related to commercial and other serious crime. Over the past year many enquiries have been made of the CCU which have running through them the common thread of difficulties regularly being encountered with countries which refuse to facilitate access to bankers books or records which are needed to provide evidence of the commission of an offence.

Bank Secrecy in the International Arena

A. *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*

Much, but certainly not all, of the impetus for the recent development of multilateral and bilateral mutual legal assistance arrangements comes from the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 7 of that Convention deals with Mutual Legal Assistance and paragraph 5 of that Article expressly provides:

A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

A state party to the 1988 Drugs Convention which receives, from another state party, a request for assistance with the investigation, prosecution or other judicial proceeding relating to criminal offences outlined in Article 3 of the Convention, cannot invoke bank secrecy as a ground for refusing to comply with the request.

B. *The Financial Action Task Force*

Governments will be aware of the activities of the Financial Action Task Force which is working to combat money laundering. Governments will also be aware of the 40 Recommendations of the FATF which have been accepted by a number of Commonwealth Countries either as members of the Task Force or as participants in the Caribbean Financial Action Task Force.

There are various recommendations which relate directly or indirectly to bank secrecy. Among those are:

Recommendation 2 which states that:

Financial institutions secrecy laws should be conceived so as not to inhibit implementation of the recommendations of this group.

Recommendation 21 provides:

Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations....

and

Recommendation 36 (dealing with MA on money laundering issues) which states that:

There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions and in related actions in foreign jurisdictions

More and more countries are subscribing to the principles enunciated by the Financial Action Task Force as they recognise that adequate protection of their economies against the dangers of permitting (tacitly or actively) money laundering is essential. This being the case, it is clear that countries which fail to take adequate precautions to ensure that they are not havens for laundered funds will find themselves able to attract less and less legitimate banking business.

C. *The Offshore Group of Banking Supervisors*

The Offshore Group of Banking Supervisors was set up in 1980 and currently has 19 members (of which 14 are Commonwealth countries or dependencies). It is committed to the Financial Action Task Force's recommendations. In 1992 the Chairman of the Group asked members to provide a statement of their anti-money laundering measures and discussions have been held with the FATF over possible involvement of the Group in the work of the Task Force.

Bank Secrecy and the Law

A. *At Common Law*

The relationship between a banker and his customer is a contractual one and, at common law, an implied term of the contract is the duty of confidentiality owed by the banker to his customer.

The obligation not to disclose information is less than absolute and the leading case in the common law world is still *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 which established that the bank has the right to disclose information for the purpose of protecting the bank, or persons interested, or the public against fraud or crime. There are four circumstances in which a bank may disclose information which are expressly outlined by the court in that case.

They are:

- (a) where disclosure is under compulsion by law;
- (b) where there is a duty to the public to disclose;
- (c) where the interests of the bank require disclosure; and
- (d) where the disclosure is made by the express or implied consent of the customer.

Clearly the "duty to the public to disclose" described by Bankes LJ falls within the what Atkins LJ described as a right to disclose for "the purpose of protecting... the public against fraud or crime".

B. Under Statute

As countries increasingly rely on statute rather than common law in an effort to meet the demands of a rapidly changing social and economic environment some will codify the laws relating to banking and in so doing will make statutory provision for the banker client relationship. The statutes will, in general, recognise the hitherto implied condition of confidentiality and, where they so do, it is important that they should also recognise the limits of the duty of confidentiality. In other words, codification of the law of banking can reasonably be expected to reflect all aspects of the common law which applied before statutes took over.

Two specific references are available to the Commonwealth Secretariat which demonstrate statutory intervention in the area of bank secrecy. The Minister of Law and Justice of India in a paper presented to the Christchurch Law Ministers Meeting outlined the approach of his country to bank secrecy which was to expressly recognise the exceptions outlined in *Tournier's Case* in Indian legislation with the result that "the law itself has conferred powers on courts and enforcement agencies to secure information about the customers' accounts in the public interest." The Government of New Zealand, in its memorandum prepared for the same meeting, stated that its legislature "has intruded whenever it considers it necessary to do so in the public interest."

The Public Interest

Intruding upon the confidential relationship between banker and client can be, both at common law and increasingly in statute law, justified *in the public interest*. Traditionally the public interest has been a domestic

concept, tied to the nation and its special interests. It has been so construed by the courts of most common law countries for a long time. But is a parochial definition of public interest sufficient at a time when economies are inter-dependent, when crime is increasingly international and when money laundering is almost always international?

The answer lies in part in the statute books and treaty series of countries. Countries which have enacted laws on mutual assistance in criminal matters have, in effect, said that there is a public interest in assisting other countries combat crime. Similarly, extradition laws recognise the public interest in ensuring that those who break foreign laws can be brought to justice. Bilateral and multilateral conventions dealing with criminal conduct are entered into by governments recognising their countries' "public interest" in protecting themselves against the wrongs described in those conventions. That countries have a "public interest" in combating crime having an international perspective is accepted. What remains is for all countries to ensure that that public interest is taken into account when applications are made by foreign courts or law enforcement agencies for access to bank records which are needed for investigation or prosecution purposes.

There are at least two means of ensuring that foreign law enforcement and prosecution agencies and courts can rely on a country to assist in bringing criminals to justice in cases where bank records are needed to establish or prove a case.

The first is to provide by statute that disclosure must be made by a bank when a specified person or class of persons (perhaps Law Officers or Judges/Magistrates) certifies that it has received a bona fide request for assistance from a foreign country pursuant to a treaty, arrangement or in reliance upon the doctrine of comity and has determined that the assistance sought should be provided. The approach relies on the first qualification outlined by Lord Justice Bankes in *Tournier's case*.

The second is to define a ground of public interest to be the interest (as appropriately certified for domestic purposes) of a foreign country in investigating or prosecuting a crime against its own law. This approach finds its base in the second of Lord Justice Bankes qualifications.

A third, but at this stage less well developed, ground could be disclosure in the interest of the bank itself. A bank clearly has an interest in not breaking the law. If based in a country which has strong laws designed to counter money laundering (such as a requirement that its banks to report suspicious or even just large transactions, to report international transfers or simply to take reasonable care over the people it deals with) banks must take especial care not to facilitate money laundering and accordingly, particularly if laws were accompanied by sanctions for non-compliance, banks would be

very interested in disclosing to appropriate authorities any concerns they had over their clients' dealings.

Conclusion

It is possible, as has been demonstrated in a number of countries, to balance the interests of the banking community in maintaining good and confidential customer relations with proper regard for the enforcement of criminal laws and with assisting other countries enforce their laws.

Where countries enact banking secrecy laws all that is needed are gateways through which legitimate enquiries can be made and answered. An additional desirable feature of laws impinging on bank secrecy is protection of the banker when he releases information in accordance with law.

Where countries rely on the common law there are existing gateways which permit the disclosure of information for good and proper reason and those good and proper reasons include compulsion by law to release information. All that is needed in such countries is to ensure that mutual assistance laws state explicitly that banks can be compelled to release information when the executive authority of the country determines that a mutual assistance request is to be granted.

Possible Action by Law Ministers

A concerted effort by Commonwealth Countries to ensure that bank secrecy does not defeat legitimate activities by law enforcement and prosecution authorities to combat crime may commend itself to Law Ministers.

If Ministers accept

(a) that countries rely on each other for success in their

efforts to quash drug trafficking, corruption and serious white collar crime and the laundering of the proceeds of these activities; and

(b) that there is a consequent need for each country to facilitate the justifiable investigative and prosecutorial activities of other countries seeking to bring criminals to justice

they may wish to express a view on the optimum level of access to bank records which should be available upon proper request from another country.

Law Ministers may also wish to consider putting on the record a statement which, while recognising that offshore banking centres can make a legitimate contribution to international commerce, also recognises that it is essential that the development of offshore financial industries be accompanied by the development or enhancement of measures which will ensure that the criminal elements cannot use such centres to further their corrupt or criminal enterprises.

Commitment to the "gateways" listed in Tournier's Case and an acceptance that where the subject of bank secrecy is dealt with by statute there is a need to replicate those common law tests would be one way in which Ministers could state their acceptance of the principle that proper law enforcement and proper banking practices can operate together. Express recognition of the legitimate interests of other countries in gaining access to bank records when they can justify their inquiries by giving adequate information about the case being investigated or prosecuted may commend itself to Ministers.

Implementation of the Scheme for the Transfer of Convicted Offenders

A Memorandum by the Commonwealth Secretariat

Article 19 of the Scheme for the Transfer of Convicted Offenders within the Commonwealth provides that any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation. Upon receipt of notice in accordance with Article 19 the Secretary-General notifies all governments of the acceptance and distributes copies of the legislation deposited with him.

Six member countries have given notice of their participation in the Scheme and provided copies of their legislation. They are:

Britain	Canada
Malawi	Nigeria
Trinidad & Tobago	Zimbabwe

The notification for Britain states that the acceptance of the Scheme is also in respect of:

The Isle of Man

and the following territories for the international relations to which the United Kingdom is responsible:

Anguilla	Cayman Islands
Falkland Islands	Montserrat
St Helena and Dependencies	
British Indian Ocean Territory	
British Virgin Islands	Gibraltar
Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus	

The proper channels of communication which have been notified to the Secretary General are:

BRITAIN

The Assistant Secretary
C4 Division
Home Office
50 Queen Anne's Gate
LONDON SW1 H9 AT, UK

CANADA

Serge Boudreau
Manager, International Transfers
Correctional Services of Canada
340 Laurier Avenue
Ottawa, Ontario K1A 0P9
Canada

MALAWI

The Attorney-General
Ministry of Justice
Private Bag 333
LILONGWE 3
MALAWI

NIGERIA

Ministry of Foreign Affairs
PMB 130
ABUJA
NIGERIA

TRINIDAD & TOBAGO

The Minister of National Security
P O Box 873
Knox Street
Port of Spain
TRINIDAD & TOBAGO

ZIMBABWE

Minister of Justice, Legal & Parliamentary Affairs
P.O. Box 7706
CAUSEWAY
ZIMBABWE

Mutual Assistance Between Business Regulatory Agencies

A Memorandum by the Commonwealth Secretariat

Background

Commonwealth Law Ministers discussed the matter of co-operation to combat fraud in the financial markets at their 1990 meeting in Auckland, New Zealand. The meeting Communiqué records that:

"13. Ministers identified the need for the extension of mutual assistance in the area of business regulation. The increasing internationalisation of financial markets required effective mutual assistance between national business regulatory agencies. Voluntary co-operation needed to be reinforced by legislative provisions to enable powers of compulsion to be exercised in the fulfilment of requests in appropriate cases. Ministers agreed to encourage their regulatory agencies to provide assistance to corresponding agencies in other Commonwealth countries, and to develop inter-agency agreements to that end. They invited the Commonwealth Secretariat to report to their next Meeting on the progress that had been made throughout the Commonwealth to develop this additional form of mutual assistance."

Although Law Ministers have discussed the idea of mutual assistance in financial markets, in reality the actions taken by Commonwealth governments are largely confined to Securities Regulators. Little has been done in the areas of the bond markets, bullion markets, banking or general corporate mutual assistance. Only the Australian and the United Kingdom laws extended mutual assistance beyond the securities market: the Australian law has been placed in one Mutual Assistance Act covering various business regulatory areas whereas the United Kingdom has placed its provisions dealing with investigatory assistance in the Companies Act 1989 and provisions permitting enforcement in support of overseas regulatory authorities in the Financial Services Act 1986 which are both administered by the Secretary of State for Trade and Industry.

This memorandum looks at the significant legislative developments in Commonwealth jurisdictions.

Introduction

Recent trends in the world's financial markets towards globalisation, inter-market listings and international electronic trading in securities have allowed for much freer movement of financial instruments in those markets. Regulators have realised that they have a growing

interdependence on each other when attempting to regulate their own market places. The international character of today's securities markets makes enforcement difficult as many evidentiary, jurisdictional and detection problems are raised. Regulators are finding that they need to seek assistance from foreign regulators but are hindered in information sharing and investigative assistance by the current regulatory structures.

There are many differences in the laws and regulatory structures of different countries as well as other factors which impede efforts to improve international information sharing. These include:

- blocking and privacy laws
- bank secrecy laws
- lack of regulatory authority to obtain information requested
- lack of a national regulator
- differing technical and resource capabilities-ongoing criminal proceedings
- an inability to ensure the confidentiality of shared information, and
- differing regulatory structures - some administrative, some civil and some criminal - others, all three.

Domestic Developments

In order to give full effect to the sentiments expressed by Law Ministers in the 1990 Communiqué it would be necessary for domestic law and practice, in jurisdictions where the issue is relevant, to permit a particularly advanced form of transnational co-operation. There are several levels to this international co-operation. First, regulators may have provisions in their legislation which enable them to exchange publicly available information with overseas regulators. Second, regulators may have provisions which allow for the exchange of non-public information, subject to the appropriate conditions and safeguards. This non-public information may have been obtained under compulsory powers during investigation of domestic matters. The third and final level of co-operative powers enables the regulator to use their compulsory powers to assist in the administration of the securities laws of another jurisdiction. This latter level is quite important because if the foreign regulator is requesting information which

has not already been the subject of an investigation at the local level, the local regulator may have difficulty in offering to provide information which it does not yet have on file. It would have to go out and gather the information on behalf of the foreign regulator but without a statutory mandate to do so, it may not be able to assist in this way.

The Commonwealth Secretariat survey covered Commonwealth countries which are also members of IOSCO: Australia, Bermuda, Canada, Cyprus, Hong Kong, India, Jamaica, Kenya, Malta, Mauritius, New Zealand, Singapore, Trinidad & Tobago and the United Kingdom. Australia, British Columbia (Canada), New Zealand and the United Kingdom all have mutual assistance provisions within their domestic legislation. Hong Kong and Malta do not currently have mutual assistance provisions in place while Cyprus and Trinidad & Tobago are currently contemplating amending their legislation to include such provisions.

Australia

The *Mutual Assistance in Business Regulation Act 1992* enables designated Australian Commonwealth business regulatory authorities to provide assistance to foreign business regulatory authorities or agencies. Australia is the only Commonwealth country to enact separate legislation dealing with mutual assistance in business regulation. It sets up the framework for Australian agencies such as the Australian Securities Commission and the Trade Practices Commission to provide assistance to their overseas counterparts. This is a wider position than the Canadian or New Zealand legislation has taken. These two countries have limited their mutual assistance provisions to their Securities Acts.

The scheme for mutual assistance between business regulators allows the request to be received by the Australian business agency but the agency must take into account such factors as the resource cost to the Australian agency, the availability of the same information to the foreign agency from other sources, the likelihood of the Australian agency successfully obtaining the information sought in the application, and the extent to which the foreign agency has corresponding functions and responds to or is likely to respond to a similar request from an Australian agency. [s.7(3)]

If the Australian business agency decides to comply with the foreign request it must then inform the Attorney-General that the regulator does not oppose the request and advise whether or not it proposes imposing certain conditions in relation to compliance with the request. [s.7(1)] The Attorney-General must then either authorise and approve the regulator's decision or override it. In considering his decision, the Attorney-General should take into account matters such as Australia's national interest, whether compliance with the request is consistent with international law or

whether compliance with the request is likely to be used for punishing a person for an offence of a political character.

The Australian regulator cannot and must not comply with a request from a foreign regulator unless the Australian regulator has received an undertaking in writing from the foreign regulator stating that the information or evidence obtained from the person and provided to the foreign regulator by the Australian regulator will not be used for the purpose of criminal proceedings against the person and, to the extent of its ability, the foreign regulator will ensure that the information will not be used by any other person, authority or agency for the purposes of any criminal proceeding or imposition of a penalty. [s.6(1)] Australia takes the view that if information is sought for criminal proceedings it should be sought under the Mutual Assistance in Criminal Matters Scheme which has its own inbuilt safeguards.

Once these conditions have been met, the business regulator may assist the foreign regulator in the enforcement of foreign business laws by obtaining relevant information, documents and evidence and transmitting them to the foreign regulator. The Australian regulator may take evidence under oath and require the production of documents. There is no ability for the Australian regulator to enter premises of the person who is the subject of an investigation where the Australian regulator is acting on behalf of a foreign business regulator. The power to ask for a warrant to be issued, and for the Australian Federal Police with other persons named in the warrant to enter the premises, search it and take possession of documents and books is available under the Australian Securities Act 1989 for domestic investigations.

Canada - British Columbia

In Canada, securities regulation currently falls under the jurisdiction of the provinces as a matter of property and civil rights. There is no Canadian (federal) securities regulator. In British Columbia, the British Columbia *Securities Act 1985* makes express provision under s. 126 for assistance to foreign securities regulators by allowing the British Columbia Securities Commission to issue an investigation order to assist in the administration of the securities laws of another jurisdiction.

The investigation order grants a wide range of powers to the investigator which include power to:

- (a) to enter into the premises or on the land of a person at any reasonable time, for the purpose of carrying out an inspection, examination or analysis,
- (b) to require the production of any records, property, assets or things and to inspect, examine or analyse them, and
- (c) on giving a receipt, to remove any records, property, assets or things inspected, examined or analysed under paragraph (a) for the purpose of further inspection, examination or analysis.

Generally the power to assist a foreign regulator includes power to investigate, inquire into, inspect and examine the affairs of a person; any records, negotiations, transactions, investigations, loans, borrowings and payments to, by, on behalf of, in relation to or connected with that person; any property, assets or things owned, acquired or disposed of in whole or in part by that person or by a person acting on behalf of or as agent for that person; the assets at any time held by, the liabilities, debts, undertakings and obligations at any time existing and the financial or other conditions at any time prevailing in respect of that person, and the relationship that may at any time exist or have existed between that person and any other person by reason of:

- (a) investments made,
- (b) commissions promised, secured or paid,
- (c) interests held or acquired,
- (d) the lending or borrowing of money, securities or other property,
- (e) the transfer, negotiation or holding of securities,
- (f) interlocking directorates,
- (g) common control,
- (h) undue influence or control, or
- (i) any other relationship.

An investigator appointed under section 126 or 131 has the same power as the Supreme Court has for the trial of civil actions to summon and enforce the attendance of witnesses, compel witnesses to give evidence on oath or in any other manner, and to compel witnesses to produce records and things. He also has the same power as the Supreme Court to deal with the failure or refusal of a witness to attend, to take an oath, to answer questions, or to produce the records and things in his custody or possession.

In circumstances when it is "necessary and in the public interest" the British Columbia Securities Commission may also apply to the court for an order authorising an investigator to enter non-residential premises for the purposes of carrying out an inspection or examination and for removing records or property for further inspection, examination or analysis.

Information obtained by way of investigation order may be disclosed to foreign securities regulators providing that such disclosure would not be prejudicial to the public interest. The Commission will not disclose compelled testimony to a foreign regulator unless that regulator can provide assurances that the testimony will not be used against the testifier in a criminal proceeding. Compelled testimony cannot be used against the testifier in Canadian criminal proceedings and so will not be provided for such use by foreign jurisdictions. Some foreign regulators have obtained compelled testimony by securing appropriate "use

immunity" commitments from the relevant criminal authorities.

Information already in the possession of the British Columbia Securities Commission or available without recourse to the statutory investigation powers can most often be provided to other bona fide enforcement agencies pursuant to the "public duty" provisions of section 8 of the Act.

Section 137.1 of the Act expressly allows, where it would not be prejudicial to the public interest, disclosure of facts, information and records obtained in an investigation to any body empowered by the laws of another jurisdiction to administer or regulate trading in securities. The British Columbia legislation therefore allows for both information exchanges and new investigations on behalf of foreign regulators.

New Zealand

In 1988 New Zealand amended its *Securities Act 1978*, to include specific provisions allowing the New Zealand Securities Commission to co-operate with any Securities Commission or other similar body in any other country. Information obtained by the Securities Commission in the ordinary course of its duties, whether confidential or not, can be communicated to the foreign securities regulator. Further, a separate amendment allows the Securities Commission to take evidence on behalf of overseas regulators. The Securities Commission may also collect documents or information that, in the Securities Commission's opinion, is likely to assist the Commission with the requesting body's request. These specific mutual assistance sections mirror the domestic enforcement provisions of the Commission, to take evidence under oath and to receive books, documents, papers etc.

Before complying with a request for assistance from a foreign regulator, the Commission must turn its mind to whether or not compliance with the request will substantially alter the performance of its other functions under the Act. Further, the Commission must recommend compliance with the request to the Minister and the Minister must approve and accept the recommendation. There is no power to request the issuance of a warrant to enter premises and search them either on behalf of a foreign regulator or indeed in a domestic investigation.

The United Kingdom

The ability to provide assistance to overseas regulatory authorities is laid out in three separate acts in the UK: the Companies Act 1985, the Companies Act 1989, Section 82-91 and the Financial Services Act 1986, Section 128 (as amended) and Sections 179-180.

The 1985 Companies Act:

Section 449(1)(M) of the *Companies Act 1985* allows information already held by the Secretary of State for Trade and Industry or his Department to be passed to overseas regulatory bodies for the purpose of enabling the exercise of their regulatory functions. Information already held may include evidence obtained by a search warrant under this Act.

The 1989 Companies Act:

The 1989 Companies Act gives power to the Secretary of State for Trade and Industry pursuant to s.83(2) to assist an overseas regulatory authority where the assistance "is for the purposes of its regulatory function". These regulatory functions are listed in s.82(2) and include:

- (a) all those functions which the UK regulatory bodies or the Secretary of State exercise in relation to banking, insurance, companies or financial services under the Insurance Companies Act, Companies, Financial Services or Banking Acts or in connection with the investigation or enforcement of rules relating to insider dealing; and
- (b) any other functions of the regulatory authority which relate to companies or financial services.

The assessment of whether the request is "for the purposes of its regulatory function" is in practice made by HM Treasury and requests should be made to the Treasury in the first instance.

The Secretary of State nevertheless retains a discretion pursuant to s.82(4) as to whether to accept or reject requests for assistance. He may in particular take into account:

- (a) issues of reciprocity;
- (b) issues of dual criminality and the breadth of the jurisdictional claim being made by the requesting country;
- (c) the seriousness of the matter to which the request relates and the possibility of assistance being available through other sources; and
- (d) the public interest.

By s.82(6) the Secretary of State may decline assistance unless the overseas authority undertakes to make a contribution towards the costs thereof.

Once approval to a request has been given the DTI will proceed to act. Although on the domestic front the Department of Trade and Industry ("DTI") does not usually exercise statutory powers in the financial services and banking areas it can assist in these areas even if it has to liaise with another agency to comply with the request (for example, the Bank of England or the Securities and Investment Board). The scale of assistance available covers a large area of business regulation and is broadly worded so that the functions of overseas regu-

lators need not exactly parallel those of regulators in the UK. The DTI may exercise compulsory powers to require any person to attend and give evidence under oath and to produce any specified documents which appear to be related to the matter. Legal professional privilege can be claimed in response to an order to produce. There is no power of search and seizure under the 1989 Companies Act.

The Financial Services Act 1986:

The Financial Services Act (the "FSA") enables (i) powers of disclosure, and (ii) disciplinary powers and powers of intervention to be exercised to assist foreign regulatory authorities. It should be noted that under the FSA "Overseas Regulatory Authority" is defined as having the same meaning as under s.82 Companies Act 1989.

S.180(1)(qq) allows the disclosure of "restricted information" within the meaning of s.179(2) for the purpose of enabling or assisting an Overseas Regulatory Agency to exercise its regulatory function. The information may be held by, inter alia, the Secretary of State, any designated agency, the Bank of England - see s.179(3).

S.180(3) goes further and enables the Treasury to authorise disclosure under the FSA to authorities outside the UK who do not fall within the statutory definition of an Overseas Regulatory Agency. For each authority designated under s.180(3) there will also be a statement of the functions of the authority in relation to which information will be provided. So far six such designations have been made.

It is understood that the rules governing the release of information are specific to each holder of information and each request will be dealt with individually.

S.128C provides that the Secretary of State may exercise disciplinary powers or powers of intervention at the request of, or for the purpose of assisting, an overseas regulatory authority. In practice the s.128C powers have been delegated to the SIB as a designated agency within the meaning of s.114 and it should be approached in the first instance. These powers are wide ranging and of enormous potential use. They include:

- (a) the right to withdraw or suspend authorisation and thereby stop a person in the UK from conducting investment business;
- (b) the right to prohibit an authorised person from entering into transactions and soliciting business from investors;
- (c) the right to prevent assets being disposed of;
- (d) the right to appoint a trustee and to transfer the company's assets into his control.

Powers of intervention are those powers listed in Chapter VI of Part I of the Act. They are similar in scope and nature to the disciplinary powers.

In deciding whether to exercise powers on behalf of an

overseas regulatory authority tests similar to those set out in the Companies Act 1989 are applied. Assistance may be declined if the requesting authority fails to undertake to contribute to the costs of the exercise.

Disciplinary and intervention powers can only be exercised over "authorised persons". Only an authorised person can carry out investment business as defined by Schedule 1 of the FSA in the United Kingdom and a person becomes authorised by becoming a member of the Securities and Investments Board or one of the Self Regulatory Organisations. Tough criteria regarding financial capitalisation, conduct of investment business and internal compliance procedures must be adhered to for a person to become and remain a member of a SRO and hence an authorised person.

The Self Regulating Organisations are:

- (a) Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA);
- (b) Investment Management Regulatory Organisation (IMRO)
- (c) The Securities Association;
- (d) Life Assurance and Unit Trust Regulatory Organisation; and
- (e) Association of Futures Brokers and Dealers;

International Organisation of Securities Commissions

A number of Commonwealth Countries are members of IOSCO and have advised the Secretariat that, notwithstanding the lack of specific domestic legislation relating to mutual assistance between business regulatory agencies, they have acceded to the IOSCO Resolution concerning Mutual Assistance. The text of this resolution is:

Considering the increasing international activity in the securities markets;

Recognising the need to enhance investor protection through both oversight of the internationalised markets and securities-relation businesses as well as through enforcement of national securities laws with respect to international transactions;

Desiring to develop new mechanisms for mutual co-operation and assistance among securities authorities;

NOW THEREFORE BE IT RESOLVED THAT the Executive Committee of the International Organisation of Securities Commissions ("IOSCO") hereby calls upon all securities authorities;

(a) to the extent permitted by law, to provide assistance on a reciprocal basis for obtaining information related to market oversight and protection of each nation's markets against fraudulent securities transac-

tions;

(b) to designate a contact person who will insure the timely processing of all requests for assistance.

The Capital Markets Authority of Kenya has advised that it has acceded to this resolution and the Stock Exchange of Trinidad & Tobago advises that, as an IOSCO member, it has in principle, an arrangement through the medium of a MOU to co-operate with other member countries when information is requested of it. India also relies on the MOU as a basis for exchanging information with other member agencies. Similarly the Securities and Exchange Commission of Nigeria advises that it can exchange information with other members of IOSCO.

An IOSCO document of particular importance in this area is entitled "Principles for Memoranda of Understanding" and is appended to this memorandum.

1. SUBJECT MATTER

MOUs should provide that investigatory assistance will be granted without regard to whether the type of conduct under investigation would be a violation of the laws of the Requested Authority unless the Requested Authority is not permitted to provide assistance where the type of conduct under investigation would not be a violation of the laws of the Requested Authority.

In 1989, the Technical Committee endorsed a resolution calling for member organisations to enter into MOUs on information sharing in which they would undertake to provide each other with information on a reciprocal basis, without regard to whether the matter under investigation would be a violation of the laws of the Requested Authority. Most of the existing MOUs cover the broad range of subject matters supported by the Technical Committee. By providing in an MOU for a broad range of matters for which assistance will be provided, each Authority is assured that it will receive as much assistance as possible with respect to all matters falling within its jurisdiction.

If a Requested Authority is not able to provide assistance with respect to matters which would not constitute violations within its own state without breaching its domestic legislation, the Requested Authority should consider recommending that appropriate amendments be made to this legislation to enable the assistance to be given, if it has the power to make such recommendations.

2. CONFIDENTIALITY

An MOU should provide that an Authority that receives information pursuant to an MOU request will protect the information with the highest possible level of confidentiality which, at a minimum, should pro-

vide that the information will be treated with the same level of confidentiality that is given to similar information that it collects in investigations of possible domestic violations. In addition, an MOU should provide the Requested Authority with the opportunity to identify the level of confidentiality that it expects to be attached to information that it transmits pursuant to an MOU request.

The primary purpose of MOUs is to provide information for use in investigations, which are, in most instances, non-public inquiries. In fact, most securities and futures regulators are subject to domestic laws and regulations governing the confidential treatment of information. The confidentiality requirements, however, vary by country and it is possible that the procedures of one authority for maintaining confidentiality will not be consistent with the disclosure or confidentiality provisions of its foreign counterparts. This, in turn, may lead to restrictions on the requested authority's ability to transmit information.

It may be possible to overcome differences between the confidentiality requirements and procedures of the authorities by including confidentiality provisions in the MOU that satisfy the needs of both authorities. In certain instances, however, legislative action may be required to increase the level of confidentiality to encourage the widest possible exchange of information.

3. IMPLEMENTATION PROCEDURES

In a mutually agreeable form, the signatories to an MOU should describe the procedures that they will follow in making and executing requests for information pursuant to the MOU; those procedures should be consistent with both signatories' legal requirements or impediments.

One of the main purposes of an MOU is to create a framework of procedures for exchanging information between regulators. Therefore, it is important that the parties to an MOU clearly set out the manner in which requests will be made and executed.

4. THE RIGHTS OF PERSONS SUBJECT TO AN MOU REQUEST

The fact that an investigation is conducted on behalf of a foreign authority pursuant to an MOU request should not alter the legal rights and privileges granted to persons in the State of the Requested Authority.

Because it is essential that the legal rights and privileges of witnesses be protected, the signatories to an MOU should make sure that the means of executing a request is consistent with the laws, methods and requirements of the Requested Authority. When the laws and policies of the requested authority provide a range of options, requests should be executed in the manner most consistent

with the needs of the Requesting Authority.

Authorities negotiating information-sharing agreements may find it useful to examine the scope and implications of other agreements or treaties between the states of the signatories so that, among other things, they can ensure that the citizens of the signatory countries receive similar guarantees and protections.

5. CONSULTATION

MOUs should contain a provision in which the Authorities agree to consult on relevant issues that arise during the operation of the MOU. Moreover, authorities should consult frequently to discuss developments or proposals likely to affect the other Authority's interests or the available means for cooperation.

Since MOUs are designed to facilitate assistance, and not to create overly formal relations between the signatory authorities, they should contain a provision on consultations. Such a provision could specify circumstances under which it would assist the operation of the MOU to consult, such as where assistance may be or has been denied, and may also provide for consultation when requested by a signatory. By consulting about, for example, a denial of a request for assistance, the Requested Authority may be able to identify certain assistance that it is able to provide, and the Requesting Authority may benefit from learning more about why assistance was denied.

Such consultations also may promote cooperation and avoid misunderstandings and conflicts in situations involving:

- unforeseen circumstances
- overlapping jurisdiction, and
- changes in one authority's laws or procedures.

6. PUBLIC POLICY EXCEPTION

An MOU should provide that the Requested Authority maintains the right to refuse to provide assistance in instances where the provision of assistance would violate the public policy of its state. The concept of public policy would include issues affecting sovereignty, national security, or other essential interests.

Although it is optimal for the scope of an MOU to be as broad as possible, there may be limited instances where, notwithstanding the fact that a request falls within the scope of the MOU, providing assistance would be contrary to the public policy of the state of the Requested Authority. For this reason MOUs should provide a mechanism for dealing with this potential conflict so that the Requested Authority will be able to rely on a public policy exception to the MOU in denying assistance.

7. TYPES OF ASSISTANCE

MOUs should provide that the Authorities will take all reasonable steps to ensure that they can utilise their full domestic powers to execute requests for assistance. The available assistance should include, where the Requested Authority has such powers, obtaining documents and the statements or testimony of witnesses, granting access to the Requested Authority's non-public files, and conducting inspections of regulated entities.

Both before and since the Technical Committee's 1989 resolution on information-sharing several member organisations have obtained the authority to use their full domestic powers to compel the production of documents and statements or testimony on behalf of foreign authorities. In the absence of such authority, a Requested Authority may be limited to providing only information that it can obtain voluntarily or from public files in response to a request for assistance. Since law violators may refuse to produce incriminating information on a voluntary basis, and legal impediments may prevent an innocent intermediary from voluntarily providing information, the Requesting Authority may be unable to obtain critical information at the investigative stage of a matter if production of such information cannot be compelled by the Requested Authority.

herefore, the ability to compel production of documents and statements or testimony on behalf of a foreign authority greatly enhances the value of MOUs. Authorities that do not have such an ability should take all reasonable steps, including considering recommending amendments to their legislation, where they have such power to recommend, to remove impediments that keep them from utilising their full domestic powers for providing assistance to foreign authorities.

8. PERMITTED USES

MOUs should specify whether and under what circumstances the Requesting Authority may provide information it receives pursuant to an MOU to other domestic authorities for use in related matters, including investigations or proceedings instituted by other authorities and regulators, and SROs.

The civil, criminal and administrative components of a country's securities and futures laws are often enforced by multiple agencies. Since, in the first instance, the Requested Authority is responsible for the use of information located in its files, or which it gathers on behalf of the Requesting Authority, the Requested Authority should have the ability to determine permissible uses of the information. On the other hand, to further the goal of effective law enforcement, MOUs should allow the

Requesting Authority to provide information it receives pursuant to an MOU to other regulatory and enforcement groups or agencies that are charged with enforcing securities and futures laws, unless precluded by the laws of the Requested Authority from so doing.

9. PARTICIPATION BY THE REQUESTING

MOUs should provide that, to the extent permitted by the laws and policies of the Requested Authority, the Requesting Authority may be permitted to participate directly in the execution of a request for assistance.

Participation by the Requesting Authority, to the extent permitted by the laws and policies of the State of the Requested Authority, may be desirable to ensure that resources are used effectively in executing requests for assistance.

For example, in executing an MOU request that involves document review and/or the questioning of witnesses, a high degree of familiarity with the investigative record may be necessary in order to elicit the necessary information from witnesses and documents. In many cases, MOU requests are preceded by complex, long-term investigations by the Requesting Authority and the files of the investigation may include far more information than can reasonably be included in a particular MOU request. In such cases, the Requested Authority should consider permitting the persons most familiar with the investigative record to assist in the execution of the request.

10. COST-SHARING

MOUs should provide that, under certain circumstances, the Requested Authority can, if it deems it necessary, initiate a process for having the Requesting Authority share the costs of providing assistance that are incurred by the Requested Authority.

Requests for assistance may involve extensive use of investigative resources by the Requested Authority. Sharing costs may be appropriate where the cost of a particular request is substantial or where a substantial imbalance has arisen in the cumulative costs incurred by the signatories. Therefore, to minimise the burden that such investigations might place on the Requested Authority, an MOU should provide a mechanism by which the Requesting Authority may be asked to reimburse the Requested Authority for extraordinary costs. An MOU also should provide that the Authorities will consult about the handling of costs in such cases.

Proposed Statement on Mutual Assistance Between Business Regulatory Agencies

**Prepared by the Commonwealth Secretariat for consideration by the Meeting of Senior Officials
and possible report to Law Ministers**

BACKGROUND

1. At the meeting of Senior Officials of Commonwealth Law Ministries held in Singapore from 30 March to 2 April 1992 it was decided to recommend that it would be appropriate for Law Ministers to revisit the subject of mutual assistance between business regulatory agencies when they meet in 1993.

2. In this context it will be recalled that, following discussion of this matter in Christchurch, New Zealand in April 1990, Ministers identified the need for the extension of mutual assistance in the area of business regulation. In so doing they declared that "Voluntary co-operation needed to be reinforced by legislative provisions to enable powers of compulsion to be exercised in the fulfilment of requests in appropriate cases". They also invited the Secretariat to report to the 1993 Meeting on the progress made throughout the Commonwealth in developing this additional and important form of mutual assistance.

3. At the Singapore gathering of Senior Officials it was generally felt that it would not be appropriate, at least at present, to have recourse to a formalised Commonwealth Scheme in this area of concern. However it was agreed that it might well be timely for Ministers to take the opportunity of their 1993 Meeting to articulate, in greater detail than was possible in Christchurch, the general principles which they feel should guide the future development of law and practice in this area of mutual assistance. The product of such consideration by Ministers could, it was agreed, be included either in the final Communique or in a stand-alone statement which might be annexed to that Communique.

4. Senior Officials may care to consider the issue further at their meeting prior to the Law Ministers' Meeting. To assist in this task the attached draft statement has been prepared. It takes into account such international practice as has been developed in the area and the work of the International Organisation of Securities Commissions (IOSCO). Regard has also been had to the laws of those Commonwealth Countries which already permit the exercise of compulsory powers in aid of counterpart agencies abroad. The draft was circulated to Commonwealth Governments in September 1992.

*Commonwealth Secretariat
Marlborough House
September 1993*

DRAFT STATEMENT

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.

It was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the general principles of their domestic legal systems, be guided by the following general principles 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 breach of the law, regulation or requirement; whether

the assistance could more appropriately be obtained by other means; issues of international law and comity; and the resource costs involved. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of 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 agency in that country to use appropriate powers available to it in a domestic context. This would include in particular:

- (a) gaining access to, or supplying, information in its files;
- (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
- (c) exercising appropriate powers of investigation or inspection.

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 agency was entitled to obtain in the context of responding to a request for assistance.

6. There should be no legal impediment to the spontaneous provision by a regulatory agency (subject to appropriate safeguards) of information to a counterpart agency in another Commonwealth country where that information clearly gave rise to a suspicion of a breach of a legal provision, regulation or requirement of that counterpart agency. The decision of whether or not to provide such information in any particular case would be at the sole discretion of the agency in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.

The Commonwealth Scheme for Mutual Assistance in Criminal Matters: Progress Towards Full Implementation

By Professor J D McClean

1. The provision of mutual assistance in criminal matters between all Commonwealth countries has long been seen as an important objective by Law Ministers. It forms the centre-piece of a range of legal provisions which may also contain specialist material on drug trafficking, money-laundering and various types of misconduct within the financial services industry.

2. International developments such as the signing at the end of 1988 of the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the work of the Financial Action Task Force have alerted the international community to some of these particular issues. That in no way diminishes the importance of having in place general provisions enabling formal procedures to be invoked to provide assistance to courts, investigation and prosecution agencies across the whole range of serious criminal conduct, enabling (inter alia) evidence to be obtained and confiscation of proceeds orders to be made and enforced.

3. A growing number of countries now have legislation in place which enables the principles of the Harare scheme to be put into practice. Practical manuals, such as the Guidelines prepared in the United Kingdom and shared with Senior Officials at their 1992 Meeting, have been produced and the Government of Australia has expressed a willingness to augment the efforts of the Commonwealth Secretariat in preparing documentation for wide use throughout the Commonwealth. In international conversations between practitioners, such as those which take place at the annual Oxford Conferences on International and White Collar Crime, mutual assistance is seen as an established feature of best practice to which the Harare Scheme made a major contribution.

The Text of the Scheme

4. It will be recalled that the Law Ministers adopted the Scheme at their meeting in Harare in 1986, after much of the meeting of Senior Officials held in London earlier in the same year had been devoted to the subject. Law Ministers agreed to some amendments, principally to those provisions of the Scheme relating to the seizure and forfeiture of the proceeds of crime, at their meeting in Christchurch in 1990.

5. A number of issues raised in Christchurch on behalf of the Government of Malaysia, and which could not be fully discussed in the time available at that Meet-

ing, were referred to Senior Officials and considered by them in Singapore in 1992. After a full discussion agreement was reached on the points raised, in a way which did not require any amendment to the text of the Scheme. The agreement was recorded in the following Note (Document SOLM(92)25 as amended in discussion on 1 April 1992):

1. The Meeting considered three related proposed amendments to the Harare Scheme. The first was concerned with the precise point at which a criminal matter arose under paragraph 3(1) for the purposes of seeking assistance, and suggested including a separate reference in the context of forfeiture proceedings to the initiation of investigations in the requested country. The second was addressed to the meaning to be given to the word "court" where it appears in paragraphs 3(3) and 27(2)(c) of the Scheme.

2. In the subsequent discussion there was widespread support for the view that assistance should be available at the investigation stage, and in criminal as well as in forfeiture proceedings. It was appreciated that most Commonwealth countries provided within their domestic legislation for the enforcement of judicial rather than executive orders, but the view was strongly expressed that this variation should not of itself be a bar to assistance being given to the extent which the laws of the requested country permitted.

3. After discussion it was agreed that the paragraphs in question could be read in the light of the following understandings and on that basis the suggested amendments were not proceeded with:

- (a) With regard to paragraph 3(1), in most cases in which an investigation was in train there would be reasonable cause to believe that an offence had been committed and so formal assistance would be available in accordance with the Scheme: in cases where such a belief could not be so certified (perhaps because the offence was still being planned and assistance was needed in advance of its commission), the availability of such assistance was preserved by paragraph 1(1) of the Scheme.
- (b) Insofar as the expression "order" in paragraphs 3(3) and 27(2)(c) was concerned, this did not necessarily encompass only orders made by a court. In some countries non-judicial orders would be capable of recognition and enforcement (subject to paragraph 27(5) of the Scheme). In others, a requested

authority could take steps under paragraph 27(3) to obtain an order having similar effect from a court in its own country.

4. This was seen and accepted as meeting the substance of Malaysia's concerns.

Issues of principle

6. The principles embodied in the Harare scheme seem to have won wide acceptance. There has, however, been some unease at a common feature of legislation on the seizure of the proceeds of crime, that which in effect reverses the burden of proof in certain circumstances. In particular, someone appearing to possess the proceeds of crime may be required to convince the court that he came by them innocently. This is a feature, for example, of legislation based on the model of the United Kingdom's Drug Trafficking Offences Act 1986, to be found in a number of Commonwealth jurisdictions.

7. Earlier this year the Judicial Committee of the Privy Council gave an important judgment on these issues in a case on appeal from Hong Kong, *Attorney-General for Hong Kong v Lee Kwong-kut*. In view of the interest and general importance to countries whose Constitutions contain provisions similar to Hong Kong's Bill of Rights, its text is appended as Appendix A. It will be seen that the opinion contains a discussion of Canadian cases on the Charter of Rights, as well as of cases from Britain, Bermuda, Gambia and the United States.

Legislative implementation

8. It is clearly essential that the agreement recorded in the Harare Scheme be reflected in legislation. Although it is often possible to provide a wide measure of informal assistance as a matter of courtesy, anything which requires the issue of a warrant, a court order, or the seizure of property, can only be done under clear statutory authority.

9. The Table in Appendix B lists the extent of implementing legislation as reported to the meeting of Senior Officials in 1992, supplemented by other information available to the Commonwealth Secretariat. The Table indicates, without giving details, the existence of legislation dealing specifically with assistance in the area of drug trafficking.

10. It would be appreciated if additions and corrections to this Table, which is almost certainly incomplete, could be supplied to Dianne Stafford, Assistant Director (Mutual Legal Assistance) at the Secretariat.

APPENDIX A

ATTORNEY-GENERAL OF HONG KONG v LEE KWONG-KUT

**Judicial Committee of the Privy Council, 19 May
1993**

*Before: Lord Keith of Kinkel, Lord Lane,
Lord Bridge of Harwich, Lord Browne-Wilkinson, Lord
Woolf*

Appeals with special leave by the Attorney-General of Hong Kong from the judgment of the Court of Appeal of Hong Kong [1992] 2 HKCLR 76 (Cons Acting CJ, Kempster JA and Bokhary J) given on 18 June 1992.

The opinion of the Board was given by LORD WOOLF: These appeals illustrate the effect on existing legislation of adopting a Bill of Rights. On 8 June 1991 the Hong Kong Bill of Rights Ordinance 1991 (Laws of Hong Kong, c 383) ("the Hong Kong Bill") came into force.

After a hearing on 2 September 1991, at which no evidence was called, a magistrate dismissed an information preferred against Lee Kwong-kut ("the first defendant") under section 30 of the Summary Offences Ordinance (Laws of Hong Kong, c 228) ("section 30") on the ground that section 30 had been repealed by section 3(2) of the Hong Kong Bill. The Attorney-General of Hong Kong appealed against that decision and on 18 June 1992 the Court of Appeal of Hong Kong [1992] 2 HKCLR 76 dismissed that appeal.

On 4 August 1992 Gall J quashed an indictment against Lo Chak-man and Tsoi Sau-ngai ("the second defendants"), charging each of the second defendants with one count of assisting another to retain the benefit of drug trafficking contrary to section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Laws of Hong Kong, c 405) ("section 25"). Gall J quashed the indictment as a result of his ruling that section 25(1) and section 25(4)(a) and (b) had been repealed by section 3(2) of the Hong Kong Bill.

In relation to the rulings in both cases, the Attorney-General sought special leave to appeal and this was granted on 17 November 1992. In both cases the rulings were made on the grounds that the respective sections were inconsistent with section 8, article 11(1) ("article 11(1)") of the Hong Kong Bill, which provides:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Both appeals were heard together. This was a convenient course to a point on what is the first appeal to come before the Board as to article 11(1) since it has enabled the Board to consider a wide ranging argument about

section 30 and section 25 which have very different structures. It was not however necessary for their Lordships to call upon counsel for the first defendant since, having heard the argument on behalf of the Attorney-General in relation to the appeal in his case, their Lordships were satisfied that the appeal could not succeed. Their Lordships have humbly advised Her Majesty accordingly.

It is desirable at the outset to explain the different structure of the two offences before turning to consider the possible effects of the Hong Kong Bill.

The structure of section 30

The terms of section 30 are:

"Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of \$1,000 or to imprisonment for three months."

The way in which the present information was worded shows how a charge under section 30 is approached in practice. What is alleged is that the first defendant had on 17 November 1990 (at a named place) in his possession cash \$1.76m. Hong Kong currency, reasonably suspected of having been stolen or unlawfully obtained. The failure to give an account to the magistrate is not mentioned.

In his judgment in the Court of Appeal [1992] HKCLR 76, 79, relating to the first defendant, Kempster JA points out that section 30's source, like similar provisions in the laws of each of the states of Australia and of a number of former British colonies in Africa, was the former offence under section 24 of the Metropolitan Police Courts Act 1839 (2 & 3 Vict c 71) (which was repealed by the Criminal Law Act 1977) and that its history in Hong Kong goes back to section 36 of the Summary Offences Ordinance 1845.

For a proper understanding of section 30 it is useful to have in mind the powers given to the Hong Kong Police by section 55 of the Police Force Ordinance (c 232), which is comparable to part of what was section 66 of the Metropolitan Police Act 1839 (2 & 3 Vict c 47). Section 55 of the Police Force Ordinance states:

"It shall be lawful for any police officer to stop, search and detain any vessel, boat, vehicle horse or other animal or thing in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained; ..."

As has been decided in England in *Hadley v Perks* (1886) LR 1 QB 444 and in Hong Kong in *Attor-*

ney-General v Chiu Man-lun [1989] 1 HKLR 99, section 30 and section 24 of the Metropolitan Police Courts Act 1839 are to be regarded as supplemental to the powers of arrest given respectively by section 55 of the Police Force Ordinance and section 66 of the Metropolitan Police Act 1839. Construed in this way section 30 created an offence with which a person could be charged after he was stopped and arrested by a police officer in circumstances where there was a suspicion that he had committed an offence but where it was not possible to establish that he was guilty of what were the more serious offences of larceny or receiving. The nature of that offence was made clear by Lush J in *Hadley v Perks*, LR 1 QB 444, 462, when he said of section 24:

"It makes it an offence for a person to have in his possession, or convey in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it."

Section 30 is therefore an offence which contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession.

The third element is not a special defence as is contended by Mr Bratza in his extremely persuasive argument, on behalf of the Attorney-General, but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.

This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law. He could, for example, be in possession of the property without having any knowledge of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him. Section 30 therefore does not create an offence of the class identified in *Reg v Edwards* [1975] QB 27, 39-40, by Lawton LJ when he giving the judgment of the court, he said after examining a line of authority dating from the 17th century:

"this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was

hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception."

This does highlight the very special nature of section 30 since, as Lord Griffiths said of the formulation of the exception by Lawton LJ in *Reg v Edwards* in *Reg v Hunt (Richard)* [1987] AC 352, 375:

"the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare."

On this point section 30 can be compared with the approach adopted by the majority of the Board in *Mok Wei Tak v The Queen* [1990] 2 AC 333 concerning section 10(1)(a) of the Prevention of Bribery Ordinance (c 201), where in the words of Lord Roskill, at p.349, "the offence is the maintaining of a standard of living which cannot be satisfactorily explained." Here the offence is being in possession of the suspicious property without being able to give a satisfactory explanation. In adopting this approach to the nature of section 30 it is also not intended to cast any reflection on the correctness of the decision in *Attorney-General v Lo Man-cheuk* [1980] HKLR 687 that it was not necessary to make any reference to the failure of the accused to give an account to the satisfaction of the magistrate of his possession of the property reasonably suspected of being stolen or unlawfully obtained in a charge under section 30. The correctness of this decision was not in issue before their Lordships.

The structure of section 25

The respective counts of contravening section 25(1)(a) on which the second defendants were to be tried were identical: the particulars of each count alleged that between 6 and 20 December 1989 they had respectively been concerned in an arrangement whereby the retention or control of another's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the other person carried on or had carried on drug trafficking or - had benefited from drug trafficking.

The relevant provisions of section 25 are:

- (1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby
- (a) the retention or control by or on behalf of another

('the relevant person') of the relevant person's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

- (b) the relevant person's proceeds of drug trafficking -
- (i) are used to secure that funds are placed at the relevant person's disposal; or
- (ii) are used for the relevant person's benefit to acquire property by way of investment, knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has earned on drug trafficking or has benefited from drug trafficking,

commits an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to an authorised officer a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based

- (a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made in accordance with this paragraph, that is - (i) it is made before he does the act concerned, being an act done with the consent of the authorised officer; or (ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;
- (b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by rules of professional conduct; and
- (c) he shall not be liable in damages for any loss arising out of - (i) the disclosure; (ii) any act done or omitted to be done in relation to the funds or investments in consequence of the disclosure.

(4) In proceedings against a person for an offence under this section, it is a defence to prove

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking; or
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1); or
- (c) that - (i) he intended to disclose to an authorised officer such a suspicion, belief or matter as is mentioned in subsection (3) in relation to the arrangement; but (ii)

there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a).

(5) A person who commits an offence under this section is liable - (a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; ...

The only significant difference between section 25 and section 24 of the (United Kingdom) Drug Trafficking Offences Act 1986 is in relation to the knowledge which is required of the status of "the relevant person" before an offence is committed. Section 25(1) refers to "knowing or having reasonable grounds to believe" whereas the United Kingdom legislation refers to "knowing or suspecting."

The language of section 25 makes the purpose of the section clear. It is designed to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. Once a person has knowledge or has reasonable grounds to believe that a relevant person carries on or has carried on drug trafficking or has benefited from drug trafficking, then it will be an offence to become involved with "the relevant person" in any of the wide-ranging activities referred to in the section, unless the activity is reported in accordance with subsection (3) or the person who engages in the activity is in a position to establish the defence provided for in section 25(4). The section therefore creates an offence, which involves an absolute prohibition on engaging in the activities referred to in the section with someone whom you know or have reasonable grounds to believe is a person who carries on or has carried on or has benefited from drug trafficking, subject to an exception contained in section 25(3) and a special defence contained in subsection (4). Section 25 is an offence which falls within the classes referred to by Lawton LJ in the passage cited from his judgment in *Reg v Edwards* [1975] QB 27, 39-40.

As was held in *Reg v Colle* (1991) 95 Cr App R 67, in relation to that special defence, the legal or persuasive burden of proof is on a defendant, the standard required being proof on a balance of probabilities. Furthermore the only "mens rea" which the prosecution is required to establish, if mens rea is an appropriate description of the necessary mental element, is that the defendant should know or have reasonable grounds to believe that the relevant person is connected with drug trafficking. This mental element can exist, even if the defendant does not have the required belief, if there are reasonable grounds for his holding the belief. The offence is therefore a Draconian one.

The application of article 11(1) of the Hong Kong Bill

The Hong Kong Bill was enacted by the Governor of Hong Kong, with the advice and consent of the Hong Kong Legislative Council. Its provisions are for the time being entrenched under the Hong Kong Letters

Patent 1991 (No 2). The Ordinance is designed to achieve "the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; ..." ("the International Covenant"). Section 3 of the Hong Kong Bill provides:

Effect on pre-existing legislation

- (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
- (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistent, repealed.

"Pre-existing legislation" means legislation enacted before the commencement date of the Hong Kong Bill so both section 30 and section 25 are pre-existing legislation.

The close link between the Hong Kong Bill and the International Covenant is emphasised by section 4 which states:

Interpretation of subject legislation

All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant in Civil and Political Rights as applied to Hong Kong.

Part II of the Ordinance consists of section 8 which contains the 23 articles which constitute the Hong Kong Bill. Each of those articles refers in terms to the equivalent articles of the International Covenant. Article 11(1), the terms of which have been referred to earlier, is to be compared with article 14 of the International Covenant and it should be considered together with that part of article 10 of the Hong Kong Bill which provides:

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Article 11(2) is also of relevance since it provides:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...
(g) not to be compelled to testify against himself or to confess guilt".

The decision of the Court of Appeal in the case of the first defendant [1992] 2 HKCLR 76 was not the first appeal heard by that court which involved article 11(1) of the Hong Kong Bill. In *Reg v Sin Yau-ming* [1992] 1 HKCLR 127 the Court of Appeal (Silke V-P, Kempster and Penlington JJA) gave admirably clear judgments which were intended to provide guidance to the Hong Kong courts as to the proper approach to the application

of article 11(1) of the Hong Kong Bill. The judgment was in relation to offences of possession of dangerous drugs for the purpose of unlawful trafficking. In their decision, the Court of Appeal decided that certain of the provisions of sections 46 and 47 of the Dangerous Drugs Ordinance (c 134) were repealed as being inconsistent with article 11(1).

Although this is the first appeal in which the Hong Kong Bill has been considered by the Board, the Board has had from time to time to consider earlier constitutional orders which contain similar provisions and in his judgment in the *Sin Yau-ming* case, Kempster JA, at p 155, referred to the general approach to the interpretation of constitutions and bills of rights, indicated in the previous decisions of the Board in *Minister of Home Affairs v Fisher* [1980] AC 319 and Attorney-General of The Gambia v Momodou Jobe [1984] AC 689. In *Minister of Home Affairs v Fisher* [1980], AC 319, 328, in relation to the Bermuda Constitution Order 1968 (SI 1968 No 182), Lord Wilberforce stated, of instruments of this nature, that they "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." In Attorney-General of The Gambia v Momodou Jobe [1984] AC 689, 700, Lord Diplock said:

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction".

Lord Diplock's comment was as to the Constitution of the Republic of The Gambia 1970 but, as in the case of the statement of Lord Wilberforce, the approach indicated is equally applicable to the Hong Kong Bill.

Reference was also made in the judgments in the *Sin Yau-ming* case [1992] 1 HKCLR 127 to decisions in other common law jurisdictions, including the United States of America and Canada and of the European Court of Human Rights in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Such decisions can give valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill, particularly where the decisions in the other jurisdictions are in relation to an article in the same or substantially the same terms as that contained in the equivalent provision of the Hong Kong Bill. However, it must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong. This is particularly true in the case of decisions of the European Court of Human Rights, as Silke V-P recognised. The European Court of Human Rights is not concerned directly with the validity of domestic legislation but whether, in relation to

a particular complaint, a state has in its domestic jurisdiction infringed the rights of a complainant under the European Convention; whereas, in the case of the Hong Kong Bill, the Hong Kong courts, and on appeal the Board, have to determine the validity of domestic legislation having regard to the entrenched provisions of the Hong Kong Bill.

Of the various authorities to which the Court of Appeal were referred in the *Sin Yau-ming* case [1992] 1 HKCLR 127 and on the appeal in the case of the prosecution of the first defendant [1992] 2 HKCLR 76, the Court of Appeal in Hong Kong found that the decisions of the Supreme Court of Canada provided the most assistance, in particular on the interpretation of article 11(1). In the *Sin Yau-ming* case all three judges and, on the Attorney-General's appeal in the case of the first defendant, Kempster JA relied heavily on the judgment of Dickson CJC in the Supreme Court of Canada in *Reg v Oakes* (1986) 26 DLR (4th) 200, while on that appeal Cons Acting CJ and Bokhary J followed the subsequent judgment of Dickson CJC in *Reg v Whyte* (1988) 51 DLR (4th) 481. When giving his ruling in the second defendants' case, Gall J also applied the approach which was identified by Dickson CJC in *Reg v Whyte*. In both cases Dickson CJC was applying section 11(d) of the Canadian Charter of Rights and Freedoms which is the equivalent of article 11(1) of the Hong Kong Bill. In *Reg v Whyte* a stricter approach was adopted to section 11(d) than that which had been adopted in the earlier case of *Reg v Oakes*. Mr Bratza accepts that the approach in *Reg v Whyte* now represents the accepted approach in Canada, as is confirmed by later decisions of the Canadian Supreme Court: for example, in *Reg v Downey* (1992) 90 DLR (4th) 449. However on behalf of the Attorney-General he submits that it is not desirable for the Hong Kong courts to follow that approach in relation to article 11(1) as it is more intrusive in its effect on existing legislation than the approach adopted in other jurisdictions.

So far as the present appeals are concerned, their Lordships are of the opinion that, whether what can be described as the *Whyte* approach or the less intrusive approach adopted in other jurisdictions is applied, the outcome would be the same. However in order to assist the Hong Kong courts in the future and in view of the carefully reasoned decisions of the Court of Appeal already referred to, the Board feel it is necessary to give some assistance as to the correct approach for the courts to adopt in relation to article 11(1) and in particular as to whether it is appropriate to adopt the *Whyte* approach in Hong Kong as a matter of course.

Before examining the approach adopted in Canada it is helpful to consider the language and objectives of article 11(1) and the approach adopted in other jurisdictions apart from Canada to similar provisions.

Article 11(1) of the Hong Kong Bill is part of a group of provisions contained both in that article and in article 10 which are designed to ensure that, before an individual is convicted of a criminal offence, he will have a fair trial and that justice will be done. Article 11(1) would be described in the United States as a due process provision. In his case the first-named of the second defendants draws attention to the fact that article 11(1) is not subject to any express limitation. Reference is also made to the comments by the United Nations Human Rights Committee at its twenty-first session on article 14 of the International Covenant, which include the statement that:

"The burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond all reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".

However, it should not be assumed from this statement that the comparable article in the International Covenant to article 11(1) does not permit the degree of flexibility which is normally assumed to be implicit in any provision of general application which is of the same nature as article 11(1) of the Hong Kong Bill. Placing to one side for the moment the decisions in Canada all of the many decisions in different jurisdictions, to which their Lordships were referred, recognise that provisions similar to article 11(1) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. In the common law jurisdictions, Viscount Sankey LC's famous statement in *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481, that:

"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception".

is regularly treated as a starting point for the approach to provisions equivalent to article 11(1). If that statement is taken together with the comments of Lawton J.J. in *Reg v Edwards* [1975] QB 27, 39-40, and Lord Griffiths in *Reg v Hunt (Richard)* [1987] AC 352, 375, referred to earlier, and if it is also remembered that it is the substance rather than the letter of the language of the statute which is important when considering whether there is an exemption or proviso, this statement is also a useful starting point when considering the effect of article 11(1) itself.

Mr Bratza relied on the decision in the United States Supreme Court in *Patterson v State of New York* (1977) 53 LEd 2d 281 as showing that that court had rejected an argument that the "due process" clause of the Fourteenth Amendment required a state to disprove beyond reasonable doubt every fact constituting any offence and all affirmative defences relating to the culpability of the accused. He also relied upon the cases before the European Court of Human Rights which were referred to in the judgments in the *Sin Yau-ming case* [1992] 1 HKCLR 127. Here reference can be usefully made to the decision of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379, 388, where the judgment, which has been followed in later cases in that court, contains the following statement as to the equivalent provisions to article 11 of the Hong Kong:

"Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider paragraph 2 of article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".

This statement provides a valuable illustration of the collective effect of the decisions in other jurisdictions, apart from Canada, to which their Lordships have been referred on equivalent provisions to article 11(1) in other constitutional documents. Even though they are not subject to any express limitation they are considered to have an implicit degree of flexibility. The situation is the same in relation to article 11(1).

This implicit flexibility allows a balance to be drawn between the interest of the person charged and the state. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the

strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position is the same with regard to insanity, which was one of the exceptions identified by Viscount Sankey L.C. in the passage of *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481, which has already been cited. The other qualification which Viscount Sankey L.C. made as to statutory exceptions clearly has to be qualified when giving effect to a provision similar to article 11(1).

Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for providing the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 L. Ed 2d 57, 82, "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Turning to the recent decisions of the Canadian Supreme Court, they contain remarks of considerable value. In particular the majority judgment of Dickson C.J.C. in *Reg v Oakes*, 26 DLR (4th) 200, contains a number of helpful statements.

His general conclusion, at p 222, after examining the authorities in various other jurisdictions, was in the following terms with which, with its reference to "important element" and "essential element", their Lordships would respectfully agree:

"In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of in-

nocence ... If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue".

It is, however, important when considering the decision in *Reg v Oakes* and the cases in which it has been followed, to remember that prior to the adoption of the Canadian Charter, Canada had a Bill of Rights and that while the Bill of Rights did not have an express limitation on the effect of its specific provisions, the Charter does have such a limitation in section 1:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Having regard to this express limitation, it is understandable that Dickson C.J.C. in *Reg v Oakes*, at p.223, considered that "it is highly desirable to keep sections 1 and 11(d) (of the Canadian Charter) analytically distinct." Having adopted a two-stage process, it is again understandable that the Canadian Supreme Court has adopted a strict approach as to when there had been a contravention of section 11(d). This is in contrast to the flexible approach which had been adopted by the Canadian Supreme Court in *Reg v Appleby* (1971) 21 DLR (3d) 325, to section 2(f) of the Canadian Bill of Rights which is the equivalent provision to section 11(d) of the Canadian Charter. Dickson C.J.C. in *Reg v Oakes*, 26 DLR (4th) 200, 224- 225, regarded section 1 of the Charter as stating "explicitly the exclusive justificatory criteria . against which limitations on those rights and freedoms (set out in the Charter) must be measured." Having come to this conclusion, in *Reg v Whyte*, 51 DLR (4th) 481, the Canadian Supreme Court, as already indicated, applied a stricter approach to the application of section 11(d) of the Charter than had been adopted not only in *Reg v Oakes*, 26 DLR (4th) 200, but in the subsequent case of *Reg v Holmes* (1988) 50 DLR (4th) 680. In the passage of his judgment in *Reg v Oakes*, 26 DLR (4th) 200, 222, cited above, Dickson C.J.C. regarded presumptions in relation to "an important element" or "an essential element" as offending section 11(d) of the Canadian Charter. In *Reg v Whyte*, 51 DLR (4th) 481, his approach was not confined to these elements as appears from the following passage of his judgment, at p 493:

"In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237(1)(a) does not infringe the presumption of in-

nocence. Counsel relied on the passage from *Oakes* quoted above, with its reference to an 'essential element,' to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike *Oakes* where the accused was required to disprove an element of the offence. The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

It was the approach reflected in this passage of Dickson C.J.C.'s judgment ("the *Whyte* approach") which was followed in these cases, in the Court of Appeal by Cons Acting CJ and Bokhary J in the first defendant's case, and by Gall J, in the second case.

Applying the *Whyte* approach, even to place the onus on a defendant to prove insanity as a "defence" to murder has now been held to contravene the presumption of innocence guaranteed by section 11(d) of the Canadian Charter: *Reg v Chaulk* (1990) 62 CCC (3d) 193. However, the Supreme Court was able to justify the conventional position in relation to insanity under section 1. This result illustrates the fact that, applying the two-stage approach, the courts in Canada in the end tend to come to the same conclusion as would be reached in other jurisdictions.

This does not mean that the adoption of a two-stage as opposed to a single stage approach does not have practical consequences. In relation to the second stage, the section 1 of the Charter stage, formal criteria which need to be satisfied have been established. In *Reg v Chaulk*, 62 CCC (3d) 193, 216-217, Lamer C.J.C., Dickson C.J.C. concurring, described the reasoning to be followed when there is an attempt to rely on section 1 of the Canadian Charter in the following terms:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test that is to say they must: (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom in question as 'little as possible,' and (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

In applying these tests, the Canadian Supreme Court has injected a degree of flexibility. In particular in *Reg v Chaulk* it was made clear that reliance on section 1 would not be prevented because Parliament had failed to search out and adopt the least possible intrusive means of attaining its objective as long as it has chosen from a range of means which impairs section 11(d) as little as is reasonably possible.

Notwithstanding this, it is their Lordships' opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning. The application of a test along the lines suggested by Lawton LJ in *Reg v Edwards* [1975] QB 27, 39-40, in the manner already indicated will often be all that is required. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ. If this is the situation article 11(1) is not contravened.

In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty. This is particularly true in relation to what was said in *Reg v Chaulk*, 62 CCC (3d) 193, 216-217, about proportionality since it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule.

The application of article 11(1) to sections 30 and 25

So far as the first issue in the present appeals is con-

cerned, that is whether the Hong Kong Bill has repealed the statutory provisions, their Lordships regard the answer as being straightforward once the substance of the offences has been identified. In the case of the first defendant the substantive effect of the statutory provision is to place the onus on the defence to establish that he can give an explanation as to his innocent possession of the property. That is the most significant element of the offence. It reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It therefore contravenes article 11(1) of the Hong Kong Bill in a manner which the Attorney-General could not justify.

This is by contrast to the situation in relation to the second defendants' case and section 25. It is not important whether section 25(4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. The substance of the offence is contained in section 25(1) as to which the onus is on the prosecution. Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person's proceeds of drug trafficking (within the wide terms of section 25(2)) as set out in section 25(1) and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts the defendant is entitled to be acquitted. However once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking, than the defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy section 25(3) or (4). If the defendant chooses not to take the precautionary action under section 25(3) then he knows he can only safely proceed by relying on section 25(4). To be able to achieve this the defendant will have to take any steps necessary to ensure that he does not have the knowledge or suspicion referred to. An example would be, by insisting on seeing documents establishing the untainted source of the funds. If the defendant has done this then he will be aware of the relevant facts and it is reasonable that he should be required to establish them. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a defendant to bear that onus under section 25(4) is manifestly reasonable and clearly does not offend article 11(1). Indeed section 25 and section 25 can be regarded as examples of situations close to the opposite ends of the spectrum of what does and does not contravene article 11(1).

It was argued on behalf of the Attorney-General that, as the first defendant's alleged offence was committed prior to the coming into force of the Bill of Rights, section 3 should not be invoked so as to repeal retrospectively section 30. In support of this argument Mr Bratza relied on section 23 of the Interpretation and General Clauses Ordinance (Laws of Hong Kong, c 1) which corresponds closely to section 16(1) of the Interpretation Act 1978. However, quite independently of section 3, section 8 and article 11(1) established a defendant's right "to be presumed innocent until proved guilty according to law." That right came into existence on the coming into force of the Hong Kong Bill and so it would apply in any trial taking place thereafter. It is not the date of the offence but the date of trial which is conclusive. If it had been necessary to do so, the same result could have been achieved by saying that in this context a contrary intention appears, so section 23 of the Interpretation and General Clauses Ordinance does not apply: see section 2 of the Ordinance.

The Attorney-General did not contend that it was possible to save section 30 by treating it as being only partly repealed. Having come to the conclusion that section 25(4) does not offend article 11(1), the appeal of the Attorney-General in respect of the proceedings against the second defendants must inevitably be allowed. However, it is desirable that their Lordships indicate that if they had not come to that conclusion, then, contrary to the judgment of Gall J, they would have regarded only the words "to prove" as being repealed by section 3(2) of the Hong Kong Bill. Section 3(2) repeals existing legislation "to the extent of the inconsistency" and if the words "to prove" are removed from section 25(4) the second defendants would be no longer under a legal or persuasive burden of proof to establish the defence contained in section 25(4). Instead they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene article 11(1).

The final matter to which reference should be made is that Gall J was of the view that the Crown had failed to adduce the necessary evidence to establish that the interference with the interests of the individual for the benefit of the state contained in section 25 was justified. As to this he was in the difficulty that the issues before him were presented on the basis that he was required to adopt the two-stage process laid down in *Reg v Whyte*, 51 D.L.R. (4th) 481, in circumstances where the Crown was conceding before him that there had been a prima facie contravention of article 11(1). This concession having been made, on the basis of the Canadian authorities, the burden on the Crown was a heavy one and his conclusion that the evidence which was available to him was not sufficient to enable him to be satisfied has

to be understood in this context. However as was apparent from his judgment, Gall J had ample knowledge to hold the balance appropriately between the individual and the government in relation to section 25 without any evidence being called. The need to prevent the laundering of the proceeds of drug traffic is common knowledge. He was entitled to have regard to the policy which the legislature had made clear by enacting section 25. He was in a position to assess the extent of the burden which section 25(4) imposed upon the second defendants. If he had adopted, as he should have done, a broad unified approach to the application of article 11(4) to section 25, he should have had no difficulty on the material which was before him in coming to the conclusion that the section did not contravene the article. The fact that he found this process as complex as he did illustrates the disadvantage that can flow from seeking strictly to emulate the current approach of the Canadian Supreme Court. While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature: see *Reg v Downey*, 90 DLR (4th) 449, 466, and *Reg v Chaulk*, 62 CCC (3d) 193, 222. It would not assist the individuals who are charged with offences if, because of the approach adopted to "statutory defences" by the courts, the legislature in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge.

For these reasons, their Lordships have humbly advised Her Majesty that the appeal of the Attorney-General in the case of the first defendant ought to be dismissed and they will humbly advise Her Majesty that the appeal of the Attorney-General in the case of the second defendants ought to be allowed and the order of Gall J set aside. The Attorney-General must pay the costs of the first defendant before their Lordships Board. There will be no order as to costs in the case of the second defendants.

APPENDIX B

COMMONWEALTH MEMBER COUNTRIES

Antigua and Barbuda: Mutual Assistance in Criminal Matters Act 1993

Australia: Mutual Assistance in Criminal Matters Act 1987 and Proceeds of Crime Act 1987 (Cwlth); proceeds of crime legislation in most of the States and Territories

The Bahamas: Mutual Legal Assistance (Criminal Matters) Act 1988; and legislation in drug trafficking area

Bangladesh: Legislation in drug trafficking area

Barbados: Proceeds of Crime Act 1990, Mutual Assistance in Criminal Matters Act 1992 and legislation in drug trafficking area

Belize: Legislation in drug trafficking area

Botswana: Mutual Assistance in Criminal Matters Act 1992 and Proceeds of Serious Crimes Act 1990

Britain: Criminal Justice (International Co-operation) Act 1990

Brunei Darussalam: No information

Canada: Mutual Legal Assistance in Criminal Matters Act 1988

Cyprus: Legislation in drug trafficking offences area, 1992

Dominica: Mutual Assistance in Criminal Matters Act 1990

The Gambia: Mutual Assistance in Criminal Matters Act being drafted

Ghana: Legislation in drug trafficking area; other legislation in preparation in 1992

Grenada: Legislation in drug trafficking area

Guyana: Legislation in drug trafficking area

India: Some mutual assistance provisions in Code of Criminal Procedure; further legislation under consideration in 1992; legislation in drug trafficking area

Jamaica: No information

Kenya: No information

Kiribati: No information

Lesotho: Legislation under consideration in 1992

Malawi: Mutual Assistance in Criminal Matters Act 1991

Malaysia: Legislation in drug trafficking area; other legislation under consideration in 1992

The Maldives: No information

Malta: Legislation, also to embrace European Convention on Mutual Assistance, under consideration in 1992

Mauritius: Issues under review in 1992

Namibia: Issues under review in 1992

Nauru: No relevant legislation

New Zealand: Proceeds of Crime Act 1991; Mutual Assistance in Criminal Matters Act 1993

Nigeria: Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Decree 1988; and legislation in drug trafficking area

Pakistan: Issues under review in 1992

Papua New Guinea: No relevant legislation

Saint Christopher & Nevis: Mutual Assistance in Criminal Matters Act 1993; Proceeds of Serious Crimes Act 1993

Saint Lucia: No information

Saint Vincent & The Grenadines: No information

Seychelles: No information

Sierra Leone: No information

Singapore: Legislation in drug trafficking area in 1992; other issues under review

Solomon Islands: No information

Sri Lanka: No action by 1992

Swaziland: Criminal Matters and Mutual Assistance Bill prepared in 1992; Serious Offences (Confiscation of Proceeds) Bill also prepared 1992

Tanzania: Mutual Assistance in Criminal Matters Act 1991; Confiscation of Proceeds of Crime Act 1991

Tonga: No information

Trinidad & Tobago: No information

Tuvalu: No information

Uganda: No information

Vanuatu: Mutual Assistance in Criminal Matters Act 1989; Serious Offences (Confiscation of Proceeds) Act 1989

Western Samoa: No information

Zambia: Legislation in drug trafficking area

Zimbabwe: Mutual Assistance in Criminal Matters Act 1990; Serious Offences (Confiscation of Profits) Act 1990

DEPENDENT TERRITORIES

Anguilla: Legislation in drug trafficking area

Bermuda: Legislation in preparation in 1992; legislation in drug trafficking area

Cayman Islands: Legislation in drug trafficking area

Falkland Islands: No information

Gibraltar: Legislation in drug trafficking area; other legislation pending in 1992

Guernsey: Legislation in drug trafficking area

Hong Kong: Legislation in drug trafficking area; mutual assistance under discussion with Chinese authorities in 1992

Isle of Man: Legislation in drug trafficking area

Jersey: Legislation in drug trafficking area

Montserrat: Legislation in drug trafficking area

Turks & Caicos: Legislation in drug trafficking area

Virgin Islands: Legislation in drug trafficking area

Mutual Assistance Between Business Regulatory Agencies: The International Dimension

**A Background Paper prepared by the Commonwealth Secretariat for the Meeting of
Commonwealth Law Ministers, Mauritius, November 1993**

Background

At the Meeting of Senior Officials of Commonwealth Law Ministries held in Singapore from 30 March to 2 April 1992 it was decided to recommend that it would be appropriate for Law Ministers to revisit the subject of mutual assistance between business regulatory agencies when they meet in Mauritius in November 1993. In order to facilitate such consideration the Commonwealth Secretariat was invited to prepare both an analysis of relevant legislative developments in member countries and an overview of international practice in this important area of concern.¹ This paper is intended to deal with central aspects of the latter subject. The former area has been addressed in the Commonwealth Secretariat memorandum entitled "Mutual Assistance Between Business Regulatory Agencies"². Given the nature of the interface between the domestic legislative regimes which are currently in place in certain member countries and the international cooperative practice which has evolved therefrom some element of duplication of information has proved to be unavoidable. However, in contrast to the treatment of domestic law, this paper includes selective coverage of aspects of the practice of foreign States and international organisations and institutions as well as Commonwealth developments.

The Context

Recent years have witnessed an unprecedented internationalisation of activities in the world's securities and futures markets³ and this seems set to continue. Among the major factors influencing this trend are rapid advances in communications and computer technology, growing economic interdependence, the increasing tendency of major investors to diversify their investments on a global basis, and the growing inclination of major businesses to rely on foreign debt and equity markets to raise capital.⁴ These developments have, in turn, posed significant challenges for national business regulators whose task it is to ensure fairness and honesty in the market place.⁵

Although the regulatory problems posed by this increase in international trading are many and varied particular concern has been expressed about the new opportunities which have been presented for engaging in transnational criminality and malpractice.⁶

It is now widely accepted that the situation requires both improved information sharing between regulatory

bodies and the enhanced provision of mutual assistance, tailored to the special needs of this sector, if the efficiency of national markets, and investor confidence in them, is to be maintained. As has been pointed out elsewhere, "Only international cooperation can minimise the opportunities for fraud and evasion of the rules of each individual market from abroad. Without cooperation among nations, multi-jurisdictional fraud would become an increasingly serious international problem. Those countries which do not solicit cooperation may invite the unscrupulous to exploit their domestic market participants. Every country that does not stand willing to provide cooperation may invite the unscrupulous to use that country as a haven from which to conduct operations."⁷ It is also now agreed that, for a variety of reasons, including the significant differences which have evolved in terms of domestic regulatory structures, the prominent use of administrative sanctions and civil legal proceedings in the process of the regulation of market activities, and substantive dissimilarities among countries as to the reach and role of the criminal law in relevant spheres of activity, the requirements of cooperation can not "be adequately satisfied by relying on the established mechanisms for mutual assistance in traditional criminal matters".⁸

Developments in International Cooperation between Business Regulatory Agencies

As with mutual assistance in criminal matters, international practice in this area is of relatively recent origin. Indeed, in its most modern form it can be traced back to the conclusion of a Memorandum of Understanding between the United States and Switzerland in 1982 which addressed the issue of multi-jurisdictional insider trading.⁹ The success of the 1982 negotiations was of particular significance in that it stimulated the U.S. Securities and Exchange Commission (SEC) to enter into further bilateral arrangements of ever increasing scope and complexity; "broad-based agreements that would cover the full range of cases that it could expect to confront as markets continue to become international".

In doing so the SEC has tended to favour the use of informal international instruments, such as Memoranda of Understanding (MoU), rather than treaties and this approach has similarly commended itself to the majority of governments and regulators which have since become active in this new area of international cooperation.¹⁰ It is also the first preference of the Mon-

treat based International Organisation of Securities Commissions (IOSCO) which has played a prominent role in creating, through its resolutions and studies, an atmosphere conducive to enhanced mutual assistance.

The prominence of the Memorandum of Understanding is to be explained, in part, by the acknowledged advantages it has over the treaty form. As has been pointed out elsewhere, "The main procedural reasons for using informal instruments in preference to treaties are simplicity, speed, flexibility, and confidentiality."¹¹ At the same time they establish an agreed process for obtaining necessary information and "provide the parties with experience in international cooperation and a better understanding of the differences between regulatory systems and markets. The MoUs build a watershed of positive experience which can form the basis for future, more expansive cooperation".¹² Finally, in the view of many it is an advantage that such instruments are not intended to give rise to binding legal obligations.¹³ As an April 1990 paper prepared by the Australian Attorney-General's Department for consideration by Commonwealth Law Ministers noted, "the request by the relevant foreign agency would not, and would not be intended to, give rise to a binding international legal obligation to provide the assistance requested; it would provide a facility to the domestic agency to provide the assistance requested in appropriate cases".¹⁴

Dominant though the MoU form has become recourse to bilateral treaties is by no means unknown. For example, the 11 December 1989 U.S. - Netherlands Agreement enjoys such a status in international law. Similarly the 14 December 1989 Administrative Agreement between the SEC and the Commission des Operations de Bourse of France is intended to be binding in nature.

Although the preponderant practice thus far has been bilateral a limited number of multilateral agreements have been concluded. Of particular significance in this regard is the 1989 Council of Europe Convention on Insider Trading and its Protocol. This Convention "is intended to create mutual assistance by exchanges of information between Contracting Parties, to enable supervision of securities markets to be carried out effectively and to establish whether persons carrying out certain financial transactions on the stock markets are or are not insiders, which would reveal whether their transactions were fraudulent or proper".¹⁵ Interestingly, this instrument makes provision in Article 3 for the extension, on the basis of reciprocity, of mutual assistance beyond the confines of insider trading. This optional facility would encompass "the exchange of information necessary for the surveillance of operations carried out in the organised stock markets which could adversely affect equal access to information supplied to investors in order to ensure honest dealing".¹⁶

The Protocol to the Council of Europe Convention is designed to accommodate the special position of such member states of the European Communities (EC) as elect to become parties to it. It provides that, "In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned." The basic approach adopted by the EC in this regard is, in turn, articulated in the Council Directive of 13 November 1989 on co-ordinating regulations on insider dealing.¹⁷ Members of the EC were due to take the necessary steps to ensure compliance with its terms prior to 1 June 1992 but there has been some delay in meeting this commitment. As has been pointed out elsewhere, "The importance of this Directive stems from the fact that it is to produce harmonised laws relating to insider dealing within the twelve Member States of the EEC with a virtually compulsory mutual assistance scheme attached."¹⁸ Pursuant to Article 11 the EC may conclude agreements with non-member countries on the matters which are covered by the Directive.

Significant Elements of International Practice

Concern has, on occasion, been expressed that the emphasis placed on the development of bilateral relationships to promote mutual assistance between regulators would result in a highly diverse "patchwork" system characterised by a lack of uniformity in underlying principles.¹⁹ That such fears have, in large measure, proved to be unfounded is due primarily²⁰ to the progress which has been achieved following discussions held under the auspices of IOSCO. Of particular importance were the developments at its XVIth Conference, held in Washington, D.C. in September 1991. There the President's Committee approved a set of ten "Principles" representing the components thought to be necessary for an optimal MoU. (The text of this important document is reproduced in full as an appendix to paper LMM(93)22.) In the words of the Conference Communique, these Principles "represent a consensus among regulators about provisions that should be included in MoUs in order to effectively fight fraud and other abuses in the securities and futures markets".²¹

The IOSCO Principles deal with a variety of issues ranging from procedural and cost sharing questions to weighty matters relating to the degree of confidentiality to be afforded to information which is provided and restrictions on the use of such material. Although a comprehensive examination of these principles lies beyond the scope of this introductory paper, the approach adopted to the key areas of the nature and scope of the assistance to be provided and grounds for refusal are reviewed below.

In so far as the former is concerned Principle 7 reads, "MoUs should provide that the Authorities will take all reasonable steps to ensure that they can utilise their full domestic powers to execute requests for assistance. The available assistance should include, where the Requested Authority has such powers, obtaining documents and the statements or testimony of witnesses, granting access to the Requested Authority's non-public files, and conducting inspections of regulated entities." In framing the above it was recognised that domestic legislation in many countries would require modernisation before full effect could be given to its terms in practice. This is particularly so in the critical area of the use of compulsory powers on behalf of a requesting authority in the absence of any indication of a violation of local law. The absence of the ability to place compulsory evidence gathering powers at the disposal of overseas authorities severely limits the effectiveness of international cooperation. In the words of the IOSCO text, "Since law violators may refuse to produce incriminating information on a voluntary basis, and legal impediments may prevent an innocent intermediary from voluntarily providing information, the Requesting Authority may be unable to obtain critical information at the investigative stage of a matter if production of such information cannot be compelled by the Requested Authority." Similarly, the 1990 Australian paper, to which reference was made above, opined that, "Such powers are the most effective weapon in the armoury of national business regulatory agencies to deal with the challenges of international fraud and misconduct in the financial markets."²²

Relatively few jurisdictions have yet taken this step. Those which have include Australia, France, New Zealand, the United Kingdom, and the United States. A similar position has been reached in certain of the Provinces of Canada where securities regulation falls under the jurisdiction of the component parts of the federation as a matter of property and civil rights.²³ In the absence of such compulsory powers the tendency has been for interested parties to negotiate a more limited agreement than that contemplated in Principle 7. This was the course of action followed by the United States and the United Kingdom in 1986.²⁴ That arrangement was subsequently replaced by a more comprehensive Memorandum of Understanding dated 25 September 1991 which was concluded after the necessary alterations in domestic law had been effected.²⁵ An alternative approach was, however, adopted in the January 1988 MoU concluded between the SEC and the relevant authorities in Ontario, Quebec and British Columbia the text of which is reproduced at Appendix A. Article 2(3) thereof recognised that the parties "may not in all circumstances possess the legal authority to provide the assistance contemplated Subject to such limitations of legal authority, the Authorities will use all reasona-

ble efforts to obtain the necessary authorisation to provide the assistance described in this Memorandum of Understanding".

The IOSCO Principles treat the issue of denial of assistance by simple reference to a public policy exception; a concept which, in the words of Principle 6, "would include issues affecting sovereignty, national security, or other essential interests". This approach, which contrasts sharply with the more elaborate provisions to be found in the area of mutual assistance in criminal matters, has been adopted in a number of even the most advanced MoUs. In others further grounds for refusal are afforded specific mention.²⁶ For instance, the 28 October 1992 MoU between the UK Treasury and the Securities and Investments Board and the Australian Securities Commission, the text of which is reproduced at Appendix B, mentions, in addition to the public interest, assertions of jurisdiction not recognised by the requested country, and "matters specified" by the laws and regulations of the requested country, as relevant to any decision of whether or not to decline a request. In any event, the difference of approach between that adopted in the regulatory context and that found in treaty based instruments dealing with the provision of assistance in criminal matters may be more apparent than real. Under informal and legally non-binding Memoranda of Understanding the provision of assistance is always discretionary. For a more complete picture of the factors which will actually govern the exercise of this discretion it will often be necessary to consult the relevant provisions of the domestic law of each party. Thus, both section 82 of the UK Companies Act 1989 and sections 7 and 8 of the Australian Mutual Assistance in Business Regulation Act 1992 provide an essential context for the proper interpretation of the 1992 MoU. By way of illustration, in the case of Australia the legislative criteria to be considered include, among others, whether anything provided to the requesting authority is likely to be used for punishing a person for an offence of a political character or to harm such a person because of his or her "race, sex, religion, nationality or political opinions".

The 1991 IOSCO Principles, it should be noted, also seek to ensure that the provision of information and assistance will not be precluded or frustrated by considerations of dual illegality (Principle 1). It is felt by many that in the business regulatory field such a requirement "not only may severely limit the scope of an agreement but it may also make the processing of a request for information much more complicated".²⁷ This approach has been followed in several of the arrangements concluded thus far.

The conclusion of a bilateral Memorandum of Understanding or treaty concerning the provision of mutual assistance in a business regulatory context will often have the effect of adding to, rather than substituting for,

other preexisting mechanisms for obtaining cooperation. For instance, many of the countries which possess highly developed financial markets are parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.²⁸ Similarly, informal channels of communication may also be available. In so far as criminal offences are concerned, however, an issue of some significance arises if, as is increasingly the case, avenues for the provision of formal mutual assistance in criminal matters subsist between the parties. No consensus has yet emerged as to the best manner in which to treat the interface between these two cooperative mechanisms - a matter which is complicated in practice as a result of the selection of different channels of communication in each, and by virtue of the fact that both "provide for assistance in the investigative phase".²⁹

Of the solutions adopted thus far that found in the U.S.-Netherlands Agreement of 1989 has the merit of clarity. Article 8 is worded as follows:

1. Mutual cooperation in criminal matters between the Contracting Parties shall continue to be governed exclusively by the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters of June 12, 1981.
2. Prior approval by the Competent Authority of the Requested State is required for the use in a criminal proceeding of information that previously has been exchanged under this Agreement.

A broadly similar approach to this question has been adopted by Australia. As the Explanatory Memorandum for the Mutual Assistance in Business Regulation Bill of 1992, circulated to Parliament by the Commonwealth Attorney General, was to stress its provisions "make it clear that this Bill is intended to complement the scheme of mutual assistance established by the *Mutual Assistance in Criminal Matters Act 1987*. The provisions of this Bill are not intended to be used as an alternative to that Act where a foreign regulator is investigating a criminal offence".³⁰ Here the intention is not to frustrate the provision of assistance but rather to ensure that requests relating to criminal offences are dealt with by those who are specialised in such matters acting within a framework designed to safeguard the rights of criminal suspects.³¹ Accordingly paragraph 10 of the 1992 Australia-UK Memorandum stipulates that "the requested Authority will consider whether the request might be dealt with via channels for mutual assistance in criminal matters".

In the 1989 Council of Europe Convention on Insider Trading a somewhat more liberal approach is adopted in Article 7(4). This is contained within Chapter II which governs the exchange of information between the parties. As the Explanatory Report notes, "The committee of experts considered that information ob-

tained by administrative means may be used before the criminal courts where this information could have been obtained within the framework "of the 1959 European Convention on Mutual Assistance in Criminal Matters and its Protocol or other mutual assistance in criminal matters agreements subsisting between the countries concerned."³² This is somewhat similar to the concept reflected in Article 11(2) of the 1988 Canada-U.S. Memorandum of Understanding which regards it and the Mutual Legal Assistance Treaty between the same states³³ as jointly constituting "a framework of principles and procedures for investigating and obtaining information concerning certain kinds of securities law offences".

Even in instances where a relatively free choice of means is available questions of substance will often arise. Thus, in the case of requests to the United Kingdom a requesting country can utilise, for example, either the provisions of the 1989 Companies Act, designed specifically to assist overseas regulators, or those of Part I of the 1990 Criminal Justice (International Co-operation) Act, which makes detailed provision for mutual assistance in criminal matters.³⁴ However, the compulsory powers available under each differ. As Chase has pointed out, those under the 1989 enactment "are restricted to requiring witnesses, on pain of criminal penalty for refusal, to attend before those authorised, and to requiring the production of documents from those in whose custody they are held. However, such powers do not extend to the search or seizure of documents. Herein lies an important difference for the investigator between these powers and those in the 1990 Act".³⁵ In practice if it is felt that an overseas request could be more appropriately processed within the United Kingdom by an authority other than that which has received it it is understood that it will be passed on internally to that authority for action.³⁶

Conclusions

As with the early stages in the evolution of international mutual assistance in criminal matters, the growing practice of cooperation between business regulatory bodies has been predominantly bilateral in nature. The rapid growth of a substantial network of such arrangements has, in turn, been facilitated by the use of informal Memoranda of Understanding which provide a framework within which each party will exercise its discretion, on a case by case basis, on whether to respond positively or not to incoming requests. The absence of legal obligation in such MoUs has, in turn, made it easier than would otherwise have been the case to persuade legislatures to make available to overseas bodies, in areas of great national sensitivity, powers of compulsion in the absence of any violation of domestic law. In this regard the recent trend has been particularly encouraging. These developments, when viewed in the light of the growing consensus as to basic principles

REFERENCES

1. See generally, "Mutual Assistance Between Business Regulatory Agencies", SOLM(92)11.
2. See, LMM(93)22.
3. See, eg. C Baltic, "The Next Step in Insider Trading Regulation: International Cooperative Efforts in the Global Securities Market" (1992) 23 *Law and Policy in International Business* p. 167, at pp. 169-175.
4. See "International Securities Enforcement Act of 1989: Report", 101st Congress, 1st Session, HOUSE OF REPRESENTATIVES, Report 101-240, p.2.
5. See, "Mutual Assistance in Business Regulation Bill 1992: Explanatory Report" (Parliament of the Commonwealth of Australia, House of Representatives: 1992), p.2.
6. See, eg. US General Accounting Office, *Securities and Futures Markets: Cross-Border Information Sharing is Improving, but Obstacles Remain* (1992), p.10.
7. W. McLucas "Protecting Investors from International Fraud - Legal and Enforcement Developments" (Paper presented to the XVth IOSCO Conference, Washington, DC, 23-26 September, 1991: typescript), pp.32-33.
8. "Mutual Assistance Between Business Regulatory Agencies: A Paper by the Australian Attorney-General's Department" in Commonwealth Secretariat, *1990 Meeting of Commonwealth Law Ministers: Memoranda Part I* (1991), p.250, at p.250.
9. "Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading" (1983) 22 *International Legal Materials*, pp.1-12. See also, F. Stultz, "Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks" (1988) 21 *Vanderbilt Journal of Transnational Law* p.63, at pp.107-112.
10. Supra, note 7, at p.29. See also, P. Jimenez, "International Securities Enforcement Cooperation Act and Memoranda of Understanding" (1990) 31 *Harvard International Law Journal*, pp.295-311.
11. As of June 1992 IOSCO had on file numerous MOUs and similar agreements involving participation by regulators in some 18 states.
12. A. Aust, "The Theory and Practice of Informal International Instruments" (1986) 35 *International and Comparative Law Quarterly*, p.787, at p.789.
13. M. Mann and J. Mari, "Developments in International Securities Law Enforcement" (1990: typescript), at p.5.
14. On the legal status of such informal instruments see generally, supra, note 12; and, O. Schachter, "The Twilight Existence of Non-binding International Agreements" (1977) 71 *American Journal of International Law*, at pp.296-304.
15. Supra, note 8, at p.254.
16. "Explanatory Report on the Convention on Insider Trading and its Protocol" (Council of Europe, Strasbourg: 1989), at p.6.
17. Id., p.9.
18. 89/592/EEC, OJ/L334/30. See generally, A. Stutz, "A New Look at the European Economic Community Directive on Insider Trading" (1990) 23 *Vanderbilt Journal of Transnational Law*, pp.135-177; and T. Tridimas, "Insider Trading: European Harmonisation and National Law Reform" (1991) 40 *International and Comparative Law Quarterly*, pp.919-937; and, supra, note 3, at pp.192-196.
19. D. McClean, *International Judicial Assistance* (1992), p.297.
20. See, eg. B. Begin, "A Proposed Blueprint for Achieving Cooperation in Policing Transborder Securities Fraud" (1986) 27 *Virginia Journal of International Law*, p.65, at p.96.
21. See, E. Barlow, "Enforcing Securities Regulations Through Bilateral Agreements with the United Kingdom and Japan: An Interim Measure or a Solution?" (1988) 23 *Texas International Law Journal*, p.251, at p.266.
22. "Final Communique of the XVIth Conference of the International Organization of Securities Commissions" 26 September 1991 (typescript), p.4.
23. Supra, note 8, at p.252.
24. For the position in selected Commonwealth jurisdictions see generally, supra, note 2. For the position in the United States see, Insider Trading and Securities Fraud Enforcement Act of 1988. See generally, J. Thomas, "Icarus and His Waxen Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market" (1990) 23 *Vanderbilt Journal of Transnational Law*, pp.99-134. Also of relevance to the position of the SEC in this context is the International Securities Enforcement Cooperation Act of 1990, discussed in J. Naylor, "International Securities Enforcement Cooperation Act of 1990" (1991) 12 *Company Lawyer*, at p.30. These legislative initiatives did not, however, apply to the US Commodity Futures Trading Commission (CFTC) which continued to lack appropriate powers to assist overseas regulators. This defect was cured, in large measure, by the Futures Trading Practices Act of 1992. Since that time the CFTC has been more active in concluding international agreements. Eg. in January 1993 it concluded an MOU in respect of Taiwan and in April 1993 an Agreement with The Netherlands.
25. See, "United Kingdom - United States: Memorandum of Understanding on Exchange of Information in Matters Relating to Securities and Futures" (1986) 25 *International Legal Materials* at pp.1431-1437. Of particular interest are paragraphs 11 and 17 thereof.
26. For the full text see, supra, note 1, Appendix B.
27. See, eg. Article 4(3) of the 1989 agreement between France and the United States which contains specific reference to the concepts, among others, of duplicative remedial sanctions and double jeopardy.
28. See, eg., J.P. Michau, "Information Sharing Between Securities Regulators" (Paper presented to the XVth IOSCO Conference, Santiago, Chile, 1990: typescript), p.7.
29. See, eg. supra, note 19, at pp.85-105.
30. Supra, note 28, at p.24.
31. Supra, note 5, at p.6.
32. See, id., at p.7.
33. Supra, note 16, p.12. See also, Article 12 of the Convention.
34. Canada-US Treaty on Mutual Legal Assistance in Criminal Matters (with Annex) of 18 March 1985, *Canada Treaty Series*, 1990, No.19 (entered into force 24 Jan.1990). For the application of this instrument to securities offences see, Article I and the Annex. See also, Article III.
35. Other UK statutory provisions, including those relating to the Serious Fraud Office, also contribute to what has been described as a developing "global regulatory system ... in financial services and cross border crime". M. Levi, *Customer Confidentiality, Money Laundering, and Police-Bank Relationships: English Law and Practice in a Global Environment* (1991), p.27. See also, supra, note 2, at pp.4-6.
36. B. Chase, "Mutual Assistance to Overseas Business Regulatory Bodies" in *Action Against Transnational Criminality: Papers from the 1992 Oxford Conference on International and White Collar Crime* (1993), p.27, at p.30.
37. See, UK Central Authority, Home Office, *International Mutual Assistance in Criminal Matters: United Kingdom Guidelines* (August 1991), at p.12.

which should govern activities in this area, suggest that progress will continue to be recorded in ensuring that international cooperation is widely available to those seeking to combat crime and abuse in an era characterised by global trading.

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APPENDIX A

MEMORANDUM OF UNDERSTANDING

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

AND

ONTARIO SECURITIES COMMISSION

COMMISSION DES VALEURS MOBILIERES DU QUEBEC

BRITISH COLUMBIA SECURITIES COMMISSION

JANUARY 7, 1988

Memorandum of Understanding

(To enable this document to be incorporated within the present volume the text has been reproduced in a different format)

The United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the British Columbia Securities Commission, recognising the increasing international activity in securities markets and the corresponding need for mutual cooperation in matters relating to the administration and enforcement of United States and Canadian securities laws, have reached the following understanding with respect to requests for assistance as set out herein made between the United States Securities and Exchange Commission and a Canadian securities regulatory authority:

Article 1: Definitions

1. For the purposes of this Memorandum of Understanding:

- (a) "Authority" means:
 - (i) the Securities and Exchange Commission of the United States; or
 - (ii) the Ontario Securities Commission, the Commission des Valeurs Mobilières du Québec, the British Columbia Securities Commission or any other Canadian securities regulatory authority which becomes a party to this Memorandum of Understanding in the manner set out in Article 12.
- (b) "requested Authority" means:
 - (i) where the requesting Authority is the United States Securities and Exchange Commission, the Canadian securities regulatory authority to which the request under this Memorandum of Understanding is made; or
 - (ii) where the requesting Authority is a Canadian securities regulatory authority, the United States Securities and Exchange Commission.
- (c) "requesting Authority" means an Authority making a request under this Memorandum of Understanding.
- (d) "person" means a natural person, unincorporated association, partnership, body corporate, government, political subdivision, agency, or instrumentality of a government.
- (e) "issuer" means a person who issues or proposes to issue any security.
- (f) "investment businesses" means investment advisers, investment advisory services, invest-

ment companies, other collective investment undertakings, investment banks, brokers, dealers and equivalent entities.

- (g) "securities processing businesses" means clearing corporations or securities transfer agents.
- (h) "laws or regulations" means the laws, regulations and regulatory policies applicable in the jurisdictions of the Authorities concerning securities regulation including, without limitation:
 - (i) insider trading;
 - (ii) misrepresentation or the use of fraudulent, deceptive, or manipulative practices in connection with the offer, purchase or sale of any security;
 - (iii) the duties of persons to comply with periodic reporting requirements or requirements relating to changes in corporate control;
 - (iv) the duties of persons, issuers or investment businesses to make full and fair disclosure of information relevant to investors;
 - (v) the duties of investment businesses and securities processing businesses pertaining to both their financial, operational or other requirements and their duties of fair dealing in the offer and sale of securities and the execution of transactions; and
 - (vi) the financial and other qualifications of those engaged in, or in control of, issuers, investment businesses or securities processing businesses.

Article 2: Scope of Assistance

1. The Authorities will provide the fullest mutual assistance, as contemplated by this Memorandum of Understanding. Such assistance will be provided to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution in cases where information located within the jurisdiction of the requested Authority is needed to determine whether, or prove that, the laws or regulations of the requesting Authority may have been violated.

2. Assistance available under this Memorandum of Understanding includes but is not limited to:

- (a) providing access to information in the files of the requested Authority;
- (b) taking the evidence of persons; and
- (c) obtaining documents from persons.

3. The Authorities recognise that they may not in all circumstances possess the legal authority to provide the assistance contemplated in this Memorandum of Understanding. Subject to such limitations of legal authority, the Authorities will use all reasonable efforts to obtain the necessary authorisation to provide the assistance described in this Memorandum of Understanding.

Article 3: General Principles

1. This Memorandum of Understanding sets forth a statement of intent of the Authorities regarding the exchange of information between the Authorities.

2. The execution of this Memorandum of Understanding does not prohibit any Authority from taking measures other than as provided herein to obtain information, evidence or documents located in the jurisdiction of another Authority or in the possession or under the control of a national of another Authority necessary to ensure compliance with or enforce the laws or regulations of its jurisdiction, provided that such Authority:

- (i) utilises moderation and restraint in taking such additional measures;
- (ii) where the information is located within the territory of the other Authority, makes a request to the other Authority pursuant to this Memorandum, or otherwise, prior to taking such other measures;
- (iii) notifies the other Authority before using measures not contemplated by this Memorandum of Understanding; and
- (iv) consults, if so requested, concerning how such measures may affect the interests of the other Authority and its government.

Notwithstanding these restrictions:

- (a) a requesting Authority may communicate with any person in the jurisdiction of the requested Authority who voluntarily agrees to provide the information or documents requested; and
- (b) requests for information which is available from any public source in the jurisdiction of the requested Authority may be communicated on an informal basis without compliance with the terms of this Memorandum of Understanding.

3. The provisions of this Memorandum of Understanding will not give rise to a right, directly or indirectly, on the part of any person, other than the Authorities, to obtain, suppress or exclude any information or to challenge the execution of a request for assistance

under this Memorandum of Understanding.

4. Assistance under this Memorandum of Understanding may be denied by the requested Authority on grounds of public interest.

Article 4: Requests for Assistance

1. Requests for assistance must be made in writing and addressed to the requested Authority's contact officer listed in Appendix A.

2. The request for assistance will specify the following:

- (a) a general description of the documents, information and testimony of persons sought by the requesting Authority;
- (b) a general description of both the matter which is the subject of the request and the purpose for which the information is sought;
- (c) the persons believed by the requesting Authority to possess the information sought, or the places where such information may be obtained, if the requesting Authority is knowledgeable thereof;
- (d) the legal provisions pertaining to the matter which is the subject of the request; and
- (e) the desired time period for the reply.

3. Requests for assistance may be denied where the request is not in accordance with the provisions set forth in this Memorandum of Understanding.

4. In the event of urgency, requests for assistance and replies to such requests will be effected by summary procedures or by means of communication other than the exchange of letters, provided that all such communications are confirmed in the manner prescribed in this Article.

Article 5: Execution of Requests

1. In making a request for assistance the Requesting Authority may designate the persons whose testimony it wishes to be taken.

2. The testimony of persons involved, directly or indirectly, in the activities underlying the request or holding information which may assist in carrying out the request will be taken, and the production of other evidence will be required, by the requested Authority or any other party or parties that it designates.

3. The testimony of persons will be taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the requested Authority. Notwithstanding any other provision of this Memorandum of Understanding, any person giving testimony as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the jurisdiction of the requested Authority. Assertions regarding other rights and privileges arising exclusively pursuant to the

law of the jurisdiction of the requesting Authority shall be preserved for consideration by the courts in the jurisdiction of the requesting Authority.

4. Access to information held in the files of the requested Authority will be provided upon request of the requesting Authority.

5. When requested by the requesting Authority, testimony will be taken under oath and a transcript will be made. In addition, a representative of the requesting Authority may be present at the taking of testimony and, subject to approval by the requested Authority and to paragraph 6, may prescribe specific questions to be asked of any witness or otherwise participate in the examination of any witness.

6. Subject to the following conditions, a requested Authority may grant a request made by the requesting Authority that a person or persons designated by the requesting Authority be permitted to conduct the interrogation of any person:

- (a) the requesting Authority must specify the reasons for this request;
- (b) the request may be granted or denied by the requested Authority in its discretion. The requested Authority may impose such conditions on the participation of the requesting Authority as it deems appropriate.
- (c) if the request is granted and the laws of the jurisdiction of the requesting Authority require the opportunity for counsel to the witness or any party to the proceeding, his counsel, or both, to pose questions to the witness, such participation will be permitted; and
- (d) if the request is denied, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the denial and the circumstances under which the request might be granted.

Article 6: Permissible Use of Information

1. The requesting Authority may use the information furnished solely:

- (a) for the purposes stated in the request with respect to ensuring compliance with or enforcement of the laws and regulations of the requesting Authority including the legal provisions specified in the request and related provisions; and
- (b) for purposes within the general framework of the use stated in the request including conducting a civil or administrative enforcement proceeding, assisting in a criminal prosecution, assisting in a self-regulatory enforcement proceeding, or conducting any investigation related thereto for any general charge applicable to the violation of the provisions specified in the request.

2. The requesting Authority will not use the information furnished for any purpose other than those stated in paragraph 1 of this article, unless it has first informed the requested Authority of its intention and the requested Authority has not objected to such intended use of the information. If the requested Authority opposes such use, the information may be used only under the conditions imposed by the requested Authority. If use of the information is opposed by the request Authority, the Authorities agree to consult pursuant to Article 8 concerning the reasons for the refusal and the circumstances under which use of the information might otherwise be allowed.

Article 7: Confidentiality of Requests

1. Each Authority will keep requests made under this Memorandum of Understanding, the contents of such requests, information gathered in response to requests, and any other matters arising during the operation of this Memorandum of Understanding, including consultations between the Authorities, confidential, to the extent permitted by law, except for disclosures which are absolutely necessary to carry out the request, provided that such confidentiality may be waived by the mutual agreement of the requesting Authority and the requested Authority.

2. The Authorities will keep confidential, to the extent permitted by law, any information provided pursuant to this Memorandum of Understanding subject to the terms of this paragraph, unless it is disclosed in furtherance of the purpose for which it was requested under Article 6.

3. Except as contemplated by Article 6, the requesting Authority will not offer the information to, and shall use its best efforts to ensure that it is not obtained by, any other person. Unless otherwise agreed, if such information is obtained by any other person, the requesting Authority will use its best efforts to ensure that such information will not be used by that person in any way that involves disclosure to any other person.

4. The requesting Authority will notify the requested Authority of any legally enforceable demand for information prior to complying with the demand and will assert such appropriate legal exemptions or privileges with respect to such information as may be available.

5. As soon as the requesting Authority has terminated the matter for which assistance has been requested under this Memorandum of Understanding, it will return to the requested Authority, to the extent permitted by law, all documents and copies thereof not already disclosed in proceedings referred to in Article 6 and other material disclosing the contents of such documents, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority.

6. Any document or any other material provided by an Authority in response to a request under this Memorandum of Understanding and any other material disclosing its content, other than material which is generated as part of the deliberative or internal analytical process of the requesting Authority, will not become the property of the requesting Authority, and must be redelivered to the requested Authority without delay on demand to the extent permitted by the law of the requesting Authority; provided that such demand may be made only if the requested Authority has reason to believe that the information has been or is likely to be disclosed or used otherwise than as contemplated by Article 6 above.

Article 8: Disputes and Consultations

1. In any case of dispute over the meaning of any term used in this Memorandum of Understanding, the parties will define the terms herein in accordance with the relevant laws of the jurisdiction of the requesting Authority.

2. The Authorities will engage in consultations with respect to this Memorandum of Understanding with a view to improving its operation and resolving any matters which may arise. In particular, the Authorities will consult upon request in the event of:

- (a) a refusal by one Authority to comply with a request for information on the grounds set forth in paragraph 4 of Article 3; or
- (b) a change in market or business conditions, or in the legislation governing the matters set forth in paragraph 1(h) of Article 1, or any other difficulty which makes it necessary or appropriate to amend or extend this Memorandum of Understanding in order to achieve its purposes.

3. The Authorities may agree on such practical measures as may be necessary to facilitate the implementation of this Memorandum of Understanding.

4. Any of the conditions of this Memorandum of Understanding may be amended, relaxed or waived by mutual agreement.

Article 9: Unsolicited Assistance

1. To the extent permitted by the laws and regulations of its jurisdiction, each Authority will use reasonable efforts to provide the other Authority with any information it discovers which gives rise to a suspicion of a breach, or anticipated breach, of the laws or regulations of the other Authority.

Article 10: Costs of Investigation

1. If it appears that responding to a request for assistance under this Memorandum of Understanding will involve substantial costs being incurred by the requested Authority, the requested Authority and the request-

ing Authority will establish a cost sharing arrangement before continuing to respond to such request for assistance.

Article 11: International Law

1. The execution of this Memorandum of Understanding will not prejudice the respective positions of the Authorities and their governments concerning the principles of international law applicable to procedures for obtaining information located in another jurisdiction as contemplated in Article 3.

2. The Authorities acknowledge that when the treaty between the governments of Canada and the United States of America on Mutual Legal Assistance in Criminal Matters is duly implemented and ratified it, in addition to this Memorandum of Understanding, will constitute a framework of principles and procedures for investigating and obtaining information concerning certain kinds of securities law offences.

Article 12: Execution

1. This Memorandum of Understanding will be effective from the date of its execution by the United States Securities and Exchange Commission, the Ontario Securities Commission, the Commission des valeurs mobilières du Québec and the British Columbia Securities Commission.

2. Any Canadian securities regulatory authority may become a party to this Memorandum of Understanding by executing a counterpart thereof together with the Securities and Exchange Commission and providing notice of such execution to the other Canadian securities regulatory authorities which are parties to this Memorandum of Understanding.

Article 13: Termination

1. This Memorandum of Understanding may be terminated as to any Authority by that Authority giving 30 days notice to the other Authorities that this Memorandum of Understanding is no longer in effect as to the terminating Authority's area of competence. If any Authority gives such notice, this Memorandum of Understanding will continue to have effect with respect to all requests for assistance which are made before the effective date of notification until the requesting Authority terminates the matter for which assistance was requested.

DATED this 7th day of January, 1988

(Signed)

D.S. RUDER

Chairman, United States Securities & Exchange Commission

S.M. BECK QC

Chairman, Ontario Securities Commission

D.M. HYNDMAN

Chairman, British Columbia Securities Commission

P. GUY

President, Commission des valeurs mobilières du Québec

APPENDIX A

CONTACT OFFICERS

United States Securities & Exchange Commission
450 5th Street N W
Washington D C
U S A 20549
Tel: (202) 272 2900
Attention: Director, Division of Enforcement

Ontario Securities Commission
Suite 1800, 20 Queen Street West
Toronto
Ontario M5H 3SB
Tel: (416) 597 0681

Attention: Deputy Director, Enforcement & Market
Regulation Branch

Commission des valeurs mobilières du Québec
Tour de la Bourse
C.P. 246, 17th Floor
Montreal, Quebec
H4Z 1G3
Canada

Attention: Director, Enforcement & Legal Services

British Columbia Securities Commission
Suite 1100, 865 Hornby Street,
Vancouver, B.C.
V6Z 2H4

Attention: Manager, Compliance Branch

Memorandum of Understanding (MoU) between The Treasury and the Securities and Investments Board of the United Kingdom and the Australian Securities Commission

To enable this document to be incorporated within the present volume the text has been reproduced in a different format

Introduction

1. The Commissioners of Her Majesty's Treasury (the Treasury) have responsibility for policy and legislation in the sphere of financial services and for the regulation of investment business under the UK Financial Services Act 1986, oversight of the Securities and Investments Board (SIB) and arrangements with overseas regulators for exchanging information. The Treasury liaises closely with other bodies and agencies, the UK Department of Trade and Industry in particular, which have responsibility for policy, legislation and enforcement in other areas relevant to the scope of this MoU.

The SIB is the designated agency under the Financial Services Act 1986. It is responsible for most of the financial services functions under that Act, including the oversight of the self-regulating organisations and investment exchanges and for making rules under which investment business is conducted in the UK. It has statutory powers of investigation.

The Australian Securities Commission (ASC) is the national corporate and securities regulator established under section 7 of the Australian Securities Commission Act 1989. The ASC is responsible for the administration and enforcement of the Corporations Law and the Australian Securities Commission Act 1989 which provide for the regulation of corporations and the securities and futures industry. The ASC's ability to exercise coercive powers on behalf of foreign regulators is governed by the Mutual Assistance in Business Regulation Act 1992.

In this MoU, "Authorities" means the ASC, the Treasury and the SIB.

2. The Treasury and the SIB on the one hand, and the ASC on the other, recognising the increasing international activity in the securities, futures and options markets and the corresponding need for mutual cooperation between the relevant national authorities, have reached the following understanding.

Principles

3. (a) The Authorities intend to ensure that the fullest mutual assistance is provided within the terms of the Memorandum of Understanding (MoU). The MoU does not modify or supersede any laws or regulations in force in, or applying to, the United Kingdom or Australia.
- (b) The MoU does not create any enforceable rights.

4. The purpose of the MoU is to protect investors and to promote the integrity of the securities, futures and options markets by providing a framework for cooperation, including channels for communication, increased mutual understanding, the exchange of information and investigative assistance, to the extent permitted by laws and practices.

5. To the extent permitted by laws and practices, each Authority will use reasonable efforts to provide the other Authority with any information that is discovered which gives rise to a suspicion of a breach, or anticipated breach, of the rules or laws of the other Authority.

Scope

6. The Authorities propose to ensure that mutual assistance is provided in the following areas:

- (a) insider trading, market manipulation and other fraudulent and manipulative practices in relation to companies, securities, futures contracts, options and collective investment schemes;
- (b) enforcement of the laws and regulations relating to dealing in, arranging deals in, managing and advising on securities, futures contracts, options and collective investments;
- (c) ensuring that only fit and proper persons are authorised or registered to conduct the business referred to in subparagraph (b) and promoting high standards of fair dealing and integrity in their conduct of that business;
- (d) the disclosure of interests in the securities of companies;
- (e) the duties of issuers of and offerors for securities to make full and fair disclosure of information relevant to investors;
- (f) breaches of companies legislation.

Requests

7. The MoU does not affect the ability of the Authorities to obtain information from persons on a voluntary basis, provided that any procedures in place in the country of each Authority for the provision of such information are observed.

8. To facilitate assistance, the requesting Authority should specify:

- (a) the information required (identity of persons,

specific questions to be asked etc.);

- (b) the purpose for which information is sought (including details of the rule or law which is suspected to have been breached);
- (c) a description of the conduct or suspected conduct which gives rise to the request;
- (d) the link between the suspected breach of rule or law and the regulatory functions of the requesting Authority;
- (e) the relevance of the requested assistance to the suspected breach of rule or law;
- (f) whether it is desired that, to the extent permitted by the laws applying to the requested Authority, any persons from the country of the requesting Authority should be present during interviews which form part of an investigation, and whether it is desired that such persons should be permitted to participate in the questioning;
- (g) any other matters specified by the laws and regulations in the country of the requested Authority.

9. Any document or other material provided in response to a request under the MoU and any copies thereof must be returned on request, to the extent permitted by law.

10. Each request will be assessed on a case by case basis by the requested Authority to determine whether assistance can be provided under the terms of the MoU. In any case where the request cannot be accepted completely, the requested Authority will consider whether there may be other assistance which can be given. In particular, the requested Authority will consider whether the request might be dealt with via channels for mutual assistance in criminal matters.

11. In deciding whether to accept or decline a request the requested Authority will take account of:

- (a) matters specified by the laws and regulations in the country of the requested Authority;
- (b) whether the request involves an assertion of jurisdiction not recognised by the country of the requested Authority and
- (c) whether it would be contrary to the public interest to give the assistance sought.

12. The requested Authority may, as a condition of agreeing that assistance is given under the MoU, require the requesting Authority to make a contribution to costs. Such a contribution may, in particular, be required where the cost of a request is substantial or where a substantial imbalance has arisen in the cumulative costs incurred.

Confidentiality

13. The information supplied will be used solely for the purpose of:

- (a) securing compliance with or enforcement of the rule or law specified in the request by initiating or assisting in criminal prosecution arising out of the breach of such law;
- (b) conducting or assisting in civil proceedings arising out of the breach of the rule or law specified in the request and brought by the Authorities or other law enforcement or regulatory bodies within the jurisdictions of the United Kingdom or Australia;
- (c) taking regulatory action or imposing regulatory requirements within the areas set out in paragraph 6 above.

14. Each Authority will keep confidential to the extent permitted by law:

- (a) any request for information made under the MoU and any matters arising in the course of its operation unless such disclosure is necessary to carry out the request or the other Authority waives such confidentiality;
- (b) any information passed under the MoU unless it is disclosed in furtherance of the purpose for which it was requested.

15. Unless the request provides otherwise, the confidentiality provisions of the MoU shall not prevent the authorities from informing other law enforcement or regulatory bodies within the jurisdictions of the United Kingdom or Australia of the request or of passing information received pursuant to a request to such bodies, provided that:

- (a) such agencies or bodies have responsibility for prosecuting, regulating or enforcing rules or laws falling within the areas set out in paragraph 6 above;
- (b) the purpose of passing such information to such an agency or body falls within the areas set out in paragraph 6; and
- (c) the requesting Authority has provided any undertaking in relation to the information requested which is required by the law of the country of the requested Authority.

Consultation

16. The signatories may consult informally, at any time, about a request or proposed request.

17. The Authorities may consult and may revise the terms of the MoU in the event of a substantial change in laws or practices affecting the operation of the MoU.

Termination

18. The Memorandum of Understanding shall continue to have effect unless terminated by any one of the Authorities by giving 30 days' advance written notice to the other Authorities that the understanding set out herein is no longer to have effect.

Contact Points

19. All communications between Authorities should be between the principal points of contact unless otherwise agreed.

20. The Head of Division 1, Securities and Investment Services Group is the principal point of contact in the Treasury.

21. The Group Director, Compliance and Enforcement, is the principal point of contact in the Securities and Investments Board.

22. The Director, Policy and International Relations, Office of the Chairman (Sydney), is the principal point of contact in the Australian Securities Commission.

23. Addresses for contact points are given in Annex A.

Entry into Effect

24. This MoU will be effective from the date of its signature by the Treasury, the Securities and Investments Board and the Australian Securities Commission.

Signed this 28th day of October 1992

The Treasury
ANTHONY NELSON
Economic Secretary

Securities and Investment Board
ANDREW LARGE
Chairman

Australian Securities Commission
ANTHONY HARTNELL
Chairman

ANNEX A

Contact Officers

The Treasury:

Head of Division
Securities and Investment Services Group
HM Treasury
10-18 Victoria Street
London SW1H 0NN
United Kingdom
Telephone: 44 71 215 3109
Fax: 44 71 215 3508

SIB: Group Director
Compliance and Enforcement
Securities and Investments Board
Gavrelle House
2-14 Bunhill Row
London EC1Y 8RA
United Kingdom
Telephone: 44 71 638 1240
Fax: 44 71 382 5906

ASC: Director
Policy and International Relations
Office of the Chairman, Sydney
Level 9, Norwich House
6-10 O'Connell Street
GPO Box 4866
Sydney NSW 2001
Australia
Telephone: 612 390 3016
Fax: 612 390 3034

Protection of Cultural Property Within the Commonwealth

A Paper presented on behalf of the Government of New Zealand

Background

The draft Scheme for the Protection of Cultural Heritage within the Commonwealth is one of several mutual assistance measures that have been considered by Commonwealth Law Ministers. The other schemes (on extradition, mutual assistance in criminal matters including confiscation of the proceeds of crime, and transfer of prisoners) have already been accepted.

There is a high level of international concern over the continuing unlawful export of items of cultural heritage. Few such items are ever recovered by the country of origin. The reason is that, without transnational legal co-operation, means of recovery are very limited. Accordingly, the broad purpose of the draft Scheme is to provide a framework for the enactment of appropriate legislation throughout the Commonwealth to facilitate the return of items of cultural heritage that have been unlawfully removed from the country to which they belong.

It is now a decade since the Law Ministers of the Commonwealth decided that it was necessary to combat the "unhealthy market in smuggled and stolen cultural objects". This decision was made on the initiative of the Government of New Zealand which had just lost the well-known case of *Attorney-General of New Zealand v Ortiz*. In that case New Zealand failed to secure the return of carved Maori panels illegally exported to England.

The draft Scheme was first put to Law Ministers in 1986 but without consensus being reached. At the 1990 Law Ministers meeting the scheme was not substantively considered because some delegations considered themselves insufficiently prepared to do so. Now, after examination by two working groups, it is ready for consideration for adoption by Law Ministers.

Further background to this agenda item, and New Zealand's interest in it, is set out in the Preface to LMM(93)3 at page v.

International Development

Comparatively recent developments illustrate the view of the international community that there must be better international arrangements to prevent the current pillage of cultural heritage. The UNESCO convention of 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property is not effective to meet the need. The International Institute for the Unification of Private

Law (UNIDROIT) was therefore asked by UNESCO to prepare a draft Convention on stolen or illegally exported cultural objects. The work of governmental experts has produced a draft Convention and there is to be a diplomatic conference in late 1994 to further consider the draft.

A second major development has been the promulgation by the Council of the European Communities of a Directive and Regulation on European trade in cultural heritage. This action flowed from the adoption on 1 January 1993 of a free internal market within the EC and the consequent need to prevent evasion of regulations on the import and export of national treasures possessing artistic, historic or archaeological value. These measures may be seen as potentially significant for future Commonwealth and international co-operation on the return of unlawfully exported objects. By taking this action European Community countries recognise the critical importance to States of their material cultural heritage and the need for legal protection, notwithstanding the principle of free trade within European Community boundaries. Countries outside the EC, and in particular Commonwealth countries, can reasonably argue that the need for mutual assistance measures is equally pressing to protect their particular items of cultural heritage.

It may be noted that the EC Directive is not markedly different in its terms from the draft Commonwealth Scheme (see below).

Third, the UN General Assembly passed a resolution in October 1991 calling on States to strengthen or adopt legislation to protect cultural heritage.

Commonwealth Developments

As a result of decisions taken to the meeting of Senior Officials in Singapore in 1992, a working group comprising representatives of 11 Commonwealth countries met in Rome on 27 February 1993 to give further consideration to the cultural heritage item. The working group decided, with a reservation expressed by the United Kingdom delegation, that the draft Scheme for the protection of cultural heritage within the Commonwealth should be considered for adoption at the Mauritius meeting of Law Ministers.

The Scheme (with the amendments recommended by the working group) is to apply to items of cultural heritage classified as such by the country of export. Items should be of national importance by virtue of specified criteria. Each country is to prohibit the export of items

covered by the Scheme unless export is in accordance with the terms of an export permit. Each country is to designate a central authority for the making and receiving of requests for the return of items covered by the Scheme unless export is in accordance with the terms of an export permit. Each country is to designate a central authority for the making and receiving of requests for the return of items covered by the Scheme and is to take other necessary measures to enable return, including the temporary safeguarding of the item. The authorities in the country where the item is found are not however required to institute court proceedings to secure return. There are provisions for fair and reasonable compensation for an innocent purchaser of an item who has acted without negligence. The country of export may be required to meet the expenses incurred in obtaining return of the item. Claims for the return of an item alleged to have been unlawfully exported must be made within 5 years of the country of export becoming aware of the location of the item.

The Scheme is not retrospective in operation.

The Changes Recommended by the Working Group

The key amendments recommended by the working group are set out below. By and large they are aimed at increased flexibility. They also bring the Scheme closer in terms to the UNIDROIT draft and the EC Directive.

Paragraph 3(3): Items covered by the Scheme

The new subparagraph (3) acknowledges that not all countries may feel able to extend protection to all the items contemplated by paragraph 3(2).

Paragraph 4(1): Validation System

A system whereby an intending purchaser of an item can request a validation certificate from the country of export is now expressed to be a voluntary system. There is no obligation on a country to set up a validation system.

Paragraph 5(2): Import Prohibition

Subparagraph (2) no longer requests countries to prohibit the import of items unlawfully exported from another country. Instead, it asks countries to take necessary measures to ensure that they have the capacity to return unlawfully exported items.

Paragraph 9(1): Institution of Proceedings in the Country of Location

Paragraph 9(1)(b) proposes that the country of location may advise the country of export to institute court proceedings with a view to securing an order for the return of the item to the country of export. This is a new option. Earlier drafts envisaged that proceedings that would be taken by the country of location or by the holder of the item. It may be noted that neither the EC Directive nor the draft UNIDROIT Convention requires the country of location to be responsible for instituting proceedings. Paragraph 9(3): Compensation

There is now a clear duty on a court to order the country of export to pay fair and reasonable compensation to the innocent purchaser of an item as a condition for the return to it of the item. Up till now, the court has simply been given a discretion to determine what, of any, compensation is to be payable by the country of export. This is an important change and, again, is in line with the EC Directive and the draft UNIDROIT Convention.

Second, it is proposed that an innocent purchaser for value must have "exercised due care and attention in acquiring the item" instead of having "taken all reasonable steps" to satisfy himself or herself about the status of the item. The amendment derives from EC Directive language.

Key Differences Between the EC Directive and the Draft Scheme as Amended by the Working Group

(a) Coverage of Items

The Directive is somewhat narrower than paragraph 3 of the draft Scheme. protected items must be classified as being among a country's "national treasures possessing artistic, historical archaeological value". The object must also belong to one of 14 categories listed in the annex and, except for archaeological objects and achieves, must have a minimum monetary value. Objects classified as national treasures and forming an integral part of public collections or inventories of ecclesiastical institutions are also covered even though they may not fall within one of the 14 categories. Dr O'Keefe argues at pages 22-23 of his paper (see IMM(93)3) that, with the exception of individual ethnographic items, the kind of items sought by Commonwealth countries would be for practical purposes much the same as those set out in the annex to the Directive. The items would also be likely to be of considerable value, given the costs to the country of export of seeking of an item.

(b) Time Limitations

The Directive is more rigorous in requiring a request for return of an item to be made within one year of the requesting State having become aware of the location of the object and of the identity of its possessor or holder. With limited exceptions, proceedings may not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting State.

The draft Scheme requires proceedings to be brought within five years after the date the country of export had knowledge of the whereabouts of the item in the country of location.

A Way Forward

Given the history of the UNIDROIT initiative, more than one diplomatic conference may be required to settle the final text of the UNIDROIT Convention. After that it will take a significant time for enough countries

to become parties to make the Convention operative. An effective legal regime could be years away. In the meantime, the unlawful removal and sale of items of cultural heritage will not abate. The lack of legal controls allows full scope to those minded to profit by unlawful trafficking in cultural items.

Against that background, there is much justification for Commonwealth mutual assistance in this area as there is in the area of law enforcement and extradition.

The draft Commonwealth Scheme of the protection of cultural heritage is capable of being implemented comparatively quickly by legislation. With the necessary will among Commonwealth governments, it could therefore become effective much sooner than initiatives such as the proposed UNIDROIT Convention.

Summary of Points in Support of Adoption of the Draft Scheme

- There is wide acceptance in the international community that the loss of cultural heritage can be stemmed only by effective international arrangements, and national legislation to implement those arrangements.
- The Scheme is not intended to exclude participation, existing or future, in any other arrangements designed to protect cultural property from unlawful export and consequent loss. It is intended to be complementary to such measures. Regional arrangements are an international commonplace.

Completion of the new UNIDROIT Convention could be two years away and, because it is a formal treaty, implementing legislation must be drafted with great precision. An effective legal regime could therefore take years to achieve.

- The Scheme has the advantage that it is not a treaty. Essentially, it is a framework or guideline for legislation. This flexibility means that legislation giving effect to the Scheme may vary according to the individual circumstances of particular countries, so long as its core and spirit is preserved.

- EC countries have acted to protect their own cultural heritage. It is reasonable for Commonwealth countries to wish to do the same. There is a long tradition of mutual assistance in legal matters in the Commonwealth. The draft Scheme falls within that tradition.

- Non-adoption of the draft Scheme after so much time and effort could send an unfortunate signal that the Commonwealth does not, after all, regard the protection of cultural heritage as a matter of any special importance.

Conclusion

As the initiator of the cultural heritage item on the agenda of Law Ministers in 1983, New Zealand would now like to see the draft Scheme take its place with other mutual assistance arrangements within the Commonwealth. In New Zealand's view, adoption of the draft Scheme would:

- (a) Endorse the need for appropriate international legal arrangements both to deter the future unlawful export of items of cultural heritage and to assist in the recovery of such items if unlawful export does occur;
- (b) Encourage the enactment or improvement of national legislation designed to give international protection to cultural heritage;
- (c) Accord with the longstanding spirit of Commonwealth co-operation in legal matters.

Recent Developments in Extradition

A Paper submitted by Canada

Extradition as we know it today is itself a relatively recent development, dating back only to the latter part of the eighteenth century. It arose at least partly because the development of modern methods of transportation made it much easier for individuals to avoid prosecution by fleeing the jurisdiction in which they had committed an offence. Britain came relatively late to comprehensive extradition legislation. The Extradition Act of 1870¹ was the first British Act of general application dealing with the subject. At that time Britain had only three extradition treaties with other countries while France, for instance, had fifty-three and the USA almost as many². Canada's current Extradition Act³, which is an Act of the federal Parliament, was first passed in 1887⁴ and largely reflects the British Act of 1870 as does the extradition legislation in many Commonwealth countries.

It has been in the twentieth century, however, that developments in technology, including rapid international travel and communications, and electronic transfer of funds, have dramatically increased the problems of governments in dealing with international crime. There is a steadily increasing movement across borders of prohibited substances, stolen property, proceeds of crime and individuals involved in criminal activities or fleeing from justice. International terrorism and drug trafficking have led governments to develop multilateral as well as bilateral instruments to deal with fugitive offenders. Successful criminals, particularly in the drug trade, become wealthy and powerful enough to increase greatly the difficulties their governments face in bringing them to justice.

Criminal law remains under the domestic jurisdiction of states. While there have been recent developments in the United Nations toward an international criminal court, the prosecution of individuals for criminal conduct still takes place in domestic courts and according to domestic criminal law. It is for this reason that extradition treaties, of which Canada has about fifty, are particularly important in dealing with international crime. They provide the links between the domestic jurisdictions of states that allow fugitive offenders to be transferred from one to the other for purposes of prosecution or serving of sentences. Forging these links is not always easy. Extradition treaties must overcome differences in cultures, legal systems and such matters as

methods of collecting and weighing the value of evidence while still protecting the rights of individuals.

A model treaty on extradition has been developed in the United Nations, regional conventions have been developed in the Council of Europe and the Organization of American States and, of course, the Commonwealth has adopted the Scheme for the Transfer of Fugitive Offenders⁵. The latter was amended by Law Ministers in 1990 in Christchurch, New Zealand, in order to provide greater flexibility in regard to the receipt of evidence from the requesting state and to its admissibility in domestic extradition proceedings.

In the last twenty-five years multilateral conventions have been concluded to protect international civil aviation and international shipping against terrorist acts, to combat international drug trafficking, to prevent and punish crimes against internationally protected persons and to protect nuclear material: all of which recognize the importance of extradition in dealing with offences having an international character. These conventions all contain obligations either to extradite or prosecute individuals who are charged with offences established pursuant to these conventions.

The role of extradition in the development of new multilateral instruments is continuing in three further exercises in the United Nations. On May 25, 1993, the Security Council adopted Resolution 827 (1993) which establishes an international tribunal for the purposes of trying persons responsible for war crimes and crimes against humanity in the territory of the former Yugoslavia. The tribunal will be located in The Hague, Netherlands. Provisions of the resolution require that Member States of the United Nations provide assistance to the tribunal, including the surrender of accused persons in their territory.

This raises a number of interesting questions with regard to the implementation of the resolution under existing extradition legislation. Does such legislation contemplate or permit the surrender of an individual to an international tribunal as opposed to a state? If so, may this be done in the absence of a treaty with the international tribunal? If a treaty is required for the purposes of surrender, would a treaty or arrangement with an international tribunal as opposed to a state meet the requirements of existing legislation? It is clear that re-

view and possible amendment of domestic extradition laws will be required in order to comply with Resolution 827.

On a broader level, a working group of the International Law Commission has developed a draft Statute⁶ for an International Criminal Tribunal (i.e. a permanent international criminal court) which contains similar provisions on the surrender of fugitives. This will necessitate similar reviews and possible amendment by states of their extradition laws.

The third exercise in the United Nations in which extradition will play an important part is a draft Convention on the Protection of United Nations Peace-keepers which will be discussed in the Sixth Committee of the General Assembly this fall in New York. The decision to promote negotiations on such a convention was prompted by the recent dramatic increase in deliberate attacks on peace-keepers and associated civilian personnel.

Traditionally, UN peace-keepers monitored or supervised cease-fires, truces or armistice agreements where they were unlikely to encounter serious casualties or deliberate attacks. More recently, however, peace-keeping missions have become more complex and diverse. Their mandates now include supervision of the disarming and disbanding of armed factions; the establishment of protected areas for persons subjected to human rights abuses; the enforcement of sanctions; the monitoring of elections, borders, human rights and repatriation of refugees; and the protection and delivery of humanitarian supplies to civilian populations. As such, peace-keepers are operating amidst armed conflict, both of an international and non-international character.

At least one draft before the Sixth Committee includes provisions on the obligation to prosecute or extradite those individuals suspected of committing serious crimes against UN peace-keepers. Among the issues to be decided during the negotiations will be the scope of application of the Convention, including which persons, which UN operations and which offences will be covered.

Canada's experience with extradition has been mostly with the United States for obvious reasons. We have a 5,000 kilometre, undefended border. Because criminal law in both countries is rooted in the British tradition, issues do not arise out of misunderstandings over fundamental concepts.

Canada's extradition experience with the United States dates back to the Jay Treaty of 1794 which provided for the transfer of offenders between the United States and Great Britain. It is likely that most of the transfers under this treaty were between the United States and the British colonies that are now Canada because of the common boundary between them. The Ashburton-

Webster Treaty of 1842⁷ between the United States and Great Britain again contained provisions for the return of fugitive offenders which remained in force, as amended periodically, until they were replaced by the 1971 Canada-United States Extradition Treaty which, with some amendments, is in force today⁸.

In 1992 the United States accounted for almost eighty per cent of extradition requests to and from Canada. The system works well. Both governments are committed to the aims of the Treaty, both have a great deal of experience in implementing it and officials of each government are very familiar with the legal system of the other. However, our extradition relations with our neighbour to the south, have not been entirely without problems. This will be discussed below.

With Commonwealth countries, Canada has had relatively few rendition cases in recent years. In 1992 Canada received only five requests for rendition and made only four requests to other Commonwealth countries out of a total of 183 requests to and from all sources for that year. Unfortunately, rendition is not possible between Canada and those Commonwealth countries that do not recognize the Queen as Head of State. Canada's Fugitive Offenders Act applies to "every person convicted by a court in any part of Her Majesty's Realms and Territories"⁹ and, therefore, does not apply to those convicted in the countries of the Commonwealth which have adopted a presidential form of government.

Most of the balance of Canada's extradition requests are to and from countries in Europe. It is here that Canada has experienced some of its greatest problems in achieving effective extradition relations with friendly countries. The principal problem is one of reconciling different legal systems, particularly differences in methods of investigating and prosecuting crime. Canadian extradition law still requires the establishment of a prima facie case and evidence that is supported by first person affidavits devoid of hearsay. The manner in which evidence is gathered and presented in criminal cases in most European countries is simply not geared to meet these requirements. Even among countries of the same legal system (ie, common law), difficulties have arisen due to the prima facie case requirement. For example, Canada has also encountered problems with the United Kingdom from time to time.

For the past several years Canada has been following two paths to increase the effectiveness of its extradition relations. First, it is pursuing a programme of renegotiating its extradition treaties to bring them more into line with recent developments in extradition law and practice. It is very unlikely in light of the Canadian Charter of Rights and Freedoms¹⁰ that Canada could abandon the prima facie case test, but the new treaties use existing Canadian law to alter the evidence requirements. These new treaties would require and make admissible a "summary of the evidence" which would be

much more compatible with the form of document produced in countries with a civil law tradition.

Second, Canada has undertaken a fundamental review of its extradition legislation, both the Extradition Act and the Fugitive Offenders Act, again to bring it into line with modern trends in extradition law and practice. The latter Act, which governs rendition to and from Commonwealth countries, will be combined with the former. It will remove the anomaly in our current Fugitive Offenders Act which applies only to those who have been convicted of offences in "Her Majesty's Realms and Territories" thus not permitting rendition to and from those countries of the Commonwealth which no longer have the Queen as Head of State. If the new Act is adopted as currently envisaged, it will contain a system of general and specific designations by order-in-council which will allow considerably greater flexibility than the current legislation in applying the Act to Commonwealth countries. It is difficult to say when such new legislation will be passed.

A federal election on October 25, 1993 brought a new government to power. The new extradition legislation will have to be considered in the context of the new government's legislative priorities.

What has drawn a great deal of attention to extradition law recently is the question of transboundary abductions, and particularly the recent decision by the United States Supreme Court in the Alvarez-Machain case¹¹. Dr. Alvarez-Machain was indicted in the United States for participating in the kidnap and murder of a United States Drug Enforcement Administration agent and a Mexican pilot who worked for the agency. It was alleged that Dr. Alvarez-Machain's role in the murder was to administer drugs to the DEA agent to prolong his life to enable others to torture and interrogate him. Dr. Alvarez-Machain was kidnapped from his home in Mexico and flown to the United States where he was arrested. The United States District Court ruled that DEA agents were responsible for his abduction although they did not participate in it.

At stake for the United States government in this case was the Ker-Frisbie doctrine, so-named because it was established in two cases decided by the United States Supreme Court: Ker v. Illinois¹² decided in 1886 and Frisbie v. Collins¹³ decided in 1952. The doctrine states that the power of a United States court to try a person for crime is not impaired by the fact that that person was brought within the court's jurisdiction by means of a forcible abduction. This doctrine is important to the United States government because, as a matter of policy, it is prepared in certain limited situations to use abduction from another country as a means of bringing an individual to the United States to be tried for a breach of United States law.

Presumably, such abductions would be carried out only as a last resort where it is clear that return of a wanted

individual could not be achieved by legal means and in cases where some important national consideration is at stake. In fact such abductions have been relatively rare, and the United States is not the only democratic country that has resorted to such extreme action. On May 11, 1960, Adolf Eichmann, who had been head of the Gestapo department in Berlin responsible for the physical extermination of the Jews, was abducted from Buenos Aires, Argentina, where he had been living under an assumed name since 1950. He was removed to Israel by members of the Israeli Secret Service where he was tried on fifteen counts under the Israeli Nazi and Nazi Collaborators (Punishment) Law¹⁴..

On the question of whether Eichmann's abduction from Argentina affected the jurisdiction of the Israeli courts to try him, the District Court, sitting as a three-judge trial Court, was faced with very special circumstances. Argentina's sovereignty had admittedly been violated and it had complained very vocally. But the Security Council suggested an amicable settlement¹⁵ and the two countries finally agreed "to regard the incident as closed...", according to their joint communiqué of 3 August 1960. "After that date", said the court, "no cause remained, in respect of a violation of international law, which could have served to support a plea against his (Eichmann's) trial in Israel"¹⁶. The Supreme Court essentially agreed¹⁷. Eichmann was convicted and despite an appeal for clemency, was hanged on May 31, 1962.

Another situation in which an individual was taken to a foreign state in circumstances other than by extradition in order to stand trial was that of Manuel Noriega, who was taken into custody following a military invasion of Panama by the United States forces. This is another case in which questions of national policy were involved: United States foreign policy in relation to Central America and its policy against international drug trafficking.

Noriega was found guilty by a Florida jury on eight counts of drug trafficking, racketeering and money laundering. In July of last year, Noriega, who is now close to sixty years of age, was sentenced to forty years in jail. By a rare turn of events, however, he appears to have succeeded in his claim to be considered as a prisoner of war under the Third Geneva Convention.

The question of transboundary abductions is not an academic one for Canada. There have been several abductions from Canada involving United States authorities, the most serious being the Jaffe case. Sidney Jaffe was kidnapped in September, 1981, by two Florida bounty hunters from the lobby of his apartment building in Toronto. He was handcuffed and taken by car across the United States border to Florida where he was tried and convicted essentially on land fraud charges. He was sentenced to thirty-five years in prison and a fine of over 150,000 dollars.

The Canadian Government formally protested the violation of Canadian sovereignty and law and sought Jaffe's return to Canada, but attempts to secure his release through the United States federal government were unsuccessful. Canada therefore took the unusual step of filing a petition for habeas corpus with the U.S. District Court in Jacksonville, Florida. A series of complicated legal actions resulted in Jaffe's convictions being overturned, new charges being laid and Jaffe being granted bail on the new charges. He returned to Canada and as he did not appear for trial on the new charges, he forfeited his bail in the approximate amount of U.S. \$100,000. The charges have not been answered and he remains a fugitive. Canada's petition for habeas corpus was dismissed for lack of standing as Canada was not itself a prisoner. The two bounty hunters were in turn extradited to Canada and convicted of kidnapping; each received a sentence of twenty-one months in jail which the Ontario Court of Appeal saw to fit to reduce, for compassionate reasons, to time already spent in prison¹⁸. There have also been cases in the other direction. On January 4, 1991, an individual named Derrick Hills was apprehended by a Canadian police officer some two hundred yards within the United States, after being chased through the Windsor-Detroit tunnel that connects these Canadian and American cities under the St-Clair river which marks the common border. The United States lodged a protest and requested a statement of Canadian intentions. The note asserted that "under United States Law judicial dismissal of criminal charges, or judicially ordered release... is not an appropriate remedy for violation of territorial sovereignty" thus making clear the application of the Ker-Frisbie doctrine in the United States. Canada rejected the American position and indicated its understanding that the extradition treaty in force between Canada and the United States "established the only means under which to obtain the return of fugitive offenders." While this was a case of an over-zealous police officer rather than an official abduction, Canada apologized and Hills was returned to the United States to await an extradition request which was presented shortly thereafter.

Canada's response to the Alvarez-Machain case in the United States was very much conditioned by its own experience with transboundary abductions. Canadian concerns were also raised because the Alvarez-Machain case dealt directly with one of the issues that had been raised with the United States in the Jaffe case: the issue of whether a transboundary abduction amounts to a breach of an existing extradition treaty between the two states involved. Canada had taken the position that Jaffe's kidnapping amounted to a breach of the 1971 Canada-United States Extradition Treaty. The Government of Mexico took the same position in the Alvarez-Machain case, formally protesting the breach of the Mexico-United States Extradition Treaty and demand-

ing the return to Mexico of Dr. Alvarez-Machain.

Canada submitted an amicus curiae brief to the United States Supreme Court in the Alvarez-Machain case which argued that transboundary abductions amount to breaches of extradition treaties where they exist between the countries involved, breaches of sovereignty, and breaches of domestic criminal law. The Canadian brief also took the position that the appropriate remedy is the return of the individual to the country where he or she was abducted. It also reported the results of a survey of governments undertaken by the Canadian Department of External Affairs in 1992. Replies were received from Australia, Austria, Britain, Finland, Germany, The Netherlands, New Zealand, Norway, Sweden and Switzerland. All these countries indicated that they would regard such abductions as a violation of international law. Australia, Britain, New Zealand and Sweden consider it a violation of bilateral extradition treaties. Britain, Finland, Germany and the Netherlands would demand the return of the abducted person. If an abducted person were taken to their territory and brought before their courts, Austria, Finland, The Netherlands, Norway, Sweden and Switzerland would consider that the abducted person should be returned. Justice Stevens in the dissent in the Alvarez-Machain case¹⁹ also referred to the practice in other countries. He cited a decision in which the Court of Appeal of South Africa held that the prosecution of a defendant kidnapped by agents of South Africa in another country, must be dismissed²⁰. It is interesting to note that the South African court's decision was based largely on the decisions of the United States Supreme Court in abduction cases.

The brief submitted by Canada in the Alvarez-Machain case did not make any detailed arguments on the development of the Ker-Frisbie doctrine in United States domestic law nor on any issues that were not of direct concern to Canada.

The Supreme Court upheld the position of the United States Government. Chief Justice William Rehnquist writing on behalf of the majority of the court held that a defendant may not be prosecuted in violation of an extradition treaty. However, he held that in this case there was no breach of the Extradition Treaty between Mexico and the United States. The Chief Justice found that "the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms." He also held that the Treaty did not contain any implied prohibition of forcible abductions. Thus the Court held that the Ker-Frisbie doctrine applied and Alvarez-Machain's forcible abduction from Mexico did not prevent his trial in the United States for violations of American criminal law.

Three of the Supreme Court Justices disagreed, in very strong language, with the majority decision. Justice

Stevens writing on their behalf stated that the manifest scope and object of the treaty itself "plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party" and found that the United States was in breach of its treaty obligations. He went on to say that he suspected that "most courts throughout the civilized world -- will be deeply disturbed by the 'monstrous' decision the Court announces today."

This decision was indeed met by immediate adverse international reaction. The Government of Mexico issued a press release denouncing it as "invalid and unacceptable" and announced that it had decided to review its Extradition Treaty with the United States. It also announced that it would suspend all of the activities that United States DEA agents were authorized to carry out until new criteria for cooperation and safeguards for national sovereignty could be determined. Bilateral discussions between Mexican and USA authorities resulted in a letter being sent from President Bush to President Salinas containing assurances that his administration "would neither conduct, encourage nor condone transborder abductions" from Mexico. An exchange of letters between Secretary of State Baker and Foreign Secretary Solana of Mexico recognized that transborder abductions by so-called "bounty hunters" and private individuals would be considered extraditable offenses by both countries. The two governments also agreed to review the Mexico-United States Extradition Treaty in order to analyze the implications of the Alvarez-Machain decision and avoid any possible repetitions of events such as the abduction in that case.

Canada's reaction was equally prompt. Canada sent a diplomatic note to the State Department reiterating its position that any abduction of an individual from Canada by United States authorities would be regarded as a violation of the Canada-United States Extradition Treaty, of Canadian sovereignty, of customary international law and of Canadian criminal law. It also confirmed that Canada would prosecute any persons engaged in such an abduction, and if necessary, seek their extradition to Canada. The Note also sought assurances that the United States would operate within the procedures established by the Treaty and would not resort to transboundary abductions to obtain the return of fugitive offenders.

Canada received essentially the same assurances as Mexico. In a letter to the Honourable Barbara McDougall, Secretary of State for External Affairs, Secretary of State Baker stated that "this Administration will neither conduct, encourage nor condone transborder abductions in Canada."

Ironically, once the Supreme Court decided that the United States courts had jurisdiction to try Dr. Alvarez-Machain, he was acquitted by the trial court and returned to Mexico.

The Alvarez-Machain decision is cause for concern on the part of the international community. The confirmation that United States courts have the jurisdiction to try individuals who were abducted from another country is contrary to what appears to be a trend in other countries against the assumption of such jurisdiction.²¹ However, it must be recognized that this is a question of domestic law which may very well reflect the situation in a number of friendly countries.

The principal difficulty with the Alvarez-Machain decision lies in the finding by the United States Supreme Court that an abduction carried out by agents of the United States Government in another country does not amount to a violation of an existing extradition treaty with that country unless the treaty expressly prohibits such abductions. Most governments (including that of Canada) would take the position that the provisions governing the return of fugitive offenders set out in extradition treaties are exclusive and therefore transboundary abductions amount to violations of these treaties. The only legal means of returning fugitive offenders outside such treaties would be those specifically agreed upon by the parties.

The dilemma presented by the Alvarez-Machain decision arises out of an international system that does not always work efficiently. It is understandable that governments become frustrated when existing legal mechanisms prove inadequate to bring to trial those involved in such crimes as terrorism and international drug trafficking. The temptation to resort in these circumstances to illegal means to apprehend individuals is all the greater where some important national policy or interest is involved. The broad official goals in these abduction cases are to ensure that the rule of law applies to terrorists and other international criminals and to ensure that fugitives from justice do not enjoy safe havens. These goals are shared by the international community.

However, the rule of law must prevail equally in the methods by which states seek to achieve these goals. Governments must resist the temptation to use illegal methods in applying their law and discourage their nationals from doing so. The prospect might be tedious, but the international community must continue to work in order to strengthen international cooperation both in extradition and in mutual legal assistance in criminal matters, so as to help law enforcement agencies deal with international crime in a manner sufficiently effective to make abductions unnecessary.

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Mutual Legal Assistance: (a) Between Business Regulatory Agencies, (b) Protection of the Cultural Heritage

Paper by The Hon Dr E N Tjiriange, Minister of Justice of the republic of Namibia

(A) Between Business Regulatory Agencies

It is quite important for the Commonwealth countries business regulatory agencies to develop inter-agency agreements on regulatory instruments. Such agreements should be backed by legislative provisions with powers of compulsion which must be exercised in the fulfilment of requests in appropriate cases. Of course, the extent and limitation of powers of compulsion should be well-defined and should take cognizance of the requested country's laws. The inter-agency agreements should allow an exchange of information on transnational criminalities and malpractices, cooperation at investigation, apprehension and prosecution of such transnational business criminalities and malpractices.

The opinion has been expressed in certain quarters "that recourse to a formalised Commonwealth Scheme, such as that relating to mutual assistance in criminal matters, would be of limited value." This should not be the case if the scheme of mutual assistance was backed or underwritten by necessary changes in domestic legislation of Commonwealth member states. I regard this approach to be the best for achieving a minimum level of harmonisation in order to secure an enhanced and effective cooperation.

Whether formal or informal, a Commonwealth inter-agency agreement is necessary for mutual assistance in transnational business offences. Practically, a wide variety of issues should be considered and addressed by parties to such an understanding or arrangement, for example:

(a) Enactment of legislation with "compulsory evidence gathering powers" so that requesting authority/agency may be able to obtain critical information at the investigative stage of the matter.

The following points should be considered in this regard:

- (i) extent of the powers to be exercised;
- (ii) appropriate decision-making process to be adopted;
- (iii) criteria to be applied for decision-making;
- (iv) types of conditions which may be imposed on the use of the information provided;

- (v) appropriate civil liberties and similar safeguards to be included;
- (vi) goals of flexibility, efficiency and effectiveness; and
- (vii) a scheme of cooperation should take cognizance of various options, comparable and compatible with existing legislative and administrative arrangements elsewhere.

(b) The necessary changes in domestic laws and practices so as to permit transnational cooperation in the public information and, subject to appropriate conditions and safeguards, non-public information held by regulatory authorities.

Subject to the resolution of the issues that I have raised, an inter-agency Commonwealth agreement, formal or informal, would be acceptable as a countermeasure to growing transnational criminalities and other malpractices in business transactions. This type of mutual assistance will create inter-dependence and confidence among Commonwealth regulatory agencies leading to mutual understanding, competence and improvements.

(B) Protection of the Cultural Heritage

I am pleased to say that Namibia has no difficulty in accepting the Scheme for the protection of cultural heritage within the Commonwealth, and, where possible and practicable, to obtain the return of items of material cultural heritage.

As was noted by the Working Group, one good thing about the Scheme is that it is not an international treaty; it is merely a flexible framework for municipal legislation which would offer an efficacious approach to international cooperation in the protection of the illicit export of items of material cultural heritage. Thus Commonwealth countries would be in a position to adopt the Scheme to suit their peculiar constitutional and other legal circumstances and legislative requirements and yet be in a position to cooperate with other member States of the Commonwealth in such an important area.

It is interesting to note that the Scheme would greatly assist Namibia because the Ministry of Education and Culture and the National Monuments Council are in the process of drafting a Bill for the protection of Na-

mibia's material cultural heritage. Presently no such legislation exists in Namibia - a very undesirable situation.

It is our view that the definition of "unlawful export" in section 2(d) of the draft Scheme is too restrictive and seeks to legitimise other equally unlawful "export" of very important artifacts and other material items of cultural heritage from certain Commonwealth countries during the colonial era. It is an open secret that such many cultural and historical items were removed from many colonised countries by colonial Administrations and colonial Administrators and taken to the mother country and elsewhere in the Commonwealth. Such items should be covered by the Scheme so long as they are in State-owned or State-controlled museums, Universities and such institutions of the country of location.

We wish to propose also that paragraph 3 of clause 9 of the draft Scheme should be further strengthened in such a way that purchasers of items of material cultural her-

itage exporting countries would no longer be presumed to be bona fide purchasers for value. They would bear the onus of proving that they took special diligence, considering the rarity, aesthetic qualities and value of the item, to ensure that the object was not stolen. In other words, because of the ever rising tide of theft of items of material cultural heritage, buyers should be put on their strict enquiry and be expected to take greater care than buyers of other items normally would.

Namibia again supports the proposal by the Working Group that a database of such items should be maintained by the Commonwealth Secretariat with inputs from Commonwealth Governments and circulated to Governments. But the database should not only contain information regarding private collectors and dealers of items of cultural heritage but also State institutions which may be holding such items.

Proposals by the Delegation of Singapore to Amend the Draft Statement on Mutual Assistance Between Business Regulatory Agencies

I. Clause 1

To delete "by counterpart regulatory authorities regulatory functions".

II. In Clause 2

To insert at the end of the clause immediately after the word "information", the following words:

"and that the requesting authority reimburse the reasonable costs incurred by the requested party in providing the assistance".

III. In Clause 3

1. To insert immediately after the words "law and comity" in the 5th line of clause 3, the following words:

"Whether the requesting authority responds to or is likely to respond to a similar request from the requested authority;"

2. To insert at the end of clause 3, immediately after the words "public interest, in the last line, the following words:

"or that compliance would be contrary to the Constitution of the requested country, or would prejudice the security, international relations or other essential public interests of that country; or that the circumstances which gave rise to the request does not constitute an offence under the law of the requested country".

3. To delete the penultimate sentence of clause 3 in the 5th to 7th lines of that clause.

IV. In Clause 4

1. To insert in the 4th line of clause 4 immediately after the words "other safeguards", the following words:

"including those conditions and requirements prescribed in the domestic laws of the requested country".

2. To delete the sentence beginning with "This would include in particular" and sub- paragraphs (a) to (c) of clause 4 and substituting the following sentence therefor:

"This would include appropriate powers of investigation in accordance with the domestic laws of the requested country".

V. In Clause 6

To delete the first sentence of clause 6 and substituting the following sentence:

"There should be no legal impediment to the provision by a regulatory authority (subject to appropriate safeguards including those conditions and requirements prescribed in the domestic laws of the requested country) of information to the requesting authority in another Commonwealth country where that information clearly gave rise to a prima facie case of a breach of a legal provision or regulation of the requesting authority".

VI. New Clause 7

To insert immediately after clause 6:

"7. A request for assistance should be made through a central authority of the requesting country and that authority should certify that the information requested clearly gave rise to a prima facie case of a breach of a legal provision or regulation of the requesting authority or that criminal proceedings have been instituted in respect of such breach".

Steps Suggested by the British Delegation to Facilitate the Implementation of the Financial Action Task Force Forty Recommendations

- Step One** The criminalisation of money laundering, preferably predicated on all serious crime.
- Step Two** Legislation enabling (or requiring) the disclosure by financial institutions of suspicions of money laundering without fear of prosecution for breach of confidence.
- Step Three** The adoption of legislation and other measures enabling the confiscation of laundered property, including proceeds and instruments.
- Step Four** The provision of measures to enable the extradition of money launderers.
- Step Five** Commitment to co-operate in money laundering investigations and post-conviction confiscations whether through *ad hoc* arrangements, bilateral agreement or multilateral conventions (Vienna, Council of Europe).

Mutual Legal Assistance

Paper presented by the Government of Zimbabwe

1. The Scheme for Mutual Legal Assistance in Criminal Matters and the Rendition of Fugitive Offenders

Significant use has been made of the legislation emanating from this scheme but we feel that an even more determined enforcement of the laws would benefit not only us in Zimbabwe but also our neighbours in the sub-region. We say this because we have witnessed a marked increase in transnational crime involving drugs, car thefts and the laundering of the proceeds of these crimes. Significant amounts of money have become available and this has spawned corruption. Enforcement agencies are being targeted by the crime rings and it is becoming increasingly difficult to break the rings and to bring the criminals to book.

We in Zimbabwe lament the lack of a co-ordinated approach within the subregion in the transfer of evidence, intelligence and all other useful data relating to the activities of the criminal rings. We would very much like to see a co-ordinated implementation of the arrangements for the provision and exchange of intelligence and the extradition of offenders. Because of the large amounts of money involved, inevitably the crime has become more sophisticated and we cannot continue to rely on the informal approaches which have hitherto characterised our dealings within the region.

The supply of and demand for illicit drugs is growing steadily; so also are other types of serious crime and concomitantly, the laundering of proceeds of crime. We in Zimbabwe feel that closer collaboration, particularly with our neighbours in the subregion, should lead to improved enforcement of the law. There is need for the creation between law enforcement agencies, through clearly designated channels of communication, of a spirit of mutual co-operation and confidence in order to effectively combat these forms of criminal activity.

2. Implementation of the Scheme for the Transfer of Convicted Offenders

Zimbabwe has long notified the Commonwealth Secretary-General of the enactment of legislation for the implementation of the Scheme for the Transfer of Convicted Offenders.

In the last 18 months or so, Zimbabwe has received 14 applications from foreign prisoners in our prisons requesting transfer to prisons in countries of their nationality. These have been from nationals of Botswana,

India, Malawi, Nigeria, UK and Zambia. We in Zimbabwe are very eager to transfer any prisoner who so wishes back to their countries and in each one of the applications we have received, I have agreed that the prisoners be transferred.

Unfortunately, our Commonwealth colleagues have not been very forthcoming when the applications were referred to them, in indicating whether or not they are willing to take transfer of their nationals.

In one case, an application for the transfer of a prisoner who is serving a life sentence for murder was initiated by the High Commission of the prisoner concerned. They identified the prisoner as their national and asked whether proceedings could be commenced. I was agreeable to have the prisoner transferred and the documents we normally transmit to the other government were sent to the relevant authorities. The documents included the identification documents of the prisoner, papers relating to his charge and a copy of the judgment. We were however bewildered to receive a letter from those authorities asking for such details as the height of the prisoner, his ethnic appearance, address into which he was seeking transfer, passport number and evidence that he was a citizen of that country; certified copies of the legislation on which the conviction was based, confirmation that no appeal was pending, etc. Even after supplying this information which we felt was uncalled for considering the documents we had already made available and also that the initiative in the matter had come from the authorities of his country, it does not appear that we are going to see the the expeditious conclusion of this matter.

All this is mentioned mainly to draw attention to our disappointment, firstly in the poor response by countries to introduce legislation for the implementation of this scheme and secondly, even where legislation is in place, the reluctance to co-operate meaningfully in its implementation.

We have now gone a step further and sent a circular to our High Commissions all over the world drawing attention to the existence of our legislation and the procedures to be followed. We are very anxious to transfer as many prisoners out of our prisons as possible.

We do hope that this forum will take note of the lack of progress on the part of their respective jurisdictions and urge that the situation be redressed.

Suggested Revised Statement on Mutual Assistance Between Business Regulatory Agencies

Paper Prepared by the Commonwealth Secretariat

EXPLANATORY NOTE

Following the Meeting of Senior Officials from Commonwealth Law Ministries held on Sunday 14 November 1993 a number of delegations made suggestions for alterations to the wording of the Proposed Statement on Mutual Assistance Between Business Regulatory Agencies (LMM(93)23). After a process of informal consultations, the attached suggested revised statement was formulated. It seeks to meet certain of the suggestions which were made without disturbing in a significant manner the delicate balance of the existing text. The changes, which are marked in bold and appear in square brackets, are to be found in the second preambular paragraph (p.1), substantive paragraph 3(p.2), and in the final paragraph of the text (p.3).

The attached suggested revised version was formulated prior to the receipt of the proposals for amendment made by Singapore and circulated separately as LMM(93)63.

* * *

SUGGESTED REVISED STATEMENT ON MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to **[and compatible with]** those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose ap-

propriate powers available to it in a purely domestic context.

It was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the general principles of their domestic legal systems, be guided by the following general principles 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 breach of the 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 and comity; and the resource costs involved. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of 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 agency in that country to use appropriate powers available to it in a domestic context. This would include in particular:
 - (a) gaining access to, or supplying, information in its files;
 - (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
 - (c) exercising appropriate powers of investigation or inspection.

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 agency was entitled to obtain in the context of responding to a request for assistance.

6. There should be no legal impediment to the spontaneous provision by a regulatory agency (subject to appropriate safeguards) of information to a counterpart agency in another Commonwealth country where that information clearly gave rise to a suspicion of a breach of a legal provision, regulation or requirement of that counterpart agency. The decision of whether or not to provide such information in any particular case would be at the sole discretion of the agency in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation **[in relation to the securities, futures and investment markets]** which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.

Suggested Further Revision of the Draft Statement on Mutual Assistance Between Business Regulatory Agencies

Paper Prepared by the Commonwealth Secretariat at the Request of the Chairman of the Meeting

PRELIMINARY NOTE BY THE COMMONWEALTH SECRETARIAT

In the Plenary Session on Tuesday afternoon, the Commonwealth Secretariat was asked to prepare a further revised version of the draft statement taking account of the proposals made by the delegation of Singapore and the views of Ministers expressed in discussion.

The appended text meets the points raised by Singapore in a number of respects. It makes absolutely clear that the Statement is not a Scheme, and does not bind all Commonwealth countries to a programme of action. The guidelines suggested for those countries deciding to take action now contain an express reference to Constitutional requirements, to reciprocity, and to national security. The existing reference to resource costs is amplified to indicate that the allocation of costs is a matter for negotiation. A new sentence in paragraph 4 seeks to ensure that a requested authority has all the information it needs in considering how to respond to a request (which might include, in some cases, obtaining special authorisations required by its domestic law). The opening of paragraph 5 is softened to an invitation to consider the issue there addressed. It appears to the Secretariat that all the above changes are consistent with the spirit of the existing text, the IOSCO principles relating to this area, and existing bilateral practice involving Commonwealth members.

However, in view of the tenor of Tuesday's discussion, the text retains the principle of direct communication from regulator to regulator and does not interpose a system of central authorities, thus retaining the emphasis on systems being capable of use with the minimum of formality (see paragraph 1 of the text). The revised text retains the earlier listing of powers in paragraph 4; it is pointed out that the availability of particular powers will depend upon the content of the requested authority's domestic legal system and it is not thought that this requires further emphasis in the text.

Singapore's proposal for the deletion of the penultimate sentence of paragraph 3 raises issues as to double criminality and related concepts. In light of the views of Ministers in Tuesday's discussion, the Secretariat sees no ready reconciliation of the position taken by Singapore with that expressed in the existing draft Statement.

TEXT OF SUGGESTED FURTHER REVISED STATEMENT ON MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

Note: Suggested Alterations to LMM(93)67 are underlined and appear in square brackets

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.

[It was agreed that not all Commonwealth countries would wish to make fresh arrangements in this area and that the preparation of a Commonwealth Scheme at this stage would be premature. However,] it was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to [the requirements of their Constitutions] and the general principles of their domestic legal systems, be guided by the following general principles 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 breach of the 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 would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of [national security or other essential public interests].

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 agency 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 in its files;
- (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 as to the circumstances of the case giving rise to the request].

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 of information] by a regulatory authority (subject to appropriate safeguards) to a counterpart authority in another Commonwealth country where that information clearly gives rise to a 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.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation in relation to the securities, futures and investment markets which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.

Text of Suggested Statement on Mutual Assistance between Business Regulatory Agencies

As Revised by Senior Officials on 18 November, 1993

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.

It was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the general principles of their domestic legal systems, be guided by the following general principles 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 breach of the 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 and comity; and the resource costs involved. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of 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 agency in that country to use appropriate powers available to it in a domestic context. This would include in particular:

- (a) gaining access to, or supplying, information in its files;
- (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
- (c) exercising appropriate powers of investigation or inspection.

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 agency was entitled to obtain in the context of responding to a request for assistance.

6. There should be no legal impediment to the spontaneous provision by a regulatory agency (subject to appropriate safeguards) of information to a counterpart agency in another Commonwealth country where that information clearly gave rise to a suspicion of a breach of a legal provision, regulation or requirement of that counterpart agency. The decision of whether or not to provide such information in any particular case would be at the sole discretion of the agency in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation **[in relation to the securities, futures and investment markets]** which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.

The Fundamental Political Values of the Commonwealth and Human Rights

Enhancing Election Frameworks Through Law

by Carl Dundas

Introduction

During the past five years multi-party democracy has gained ground as the preferred political system in the international community. A large and influential group of States now places more emphasis, than it had done previously on free and fair elections as the principal benchmark for good international standing.

Commonwealth governments, at their meetings in Kuala Lumpur in 1989 and in Harare in 1991, renewed their commitment to assist member countries in the promotion of democratic processes. In pursuance of the Kuala Lumpur decision, the Commonwealth governments sent an observer mission to the general election in Malaysia in 1990. This was followed by similar missions to elections in Bangladesh (1991), Zambia (1991), Guyana (1992), Ghana (1992), Seychelles (1992), Kenya (1992), and Lesotho (1993). The Commonwealth Secretariat provided technical assistance in election preparation to Kenya, and to Mozambique (the latter under a special funding programme).

Based on comments received in the course of observing the elections referred to above, and those made by observers while discharging their duties, a series of questions relating to "best practice" and the role of the law in contributing to the conduct of free and fair elections may be formulated. These include the following:

- Is the legal framework adequate to ensure that the organisation of free and fair multi-party elections can be achieved in a given situation?
- Has the full potential to contribute to the holding of free and fair multi-party elections been reflected in the provisions of the constitution and those of the electoral laws?
- Have the courts been given the fullest possible role in assisting aggrieved persons who complain about failures in the procedures of major election processes?
- Are the election safeguards satisfactorily balanced with the facilitation measures in place and aimed at delivering high quality election services at cost effective levels?

This paper seeks to identify and deal briefly with the major legal issues which form the subject of frequent complaints to Commonwealth observers of elections. These issues may be conveniently discussed under three broad headings, namely constitutional provisions, electoral laws and the role of the courts.

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and is an adviser for the elections in Mozambique. Any expressions of opinion in this paper are those of the author and not necessarily those of the Commonwealth Secretariat.

The author wishes to thank Jeremy Pope for the useful suggestions he made for improvement of the original draft of this paper.

CONSTITUTIONAL PROVISIONS

1 Electoral Commissions

An independent electoral commission is generally considered to be an essential element in the organisation of free and fair multi-party elections. This is because that body is often charged with the responsibility of organising elections, and the efficient management of the election machinery is a major factor in achieving the conduct of a free and fair election. In practice, the public perception of an electoral commission's independence depends largely on its constitutional status and particularly on the method of appointment to and removal from office of membership of the commission.

The focus on these issues appear to sharpen during the transition from a one-party to a multi-party system.

Thus in Zambia, where under the 1991 Constitution, the President appoints the Chairman and members of the Electoral Commission, there were complaints from opposition parties and sections of the public during the election campaign in 1991.¹ The situation was not helped by the fact that a vacancy occurred when one of the three members of the Commission resigned before the elections in 1991, and it remained unfilled up until the elections were held.

In Kenya, during the 1992 election campaign, dissatisfaction was expressed with the constitutional position where the President appoints the Chairman and members of the Commission.² Persistent complaints were made by opposition parties against the individual who was appointed Chairman, and also against several members of the Commission on the grounds that they were not independent of the influence of the ruling party and Government and had been appointed without consultation.

In Guyana, where the Commission was composed of three members from the ruling party prior to the 1992 elections and three members from the opposition parties with an independent chairman, decisions were difficult to make, and were seldom taken on a timely basis.³

The Electoral Advisory Committee in Jamaica consists of two members nominated by the ruling party, two by the opposition party and three independent members

proposed by the four party nominees. The formal appointments are made by the Governor-General.⁴ This formula has met with some success in achieving a high degree of independence from government interference, but the fact that active politicians are eligible to serve, and frequently do so, has the potential to compromise sensitive matters such as the design of security features on ballot papers and voting documents or equipment.

In Malta, there is an Electoral Commission with a chairman and eight members, established pursuant to section 60 of the Constitution. Each political party is entitled to nominate two delegates to the Commission. These delegates are not members of the Commission but represent the party which nominated them and have access to all the records of the Electoral Office, except medical records, adoption records of voters or to the security features relating to ballot papers, voting documents and the official mark. Where the information, documents or lists are of a confidential nature, the party delegates have the same obligations to secrecy as the person from whom such information, documents or lists are obtained.⁵

In some countries, such as Guyana and Zambia, the Electoral Commission is a temporary body. This feature detracts from the independent status that the Commission might otherwise enjoy.⁶ The Chief Election Commissioner of India enjoys constitutional protection and cannot be removed from office except in a manner and on like ground as a Judge of the Supreme Court. The conditions of service of this officer cannot be varied to his/her disadvantage after appointment. Members of the Commission can be removed from office only upon a recommendation by the Chief Election Commissioner.⁷

The experience of Commonwealth observer groups strongly suggests that the independence of an electoral commission can best be achieved in a multi-party system through the formal constitutional recognition of the commission's role to protect the interest of opposition parties on an impartial basis. It further suggests that any system which does not adequately involve political parties in the appointment of individual Election Commissioners, courts losing the confidence of key political players and so losing at least a degree of the integrity of the process as a whole.

2 Boundary Commission

In order to avoid gerrymandering (the demarcation of constituency boundaries in a manner that intentionally favours a particular political party), some Constitutions contain provisions which deal with the alteration of electoral districts and constituencies.

The boundaries of electoral districts may be subject to change periodically to accommodate increases or decreases in the electorate of those districts. For this pur-

pose, an "electorate quota" is sometimes used to determine the average size of the electorate that should be accommodated by an electoral district. The quota is determined by dividing the total electorate of all the constituencies by the number of constituencies. In applying the quota, a particular constituency may be allocated a larger or a lesser electorate than the average, as a result of taking account of varying topographical features and transportation facilities, and differences between urban and rural population density.⁸ The task is thus much more than the mechanical application of a formula, involving as it does a balancing of competing interests.

The application of the electorate quota is usually done by either the electoral commission or by a special body called a "boundary commission."

The independence and impartiality of a boundary commission is essential in order not only to avoid the practice of gerrymandering the boundaries of constituencies but to promote the integrity of the electoral system as a whole.⁹ Some countries provide for the independence of the boundaries commission and its composition in their Constitutions.

Unfortunately, the formula used in some Constitutions does not contribute as much as it could either to the Commission's independence or impartiality or to the appearance of both of these qualities. One such formula is where the Speaker of the National Assembly (invariably a member of the ruling party) is the chairman, and three members of that House are appointed by the Prime Minister and three members of the House are appointed by the Leader of the Opposition.¹⁰ This formula has not worked well and often produces two sets of recommendations, one by the members who are appointed by the government side supported by the chairman, and the other by those members appointed by the opposition party.

Another approach is for the Constitution to empower the Head of State (in a monarchical or non-executive presidential system) to appoint, in his/her own deliberate judgment, the chairman, and to appoint the other members in equal numbers on the advice of the Prime Minister and Leader of the Opposition respectively.¹¹

Yet another is where the chairman and members of the boundary commission are appointed by the Head of State on the advice of the Judicial Services Commission.¹²

This random sample of formulae suggests that there may be no one "right" constitutional formula to establish an independent and impartial boundary commission. Some of the examples cited above reveal that there are boundary commissions whose chairmen and members are all active politicians, while others exclude the holders of political office from becoming members.¹³

It is also possible for an electoral commission, estab-

lished under the Constitution of a particular State, to be empowered to discharge as well the functions of demarcating the boundaries of constituencies.¹⁴ This can be cost effective and consistent with an electoral commission's overall responsibility for electoral matters.

THE LEGISLATIVE AND REGULATORY FRAMEWORK

Selected Issues

3 Registration of voters

A properly compiled register of voters provides a sound basis for the organisation of free and fair elections. Genuine efforts to register all qualified persons are some times thwarted by inadequate or unclear legal provisions. Registration issues which frequently pose this difficulty include the following:

(a) Residential qualifications

The failure to state a clear and precise test in the law for qualification for registration in a constituency or polling district often leads to confusion and irregularity in compiling the register. The legislative scheme should avoid the conferment of the type of discretion on registration authorities that leads to a "constructive" residential status being applied. It should be factually based and subject only to an objective assessment as to whether the criteria have been met.¹⁵

(b) Method of Registration

The method of conducting the registration has often been singled out for close scrutiny. A house-to-house enquiry is widely considered to be unsatisfactory, if it is not backed up with mechanisms which allow for regular up-dating of the register. Permanent registration stations are an option, with the potential advantage of enabling young people to register as soon as they become qualified so to do. Such stations may also facilitate voters who lose their voter's card, where that card is necessary for identification on polling day. Any system of registration that does not provide for continuous revision of the register runs the risk of an inadequate exercise taking place in a limited period immediately before the poll, with potential for considerable controversy and public dissatisfaction.

(c) Claims and Objections

Adequate time, in all the circumstances of a particular case, should be allowed in the regulatory scheme for aggrieved persons to make their claim to be included in the register, and for interested persons to assist in purging the register by objecting to names that appear to be on the preliminary register improperly.¹⁶ A survey of Commonwealth best practice suggests that where an aggrieved claimant or an interested objector is not satisfied with the initial outcome of representations, an appeal should lie to a third party or the courts.¹⁷

(d) Identification of Voters

In order to avoid multiple registration (in jurisdictions where it is illegal to do so), and so reduce the incidence of multiple voting, it may be necessary to have a proper voter identification system which is laid down during the registration exercise. An identification system works best if it is administered and controlled by the electoral commission and forms an integral part of the electoral procedures. Experience has shown that where a national identification system, which is managed elsewhere and used as well for other purposes, is grafted on to the electoral process for the purposes of voter identification, the results have not always been positive; for example, Zambia in the 1991 elections and Guyana in the aborted election of 1991. A voter's card which carries the voter's photograph is considered to be a suitable form of identification in many countries. In many cases, however, problems arise because the procedures for replacing lost voter's cards are weak and give rise to misunderstandings. In some cases the procedures for issuing and delivering voter's cards are unclear. It is desirable for the legislative scheme to be so designed as to remove these problems, which are essentially of a practical nature.

4 Nomination Process

Experience has shown that the nomination process can be a vulnerable stage in election preparation. Perhaps, the undermentioned statement which is contained in the Interim Report of the Commonwealth Observer Group to the Uganda elections in 1980 points to an extreme example of the nature of the difficulties that can arise:

"No single issue has bedevilled this election more than that of nominations. Because of its potential impact on the political arithmetic of the outcome, the unopposed return of candidates from as many as 17 out of 126 constituencies was bound to cause concern....In a number of cases, prospective candidates were disqualified because of late arrival or a failure to show up at all. The parties concerned complained that they had either been detained or forcibly prevented from presenting themselves."¹⁸

The deficiencies encountered in legislative schemes are (a) procedural and (b) an inadequate role for the courts.

(a) Procedural

Some legislative schemes provide only a few hours for the conduct of the nomination proceedings. For example, Kenya allows 5 hours (8am to 1pm), Jamaica, 2 hours (10 am to 12 noon) and The Gambia 8 hours (8am to 4pm).¹⁹ Others provide for a much longer period. Malta allows a period of not less than 3 days, and in Trinidad and Tobago the process is spread over a period of 11 days.²⁰ Frequently, a short period militates against prospective candidates by effectively denying them enough time to correct any technical errors that

may be found in their applications. It also renders it easy for prospective candidates to be forcibly prevented from filing their papers within the prescribed time.

Some legislative schemes bristle with technical rules governing the number and status of subscribers required to support an application for nomination. These technical requirements make it easy for a returning officer to reject an application on purely technical grounds. Such an approach does not necessarily serve the cause of free and fair election well, and Commonwealth experience suggests that technical rules should be kept to the absolute minimum.

(b) Role of the Courts

A prospective candidate whose nomination papers are rejected by a Returning Officer is usually left without any recourse to the court immediately. Many legislative schemes provide for action only by means of an election petition, even if the rejection was due to a mere technical flaw in the application. In this context, the schemes of Malta and of Trinidad and Tobago offer a welcome departure from the general position in providing for an appeal to the High Court in such a case.²¹

Perhaps the most difficult mischief to address is the situation where a prospective candidate was forcibly prevented from filing nomination papers within the prescribed time period or at all, and a person was declared elected unopposed for the constituency concerned. Most legislative schemes require the aggrieved prospective candidate to seek redress through the courts by way of an election petition. This procedure is unsatisfactory in cases where organised interference by supporters of one party succeeded in forcibly preventing prospective candidates of another party from attending at the nomination centre in the time prescribed.²² This wholly unacceptable assault on the integrity of an election can be minimised (and perhaps even deterred) by an election commission having suitable powers to extend the time for a particular nomination centre where there are grounds to believe that such interference may have taken place.

5 Election Campaign

The proper role of an electoral commission in ensuring a level playing field among the parties contesting an election is not recognised in most of legislative schemes studied. The integrity of an electoral system would best be preserved by an independent, impartial and competent electoral commission ensuring (and having the powers to ensure) that each political party/candidate has:

- (i) the freedom to campaign throughout the country;
- (ii) access to the state-owned media;
- (iii) proper guidelines to ensure that campaign funding is kept within the law; and

- (iv) reasonable security safeguards at political meetings and at party premises. These issues are treated very briefly as follows:

(i) Freedom to Campaign

The degree of freedom to campaign throughout the country by each political party depends on the general security situation and, more importantly, on the non-discriminatory issuance of permits (where required) to hold political rallies. While security aspects must always be paramount, in the case of political rallies, neither the police alone nor the ruling party and the government, should be allowed to withhold or issue permits without full consultation with the electoral commission. Indeed, the preferred course is for the primary responsibility to issue or withhold permits to hold political rallies to lie with the commission, but with actions taken by it being in consultation with the appropriate security authorities.

(ii) Access to the State-owned Media

The lack of satisfactory access to a state-owned media is a perennial complaint by opposition parties, and this position can become particularly acute when an election is held during a transition from a one-party to a multi-party system. The electoral regulatory scheme should empower the electoral commission to settle a fair and balanced framework for political broadcasts and advertisements through the state-owned media for the political parties contesting the elections. If this is not a responsibility of the Commission, other arrangements should be put in place which ensure that all of the contesting parties are in broad agreement with what is proposed.

(iii) Funding of Political Campaigns

The funding of an election campaign by a political party or by candidates deserves public scrutiny. Many legislative schemes are weak in respect of the provisions which they contain regarding election expenses. It is believed that greater attention should be paid to the monitoring and enforcement of the legal requirements relating to candidates' election campaign expenses. The electoral commission should be empowered to ensure that proper election expenses returns are submitted on time and have appropriate powers of inspection of accounts etc to enable these to be properly audited and verified in appropriate cases. Ceilings on political expenditure are frequently too low to be realistic, and can then be ignored by all²³. It may be that the most effective way of limiting the impact of money on the election is to prohibit certain types of expenditure (eg, multi-coloured posters or the purchasing of radio and television time).

(iv) Security Protection at Political Meetings and for the Poll

The legislative scheme should ensure that a mech-

anism is established through which the electoral commission (or its chairman) liaises with high command of the security forces in order to secure more easily adequate protection at political rallies and to ensure an appropriate and unobtrusive security framework for the day/s of the poll.

6 Preparation for Polling

The timely performance of the various tasks when preparing for an election is a management function, and is not normally a contentious matter, except where the management of the electoral machinery is regarded as being incompetent or even corrupt. It is believed, however, that the implementation of the legal provisions relating to election preparation would be strengthened by the inclusion of a requirement for:

- (a) transparency of actions carried out by the electoral commission;
- (b) an adequate voter education programme; and
- (c) the training of party polling agents.

These elements are explained as follows:

(a) Transparency of Actions

An electoral commission should be required by law to keep the general public and all the political parties informed of the performance of major election tasks during the preparatory stages for an election. The regulatory scheme should require the electoral commission to consult with political parties at the request of the latter. Transparency of action also means that the commission would keep the public informed not only through the official gazette, but also through the news media. It is a widely shared belief that transparency of actions by an electoral commission has the potential to generate confidence in an electoral system. Transparency of action should be managed in a manner which does not prejudice the need for confidentiality or secrecy in proper cases, for example, security features of ballot papers and voting documents.

(b) Voter Education Programme

It is now an accepted practice to include a voter education programme in the planning profile for an election. Such a programme requires a budget and professional expertise in public relations. A good voter education programme helps voters to be better acquainted with the voting procedures and assists the image of the electoral commission concerned. It is believed that every electoral commission should be required under the legislative scheme, and be adequately funded, to provide for a satisfactory voter education programme in its planning profile for each election.

(c) Party Polling Agents

Party polling agents are crucial to the holding of elections which are manifestly and openly seen to be fair. It is, therefore, essential that these agents be

trained in their duties and have an informed appreciation both of their own role and of the polling machinery. In some countries, the Election Commission is responsible for providing training for these officials and this has been found to be of considerable value to the process as a whole.

7 Polling Events

Two issues - the secrecy of the ballot and the identity of voters - are often singled out for particular scrutiny on polling day. The majority of the cases studied suggest that many of the problems that arise in these areas on polling day do so because the legal rules are not capable of easy application. There can also be confusion where ballots are counted and different counting officers apply differing criteria when assessing whether or not particular ballots should be disallowed.

(a) Secrecy of the Ballot

Ensuring the secrecy of the vote of each voter is a fundamental principle of a free and fair election. A flawed secrecy procedure may expose a voter to threats and intimidation by the supporters of opposing political parties, and thus impact adversely on the freeness of the election.

Many legislative schemes have developed elaborate safeguards to protect the secrecy of the vote of literate voters, but fail to apply similar standards to disadvantaged voters, particularly the illiterate. It is to be remembered that in many emerging democracies, illiterate voters form the majority of the electors in many polling districts.

In practice it is not unusual for illiterate voters to be required to declare in the presence of the polling staff and voters queuing to vote for whom he/she is going to vote in order to secure timely assistance from the election staff. There were widespread complaints about the use of a procedure of this kind in Kenya in 1992.

The legislative scheme should prohibit this procedure and ensure that the secrecy of the ballot applies equally to an illiterate voter. The procedure whereby an illiterate voter is helped by the election staff, a friend or relative, who is under oath not to divulge how the elector voted, is a perhaps a practical approach, but it must be administered with utmost care. Where the method of voting is by the use of tokens, as in The Gambia, it is easier to safeguard the secrecy of the illiterate voter, than where the ballot paper is used. The practice of queuing behind candidates is rapidly fading as countries bring themselves into line with generally accepted international norms for free and fair elections. Secrecy of the vote stands out as the only process which must be absolutely secret in what should otherwise be an open and transparent system.²⁴

(b) Voter Identification

The voter identification system to be applied in an

election is usually settled in part at the time of registration. For example, if photographs and voter's cards are to be used they would become an integral part of the registration process. However, additional means of identification may be necessary at the polling station if either multiple voting or impersonation is threatened. It is commonplace today for countries to use an indelible ink (in some instances, the ink is invisible and is used together with equipment which detects the presence of the ink on the fingers on which it had been placed when the voter voted).

The real problem is what the procedure should be when a person succeeds in voting in the name of another and that other person, who is the genuine voter, turns up to vote.

Some legislative schemes allow both votes to be counted. The upshot is that in theory there can be more than a 100 percent poll in a district. Other schemes, and these are to be preferred, treat the second ballot as a "tendered ballot" - one which is not counted, but which is kept in a separate envelope for use as evidence if there is an election petition in the constituency concerned.

Some schemes employ questions peculiar to each voter, the answers to which are likely to be known only to the voter, and these questions are put by the presiding officer to anyone who claims to be a particular voter and whose identity is not satisfactorily proven.

In rural areas, local community leaders often have a role in being at a polling station to help with identification.

(c) Marking of Ballots

It is important that polling staff and party agents understand that the object of the exercise is to enable each voter to express his or her preference and that when this is clear and unambiguous, a ballot should not be rejected. In some countries, for example, ballots may be rejected where some of the indelible ink has slightly smudged the face of a ballot even though the voter's intention was plain. In others, ballots have been rejected when a candidate has, for example, been indicated with a tick rather than the prescribed cross.

Particular attention needs to be given to the training of polling staff in this area.

8 The Role of the Courts

The Courts are often empowered to deal with three categories of action in respect of elections. These are, (a) appeals during the registration and nomination processes, (b) election offences and (c) election petitions. The cases studied revealed that several Commonwealth countries have not clothed the courts with a role which enables it to play its rightful part in overseeing the organisation of free and fair elections. It is hoped that in future the courts will be perceived increasingly as an instrument through which the election processes can be

strengthened. The undermentioned points are made with respect to each of the categories of action listed above:

(a) Appeals during the Registration and Nomination Processes

These matters were dealt with earlier, but it is sufficiently important to emphasise the need for the courts to be open to claimants whose names have been omitted from the voters register, and to objectors who wish to pursue their objections. It is believed that a system which permits appeals only to a Returning Officer can be perceived by the public and by political parties as unsatisfactory. The legislative scheme should ensure that appeals to the courts are available in these cases.

There were even fewer countries to be found which permit an appeal to the courts from the nomination proceedings. Experience has shown that this is a serious shortcoming in too many legislative schemes, and remedial measures should be considered as a matter of urgency.

(b) Election Offences

Most of the legislative and regulatory schemes for elections embody a long list of offences, and so the focus of complaints is usually that breaches of the law are not punished in a timely manner, or at all. It may be that the inability to enforce the law is the failing of the electoral commission, nevertheless it does raise the question of the effectiveness of the legal regime if breaches are not punished. It is submitted that law enforcement authorities and the electoral commission should pay greater attention to enforcing the law whenever breaches of the legal provisions take place.

(c) Election Petition

The scope of election petitions is well defined in most legislative schemes. It is believed that the election petition procedure should not be the only remedy available to a prospective candidate whose papers were rejected on technical grounds at the nomination proceedings. This procedure is available only after an election has been held and is not capable of giving a timely remedy in some cases where nomination papers are rejected.

In some countries, the resources are not available to enable the courts to deal promptly with the hearing of election petitions, and this could become acute when there is a large number of election petitions.

ENDNOTES

1. See section 80 of the Constitution of Zambia.
2. Section 41 of the Constitution of Kenya.
3. Section 161 of the Constitution of Guyana.
4. See the Representation of the People (Interim Electoral Reform) Act, 1979.

5. Section 10 of the General Elections Act, 1991.
6. Section 2 of the Constitution (Amendment) (No. 2) Act, 1991 of Guyana, and section 80 of the Constitution of Zambia.
7. Clause 324(5) of the Constitution of India.
8. See for example, section 77 of the Constitution of Zambia, also the Second Schedule of the Constitution of Jamaica.
9. The term "gerrymandering" originated with the practice of Governor Elbridge Gerry of Massachusetts who, in 1812, caused the boundaries of electoral districts to be drawn in a salamander-like manner to gain political advantage.
10. See for example, Jamaica, sections 66, 67 and the Second Schedule of the Constitution.
11. For example, St. Vincent, sections 32 and 33 of the Constitution.
12. For example, Solomon Islands, section 53 of the Constitution.
13. For example, Jamaica's consists wholly of politicians, while that of Solomon Islands excludes politicians.
14. See for example, Kenya, section 42 of the Constitution, and Zambia, section 81 of the Constitution.
15. See for example, Section 4A of the Representation of the People Act of Mauritius and Part 1 of the First Schedule of the Representation of the People Act of Jamaica.
16. A period of 14 or 21 days is often stipulated in the legislative scheme. Malta allows 21 days for appeals following the publication of the register, section 39 of the General Elections Act. Under the Maltese scheme there is also a 14 day period for appeals against the refusal of an application for registration, a cancellation of registration or an objection to another person's registration.
17. For example, Botswana, sections 16-23 of the Electoral Act, The Gambia, sections 16-21 of the Elections Act and Malta, sections 36-40 of the General Elections Act.
18. Paragraphs 5 & 7, Commonwealth Secretariat, 1980.
19. See Regulation 11, the Presidential and Parliamentary Elections Regulations of Kenya; section 23 of the Representation of the People Act of Jamaica and Rule 6(1) of the Constituency Elections Rules of The Gambia.
20. See section 45 of the General Elections Act of Malta and sections 6 & 7 of the Representation of the People Act of Trinidad and Tobago. The nomination process in Trinidad and Tobago commences with the returning officer receiving nomination papers for scrutiny on the eleventh day preceding nomination day and rejecting papers if they are not in order. An appeal lies from the returning officer's ruling to a Judge in Chambers who deals with the matter before nomination day.
21. See section 51 of the General Election Act of Malta, and Rule 6(7) of the Electoral Rules of Trinidad and Tobago.
22. During the 1992 elections in Kenya, the Electoral Commission had to deal with over 40 cases of prospective Parliamentary candidates who complained that they were forcibly prevented from handing their nomination papers within the prescribed time or at all. There were 16 seats, most of which were included in the list of complaints, which were declared elected unopposed. The Commission took the view that it could only take action where the prospective candidates were rejected on grounds of technicality. In cases where prospective candidates were forcibly prevented from handing in their papers, the Commission indicated that the police and the Attorney-General had to investigate the complaints, and that where candidates were returned unopposed, the proper procedure was through an election petition in the Court.
23. See comments on election expenses - Report on Parliamentary Elections in Bangladesh - Commonwealth Secretariat, 1991.
24. See Ghana report on The Presidential Election, 1992, Conclusions, p.58, Commonwealth Secretariat, 1992.

Transparency in Organising Elections

By Carl W Dundas

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Introduction

Openness in the election process plays an important role in gaining public confidence in the electoral system and acceptance of election results¹. It may be achieved either through constitutional or legislative requirements or through sound and sensitive administrative practices. For this reason it is instructive to explore the limits of openness or transparency so as to permit a quick assessment to be made of its presence or absence in the organisation of a particular election.

A lack of adequate transparency in a particular country may be due to a failure of the election authorities to keep the public and/or the political parties informed on a timely basis, or to deficiencies in the legislative and regulatory framework of the electoral system, or to a combination of both. In the second situation, a thorough review of the legal provisions would be called for.

A review of this kind encompasses a number of issues, namely:

- (a) the need for a "level playing field" as between the various contending political parties;
- (b) fixed dates for general elections;
- (c) independence of the electoral and boundary commissions;
- (d) creation of subordinate entities to enhance transparency;
- (e) involvement of political parties in election processes;
- (f) the role of observers, opinion polls and the media;
- (g) the openness or otherwise of funding for political parties and their campaigns;
- (h) the effectiveness of limits on campaign expenditure to contain the impact of money on the democratic process;
- (i) the arrangements for the poll on the ground;
- (j) transparency at the counting place; and
- (k) the announcement of results.

(a) Transparency and Level Playing Field

The expression "level playing field" is often used in an election context but is widely misunderstood. No experienced elections official would be likely to subscribe to

the view that an absolute equality can be achieved between contending parties. Some will have more resources, some will be better organised, some will have larger numbers of supporters to mobilise, and an incumbent inevitably has certain built-in advantages.

However, in a more restricted sense, "level playing field" is a necessary ingredient of a free and fair election and in this, transparency in organising such an election is particularly helpful in reassuring opposition parties in particular as to the integrity of the process.

In the context of elections, the expression "level playing field" refers to a requirement that the election rules and regulations, as well as freedom to campaign, including access to the state-owned media, apply fairly to all political parties. The term also embraces the right of each party to satisfy itself that, through frequent consultations with the election management team, and by participating in or observing the major election preparatory processes, the procedures are being properly applied.

The test for determining whether the "playing field" is level or otherwise is not well-defined. It is clear, however, that if all or even most of the elements set out in the description above were absent, the playing field could not be considered as being "level". Nevertheless it is well recognised, and widely accepted, that the party forming the government can enjoy considerable advantages over opposition parties. These may include the right of the Head of Government to call a general election at any time when he thinks it most favourable for his party to be returned to power. Significant advantages also flow from the fact that the party in government remains in power until the election results are known, and in the run up to the poll Ministers may generate additional publicity through official announcements and press conferences. These practical considerations must be accommodated by the test of the "level playing field", reducing it from an absolute to a relative one.

There are other factors which also militate against a strict application of the "level playing field" requirement. For example, even if opposition parties have fair access to the state-owned media, the ruling party may enjoy the support of a larger number of privately-owned media bodies. It may also be the case that a ruling party has legitimate access to greater resources and thus is

able to fund a larger advertisement programme than opposition parties.

The true test of the existence of a "level playing field" is therefore whether opposition parties have a fair opportunity to put their programmes to the electorate through election rallies, media announcements and broadcasts, marches, buntings, billposting advertisements, etc., and equal access to the electoral commission.

Transparency constitutes an important part of the concept of the "level playing field" test as defined above. It requires that the management team of the election deals openly and on equal terms with each of the political parties. Equal opportunity must be given to each political party to participate in or observe the preparatory processes for an election, and each party must have an equal opportunity to consult, whenever it wishes, with the electoral commission.

Transparency is not concerned only with the parties. It has a much wider role, which is to enable the public at large to be kept informed on a timely basis about developments regarding electoral matters and to have confidence that the administration of the electoral process is in capable and impartial hands. By letting the public become aware of the work of the electoral commission and the manner in which elections are organised, the public perception of the electoral process is likely to be positively enhanced. This will in turn feed into and strengthen the integrity of the process.

(b) Fixed Dates for General Elections

One of the particular advantages of a party forming the government in a Westminster style National Assembly is that the Prime Minister of the day has the right to call an election at the time when the ruling party is judged most likely to win the election. The ruling party may therefore start planning for an election well ahead of opposition parties. It may be contended that there is no "level playing field" between the parties in such a case. Stipulated dates, in the legislative schemes for elections, on which general elections are held, would remove this particular advantage of the ruling party, which, though widely accepted, can impair overall fairness.

Because of the constitutional questions (discussed below) that would arise if a Prime Minister's right to call elections, were removed, there is need to examine the nature of the disadvantages suffered by opposition parties under the Westminster model with a view to seeing how these can be mitigated. Complaints encountered from time to time which have a bearing on this issue are as follows:

(i) that the ruling party has prior knowledge of the Prime Minister's thinking on election date, and thus stand to gain an unfair advantage over opposition parties. This right of the Prime Minister and hence the ruling party to set an election date has been abused

occasionally, resulting in considerable embarrassment for the authorities responsible for the organisation of the elections concerned.²

(ii) Where the legislative scheme does not provide for sound rules governing the period that should elapse between the announcement of an election date and either the nomination day and/or polling day, the period sometimes allowed for the organisation of either or both of these events may be much too short. When this happens, an undue strain is put on the electoral commission responsible for the election, and costly and embarrassing mistakes are made.³

(iii) The Westminster model presumes that an electoral system will be in place and be ready for activation at any time when the Prime Minister (or President) concerned wishes to call an election. There is no doubt that that is the constitutional position. Experience has shown, however, that in practice many emerging democracies from time to time have failed to keep a proper electoral system in place at a time when the Prime Minister (or President) concerned wished to call a general and/or Presidential election. This situation usually puts the electoral system as a whole under a great deal of strain, and exposes the several election processes to continuous and undue public scrutiny, since election can only be called when the organisation is complete, for example, when the voters' register is ready and election materials and supplies (including ballot boxes) have been acquired.⁴ Where the system is fashioned around a fixed date formula, these infelicitous occurrences would be avoided.

(iv) Conferment of the right on a Prime Minister or President to call an election when he or she sees fit, impinges on the quality of transparency that may be dispensed under the system, since the element of surprise is inherent in, and the key to, the procedure.

Any proposal to move away from the Westminster model to a fixed-date model, such as the Presidential or Congressional elections in the United States of America, will have constitutional implications. For example, the existence of a no confidence vote in the government by the National Assembly and its consequences, if any, would have to be examined. Similarly, the whole matter of whether the government could be dismissed during its term of office would provoke lively discussions in some countries.

There is, in any event, a clear and compelling need for a Prime Minister to be required to give adequate notice of an election date so as to ensure that the election commission has adequate time to prepare an up-to-date electoral roll and to organise the poll.

(c) Electoral and Boundary Commissions

An electoral commission's role lies at the heart of the concept of transparency in election organisation. It is this body which often has the responsibility for the or-

ganisation, superintendence and control of elections. It is thus uniquely placed to develop through its practices and procedures a culture of openness, transparency and consultation that can - and should - infuse the whole electoral process. All aspects of the electoral commission's establishment, composition, status and functions are relevant to the matter of the transparency of the election processes. Each of these attributes merits close examination in order to better understand the requirements of a suitable electoral commission that can contribute fully to transparency in election organisation.

(i) Establishment of an Electoral Commission

The preferred approach is for an electoral commission to be provided for in the Constitution, and preferably in a deeply entrenched provision thereof. The preference for the inclusion in the Constitution in the first place is based on the fact that it is generally more difficult to amend a Constitution than to change the ordinary electoral law. Deeply entrenched provisions are favoured by some countries, because such provisions cannot be changed without a qualified majority vote of 2/3 or 3/4 of the Parliament and at times a referendum with a stipulated majority of the votes cast well in excess of a bare majority.⁷ The Constitutional provisions should deal with the essential characteristics of the commission, such as its composition, status and functions. Matters of detail can be dealt with in legislative and regulatory schemes.

(ii) Composition

In practice, the degree of transparency achieved by an electoral commission will depend on the standing and character of the commissioners appointed, particularly the chairman. The members of an electoral commission should be persons of integrity and high standing in the community. They should be - and be seen to be - competent and independent of the government of the day and of all political parties. They should understand and by their acts demonstrate the duty to be impartial and fair-minded in the organisation of a free and fair election, and be responsive to the needs of political parties and the public for the timely release of information on the election processes.

The appointments procedure should be carefully considered by the framers of the Constitution, so as to avoid giving the ruling party for the time being complete or undue control over the selection and appointments process. Opposition parties should be entitled to participate in the process of selection and appointment of members of an electoral commission. Some Constitutions require the leader of the ruling party, in his or her capacity as Head of State, to appoint the members of the electoral commission in his or her own deliberate judgment.⁶

This is improper in the context of the quest for a "level playing field" and transparency. However, the true role

of political parties in the selection, screening and appointment of members of an electoral commission needs careful examination. Examples of different formulae can be studied to see whether or not each is an acceptable approach that works satisfactorily.

One such formula provided for an equal number (three) of members for the ruling party and the opposition parties, with an independent chairman.⁷ The result in this case was almost perpetual disagreement amongst the members, leaving the chairman to side with one group or the other. The upshot was that the whole decision-making process of the Commission was ineffectual.

Another formula, allows an equal number (two) of members to be nominated by the ruling party and the opposition, and three independent members from amongst whom the chairman of the Commission is chosen.⁸ This formula has worked relatively well, but the incidence of active and senior party members serving as members of the Commission jeopardises genuinely confidential matters such as security features on ballot papers, ballot boxes and other voting documents. Yet another formula permits each political party to nominate two delegates to the Commission.⁹ These delegates have the right of access to the Commission's records (except documents dealing with security features on voting materials.) This formula could prove to be effective if utilised in good faith by the political parties.

These formulae were designed to provide maximum transparency in the electoral system. However, serious questions arise as to whether the presence of party nominees on the membership of an electoral commission compromises the independence and impartiality of that commission. Perhaps, the appointment of party nominees does adversely affect the independent status of an electoral commission, or at least it does appear to do so. But the reason frequently given for doing so is not only to enhance transparency, but to build the confidence of the parties in the electoral system, and some countries believe that this is the best way of tending their young and fragile democratic process. It is believed, however, that by including party nominees as members of an electoral commission, the very limits of transparency have been reached and the risk of abuses of the office by political appointments becomes greater.

It is submitted that an electoral commission would be better served if its members were not associated with any political party and were chosen by an independent body of high standing, such as the Judicial Services Commission of the country concerned.¹⁰ Even in cases where appointments are made by the leader of the government party, as Head of State, in his or her own deliberate judgment, the selection and screening of prospective appointees can be done in consultation with opposition parties.

The question of whether transparency would be ad-

vanced by the appointment of a single-member commission should be mentioned. There is no inherent reason in theory why a single-member commission with a competent staff could not so organise elections as to satisfy the requirements of transparency, but especially in a small society a single-member commission can be vulnerable to rumours of supposed partiality. He or she also lacks any colleague with whom to discuss matters of grave concern and the best ways in which these might be handled.

Whatever the approach adopted, it should reflect a broad consensus among both parties and public at large that the arrangement is appropriate for the country in question.

(iii) Status

An electoral commission ought to be an independent body established under the Constitution. It was shown earlier that its very establishment under the Constitution of the country concerned lays the foundations for its independence. The term "independence" in this context means that the electoral commission concerned is not subject to the control of the government of the day or any political party or any other body, and acts impartially and professionally towards all political parties.

There are factors that can affect adversely the desired level of independence that an electoral commission should enjoy. It was mentioned earlier that in certain cases its very composition may be perceived as compromising a commission's independence.¹¹ This may occur where the stipulations dealing with the composition of an electoral commission provide for party nominees to be appointed. It may also happen where the wrong individuals are appointed to the membership or the chair of the commission. Some electoral commissions are temporary bodies only, and it is believed that this quality can detract considerably from their independence, due to the uncertain tenure of the commissioners and their staff.¹²

The way an electoral commission is funded may also affect its independent status. Where funds are provided through any special or block vote in the Ministry responsible for electoral matters, valuable time may have to be spent negotiating the budget with that Ministry, or the Ministry Finance, as the case may be. It is believed that the budget for an electoral commission should be voted directly by Parliament. Independence of an electoral commission also implies that the commission should enjoy full and complete control over the selection, appointment and dismissal of its staff (including all election officers).

(iv) Functions of an Electoral Commission

The general functions of an electoral commission centre on the superintendence, control and organisation of elections. In short, all aspects of electoral matters ought to fall under the responsibility of the commission.

Where this is not the case, the integrity of the electoral process is liable to being put at risk without the commission having the ability to take remedial action. Experience has shown that where functions, such as the registration of voters (which is obviously an election task), are hived off and given to some body other than the commission, not only is the integrity of the electoral process impugned, but serious breakdowns are more likely to occur in the system.¹³

In discharging its functions, an electoral commission needs to be competent, and have the ability to appoint staff and election officers who are also competent, as well as impartial.

Some electoral commissions are empowered to prepare and promulgate election rules and regulations which have the force of law.¹⁴ This power greatly strengthens the independence of the commission, as it removes an important regulatory function in the sphere of election management from the government of the day. It also enables the commission to respond swiftly to complaints in proper cases, thus enhancing its efficiency. If parliament has been dissolved, necessary regulations can still be made.

In some cases the responsibility for the compilation of the voters' register is shared between a national registration body (primarily responsible for a national identification system) and the electoral commission (which has to compile a register of voters).¹⁵ Sometimes the sharing process is avoided, but the national identification card is "imported" into the electoral process by requiring its holder to present it as a condition precedent to either or both registration and voting.¹⁶ These schemes are unsound conceptually, because they tend to usurp an aspect of voter registration which properly belongs to the electoral commission; and they are flawed in practice, since the loss of a national identification card may deprive the voter of the right to vote and the commission may not be able to rectify the problem. (Best electoral practice suggests that any intending voter should not be disenfranchised simply for having lost an identification or voter's card, but should be entitled to vote where he or she can establish an entitlement to do so by other means).

In discharging its functions, an electoral commission can do much to advance the cause of transparency. It can hold regular meetings with political parties and issue regular press releases to the public. An electoral commission should be empowered to play a key role during an election campaign with a view to securing a fair access to the state-owned media by all the political parties, proper security at all political rallies and a reasonable standard of conduct by all political parties, through an agreed code of conduct. The electoral commission should be the authority to promote and enforce the principles of the code of conduct.

An electoral commission should develop public educa-

tion programmes for the registration of voters exercise and for polling. These programmes should be designed to reach the entire electorate in a language that they can understand, and should be commenced on a timely manner. Such programmes also serve to advance the cause of transparency of the system.

(v) Boundary Commissions

Much of what has been said above about the establishment, composition and status of an electoral commission applies equally to a boundary commission. Indeed, the similarity is demonstrated clearly when it is seen that there are cases where the delimitation of constituency and other polling district boundaries is undertaken by the electoral commission.¹⁷ Where there are separate bodies to undertake the functions of an electoral and a boundary commission, it is the function of the boundary commission that distinguishes it from the other commission. In all other respects, its status should be the same as that of an electoral commission.

The function of a boundary commission is to draw the boundaries of constituencies and other polling districts in a fair manner, applying a stipulated formula. One such formula to be found in some constitutions is the electorate quota, which uses the average electorate of the constituencies as the basic size of the electorate to be placed in a constituency. The average electorate is determined by dividing the electorate of all the constituencies by the number of constituencies.¹⁸

A boundary commission may depart from the strict application of the electorate quota by taking account of the topography and transport facilities of an area, and differences between urban density and rural sparsity of population distribution.¹⁹ Fair play in drawing constituency

boundaries is likely to avoid gerrymandering which is designed to draw the boundaries in a particular way to favour a particular political party.²⁰

(d) Specific Bodies Created to Enhance Transparency

In seeking to advance the cause of transparency in election organisation, an electoral commission should examine new and creative ways of projecting activities that demonstrate its commitment. It should therefore be empowered to appoint its own high level observers, consisting of 2 or 3 persons of high standing who are independent of the commission itself and whose impartiality and integrity is well known in the community, in each constituency to monitor and report back to the commission on all stages of the implementation of major election processes, such as registration of voters, preparation for an election and the events on polling day. These observers would act as the "eyes and ears" of the commission in discharging their terms of reference, which may include the following:

- (a) an evaluation of the efficiency or otherwise of the execution of the election tasks concerned in a particular constituency, and make recommendation for improvements, if desirable;
- (b) receipt of complaints from political parties and individuals about any shortcomings in the administration of the election tasks concerned and bringing them to the attention of the Returning Officer for the constituency for remedial action, if the matter falls within the competence of the Returning Officer to settle, if not, the matter should be drawn to the attention of the commission promptly;
- (c) report on any irregular act, whether in the nature of any commission or omission by election staff, political parties, candidates or the police.

The role of these observers may be modified to meet the specific needs of a particular constituency. It is believed that if the right calibre persons are selected and if they are trained properly, this management technique has the potential not only to enhance the transparency of the electoral process, but also to improve the quality of election services delivered to the electorate.

The formation of constituency committees is another imaginative way of solving problems swiftly at the constituency level. Each constituency committee may consist of the returning officer, who will be the chairman, candidates, representatives of the political parties and senior officers of the police in the constituency. The purpose of these committees would be to meet promptly (within 24 hours) to consider complaints. They would also serve to improve the communication between the police, political parties, candidates and the electoral office, within each constituency.

(e) Involvement of Political Parties

Although, as shown above, some doubts exist as to the appropriateness of including political parties' nominees as members of electoral commissions, it is widely believed that the involvement of parties' representatives or agents in the electoral process helps the transparency of the system and generates the confidence of the parties in it.

In practice, parties' or candidates' agents are allowed to participate in several election functions and tasks. For example, some legislative schemes permit political parties to participate in the registration process.

Participation in this case may be at two levels, namely, in the screening and selection of registration officers and by appointing agents to accompany the registration officer when persons are being registered.²¹ The act of permitting political parties to help in the selection of officers is essentially a confidence-building measure, designed to purge the system of persons of doubtful credentials to work in the electoral process. The main category of undesirable people in this regard is the

political activist, that is to say, anyone who is an active member of or political campaigner for a party.

In some countries, a political party has to achieve a certain standing before it is qualified to appoint agents to accompany registration officers. In one case, a party has had to win 5 or more seats in House of Representatives.²² This formula is not considered to be particularly useful, since if no opposition parties succeeded in meeting the requirement, the ruling party alone would have the right to attend at the registration of voters.²³

Political parties and election candidates may also be empowered by the legislative scheme to have their agents present at each polling booth at a polling station, and at the counting of the ballots at the polling stations and/or elsewhere, as the case may be. Where the count takes place at counting centres, parties' agents should be allowed to accompany the ballot boxes from the polling station to the counting centre. For these purposes, accompanying the ballot boxes means actually travelling in the vehicle transporting the boxes. (Where there is insufficient room to accommodate all of the agents, the agents should agree amongst themselves as to which of them should actually be on the vehicle and which should follow on separate transport. Commissions should ensure that transport arrangements are adequate in this regard.)

Parties' agents, whether they be participating in the registration or observing polling or the count, must be properly trained. The primary responsibility for their training lies with the political parties concerned, but the electoral commission can help by preparing suitable manuals on the respective procedures.

All political parties contesting an election, to the extent practicable, should be allowed to participate in the screening of election officers, since their regional or local knowledge may be helpful in avoiding the selection of unsuitable people. As mentioned earlier, an electoral commission should consult regularly with each political party that is contesting an election. Where possible, these matters should be handled in writing so as to avoid the possibility of opposition parties claiming subsequently that there was inadequate consultation.²⁴

(f) Local and International Observers, Opinion Polls and the Media

(i) Observers

The presence of observers at the polling and the count can have a calming effect on the election atmosphere, and is believed to promote the transparency of both the polling and counting of the ballots. Their general role is to pronounce on whether an election is "free and fair".

Local observers, who are nationals of the country

concerned, have the advantage of knowing the local conditions better than international observers, but the former are sometimes regarded with suspicion as having their own agenda and not being neutral.²⁵ Local observers also have the ability at times to mobilise large numbers of people, enough to cover all the polling stations.²⁶ There is no doubt that the presence of local observers advances the cause of transparency of the election processes on polling day, particularly as they tend as a matter of course to be drawn from opposition groupings.

International observers have added a new dimension to election transparency. Their presence in a country attracts considerable interest by the international media which add their scrutiny to the whole matter of election organisation in the country concerned. There are limitations to the extent to which observers generally can impact on the transparency of the system, since they are not in charge of the machinery which runs the election. This limitation may be contrasted with the position when an international body is responsible for the actual organisation of the election, as was the case of the United Nations mandate in Cambodia. Another limiting factor is that most observers have a limited time to see only the final days of the campaign leading up to the polls, and sometimes many leave before the final results are known. They would not have observed the registration process or the greater period of the campaign. Obviously, the longer they are in the country, the more profound their effect. Ideally they should stay to observe any consequential transfer of power, and they should monitor (necessarily from a distance) the hearing of any election petitions.

(ii) Opinion Polls

Opinion polls, particularly exit polls of people who have voted, may indicate the existence of some form of transparency. However, very few developing countries have been able to conduct reliable opinion polls, and some Commonwealth countries (including Canada) discourage the publication of opinion polls near to election day. Exit polls are not popular in many emerging democracies, as it may not be fair for voters to be asked to reveal how they voted, even before the polls closed. Voters who value the secrecy of the ballot as a means of protection against threats, violence and political victimisation will not lightly participate in an exit poll and it can even be seen as a potential challenge to public belief in the secrecy of the ballot.

(iii) The Media and Transparency

The precise level of influence of the media on the transparency of an electoral process is difficult to measure, because in many cases the control of the media by the ruling party and government is at the heart of any imbalance of the "playing field" and of contributing to a lack of transparency through selective reporting.²⁷

Where there is a thriving private media, their role should be to advance the cause of transparency. This they can do by seeking regular interviews on the relevant election issues with the political parties and with the electoral commission and publish them for the benefit of the public. The media may also publish official statements by the electoral commission prominently, and generally take a positive attitude towards the work of the commission and its staff.

(g) Political Party Funding

The funding of political parties is a controversial issue in many countries. The question of funding by the State has not been countenanced in many countries because it is felt that taxpayers should not pay for parties' election campaigns. Some political parties are funded through the dues paid by the party members and contributions by business firms or trade unions. In some countries, for example, the United Kingdom, political parties are not required to publish a list of the contributions received, and from whom. Secret donations thus become a feature of the funding of many political parties, particularly during election campaign periods.

In order to improve the transparency in the funding of political parties, it is desirable that they be required to publish donations from all sources. Publication of donations would have the effect of exposing any link between donation of funds to a ruling party and political patronage handed out to the donor in return.

(h) Limits on Campaign Expenditure

The expenditure of political parties during an election campaign should be limited to realistic levels and be strictly controlled. It is desirable that the legislative and regulatory framework for elections deal with the issue of political party funding. If realistic limits were set by legislation for the expenditure of both parties and candidates during an election campaign, excessive expenditures would be avoided, and it would, perhaps, strengthen the case of those who support state funding of parties. Limits of expenditure could be set for major areas of expenditure, for example, broadcasts on radio and television, posters and bunting display and rallies, etc.

Each political party should be required to report the details of its expenditure to either the electoral commission or another independent body who should have powers to audit party accounts and take legal action in proper cases.

Some countries see fit to exclude non-citizens from contributing to the funds of political parties and to require persons who contribute to any party to give the details to a body designated for the purpose of receiving such information.²⁸

(i) Transparency and the Layout of Polling Stations

The layout of polling stations should be such as to ensure transparency but without jeopardising the secrecy of the ballot. Each voting booth should be constructed and so arranged that the voter votes in secrecy, although the processing of each prospective voter is done in the presence of party agents and observers (if any).

Where separate ballot boxes are used for each candidate and the method of voting is by token ballots, the boxes should be so situated in the polling booth as to avoid the election officers finding out for whom a voter voted. The sound emitted by each token when inserted into the ballot box should be identical in all cases.

The layout of polling stations should also take account of disadvantaged voters who may require assistance of election officers. The secrecy of their votes should be protected to the extent practicable.

Where the members of the security and police forces vote before the general electorate, or on separate premises, the environs of the polling station should be free from the presence of senior officers who are not connected with the voting, in order to avoid any indirect influence on members of the forces when they arrive to vote.²⁹

(j) Transparency at the Counting Place

The counting place, be it at the polling station, a constituency centre or other centre, should be so organised as to allow the candidates and/or party agents and observers (if any) to see the counting proceedings directly. A copy of the statement of the results of the count at each centre should be given to the party agents.

The regulatory framework should ensure that the method of counting takes full account of the intention of the voter, so that the incidence of spoiled ballots is kept at the irreducible minimum. The procedure should enable each candidate or party agent present at the count to satisfy himself or herself that each spoiled ballot falls properly within the applicable rule.³⁰ In doubtful cases there should be some procedure whereby redress can be sought from the decision of the counting officer concerned. Many electoral legislative schemes permit a recount at the request of a candidate or party agent who is present at the counting proceedings.³¹

(k) Announcement of Results

The timely announcement of election results enhances the transparency of the electoral process. The prompt-

ness or otherwise with which the results of an election are made known may depend on the electoral system that is in place. The first-past-the-post system has the ability to produce early results, particularly when the counting of the ballots is done at the polling stations.

Proportional representation systems are known to yield slower results, especially those using the Hare and d'Hondt formulae for determining the winning candidates and the distribution of constituency seats³².

The election authorities should proceed to publish the results as soon as they are available. The question of whether the Courts should be empowered to restrain the election authorities from publishing election results because of alleged irregularities at the polls should be answered in the negative.³³ The proper procedure should be through an election petition.

ENDNOTES

1. The Commonwealth Observer Group in Ghana (1992) commented that "None of us has ever witnessed a poll of such manifest transparency. ... The count, in the presence of the general public, was also novel to most of us, and exemplified a degree of transparency, and openness that few could contemplate for our own societies" Despite these observations, the opposition did not accept the results and contended that the election was rigged.
2. In 1983 the Prime Minister of Jamaica called a general election allegedly in breach of an understanding with the opposition party that a general election would not be held until a new voters' register was prepared. The nomination of candidates was set for only a few days within the announcement of the election. These factors combined led to the opposition party boycotting the elections. It can also backfire where an electorate does not think a snap election to be justified as the late Sir Robert Muldoon discovered in New Zealand in 1984.
3. In 1992, in an attempt to shorten the election period, the Attorney-General of Kenya purported to change the rules governing the time within which the political parties held their primaries for the selection of candidates. The date for the primaries had a bearing on the respective dates for the Parliamentary nominations and the elections. When the Electoral Commission, acting on the purported change in the law, set dates for the parties' primaries, the nominations and the elections, it was taken to Court by one of the opposition parties. The Court held in favour of the opposition, and the Commission had to set new dates for the primaries, the nominations and the elections.
4. This situation existed in Jamaica in 1980, in Zambia in 1991, and in Guyana and Kenya in 1992.
5. See for example, section 47 of the Constitution of Antigua and Barbuda, also sections 35, 39 and 53-56 of the Constitution of Grenada, and section 41 of the Constitution of St. Lucia.
6. See section 80 of the Constitution of Zambia and section 41 of the Constitution of Kenya.
7. The Electoral Advisory Committee of Jamaica.
8. The Elections Commission of Guyana (1992).
9. The Electoral Commission of Malta.
10. This formula is used in the Solomon Islands for the appointment of the Boundaries Commission, section 53 of the Constitution.
11. The Chairman, and some members of the Kenyan Electoral Commission in 1992, was under persistent criticism by opposition parties and sections of the public for allegedly being under the influence of the ruling party and the government.
12. The Elections Commission of Guyana (in 1992) and the Electoral Commission of Zambia are examples.
13. An example existed in Guyana in 1991 when it contributed to the failure to have a proper register of voters in time for elections set for that year. The elections had to be cancelled. Other examples are to be found in Zambia and Kenya.
14. For example, the Electoral Commission of Zambia.
15. In Guyana, before the system was reformed in 1991, the Commissioner of Registration (who was appointed under the National Registration Act) was responsible for the preparation of the preliminary list of voters. As a result of the reform, the preparation of the preliminary list came under the control of the Elections Commission, Regulation 3 of the National Registration (Residents) (Revision of Registers) Regulations, 1991.
16. In both Zambia and Kenya.
17. See section 42 of the Constitution of Kenya.
18. See the Second Schedule of the Constitution of Jamaica, and section 81 of the Constitution of Zambia, where the formula is called "population quota" and is based on the number of inhabitants and not on the electorate.
19. See section 81 of the Constitution of Zambia.
20. The term came about as a result of the practice of Elbridge Gerry, USA, politician, who when Governor of Massachusetts in 1812, reshaped electoral districts in a salamander-like outline for political reasons.
21. Such agents are called scrutineer in Jamaica, section 12 of the Representation of the People Act, also see section 5 of the Representation of the People Act of Trinidad and Tobago.
22. Jamaica, section 12 of the Representation of the People Act, but in Trinidad and Tobago the requirement is merely that a political party have a member or members as candidates for a Parliamentary election is entitled to nominate persons for appointment as scrutineers, section 5 of the Representation of the People Act.
23. In Jamaica this situation occurred in 1983 when the opposition party boycotted the general election, however, the ruling party agreed to a waiver of the strict application of the relevant provisions which would give it alone the right to nominate scrutineers for the registration process. The election in Lesotho in 1993 returned only one party to Parliament.
24. This occurred in Ghana in 1992.
25. Guyana did not permit local observers to its elections in 1992, and both Zambia (1991) and Kenya (1992) only reluctantly allowed local observers to observe the polling and counting events. Ghana (1992) and Bangladesh (1991) welcomed this added aspect of transparency, although their activities in Ghana attracted more criticism from the Commonwealth Observer Group.
26. This happened in Zambia in 1991.
27. There were widespread complaints that the government controlled the state-owned media to the advantage of the ruling party in Malaysia (1990), Zambia (1991), Guyana (1992) Ghana (1992) and Kenya (1992).
28. See for example, Papua New Guinea, section 129 of the Constitution.
29. There were reported cases of this happening in Guyana and Kenya in elections before 1992.
30. See Regulation 25(8) and (9) of the Elections (Conduct of Elections) Regulations of Malaysia 1981.
31. See Rule 36 of the Constituency Election Rules of The Gambia.

32. The Hare Formula (better known as the Hare System) uses a ballot that allows the voter to rank the competing candidates in order of preference. When the ballots are counted, any candidate who received the necessary quota of first preference votes is awarded a seat. The votes received by a winning candidate in excess of the quota are transferred to other candidates according to the second preference marked on the ballot.

The d'Hondt formula deals with the largest average formula, that is to say, the number of votes won by each party is divided by the number of seats held by the party, plus one. The first seat is awarded to the party with highest number of votes, since no seats had yet been allocated, the initial denominator is one.

33. This situation occurred in the Nigerian presidential elections in 1993.

Women's Rights as Human Rights

Submission by the Women's and Youth Affairs Division of the Commonwealth Secretariat

Women's Rights as Human Rights

1. The Harare Declaration identified "Equality for Women" as a priority area for Commonwealth action. Commonwealth Heads of Governments pledged their support to ensure women may exercise their full and equal rights. Heads of Government reaffirmed their strong collective commitment to the principles of justice and human rights, including the rule of law, the independence of the judiciary, equality for women and accountable administrations.
2. When Ministers Responsible for Women's affairs met in Cyprus, 5-9 July, 1993, they identified a number of key issues concerning women's rights as human rights, which should be brought to the attention of Law Ministers at their meeting in November, 1993.
3. In the message to Commonwealth Heads of Government (annex 1), Ministers Responsible for Women's Affairs asked Heads of Government, to make a commitment to the eradication of violence against women by endorsing the draft UN Declaration on Elimination of Violence Against Women at the forthcoming 1993 United Nations General Assembly. The Commonwealth Secretary-General forwarded on the Ministers' behalf a letter to the Secretary-General of the United Nations on 19 July, 1993, indicating their support for the draft Declaration (annex 2).
4. In the Meeting Communique (annex 3), Ministers stressed that women's rights are human rights, and called on member governments to recognise the priority given to women's human rights at the 1993 World Conference on Human Rights, and implement the recommendations of the Report. Ministers urged member governments to create awareness and promote recognition of the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) as a major human rights instrument. Ministers urged those governments which had not yet done so, to ratify and implement CEDAW.
5. Recognising that CEDAW was subjected to more reservations and interpretive declarations than any other convention; and that some countries were experiencing difficulties in ratifying CEDAW or implementing it fully because of cultural and religious values and beliefs, Ministers encouraged member governments to explore various ways in which the positive aspects of culture and traditional values which promote respect for women could be harnessed to enhance the full implementation of CEDAW.
6. Noting that legislative action pursuant to CEDAW

was a necessary but not sufficient condition to promote equality for women, Ministers emphasised that legislative reforms should be accompanied by changes in social attitudes, administrative practices and economic structures, with the adoption of active programmes of public education and debate.

7. Ministers recognised the mutually reinforcing link between CEDAW and the Convention on the Rights of the Child (CRC). They were conscious that to combine implementation of CRC and CEDAW would send young women off to adulthood with better chances as well as enhance the protection of women's and girls' rights. Ministers therefore urged member governments to use them both.

8. Ministers also recognised the valuable contribution made by Non Governmental Organisations (NGOs) to the advancement of women. They encouraged member governments to strengthen co-operation with women's organisations and human rights organisations to promote adequate monitoring of the implementation of CEDAW, and to organise public awareness programmes on the human rights of women and girls, on legal literacy and legal counselling for women, and on the many different forms of violence against women.

9. It was proposed that an office of a Commonwealth Commissioner for Human Rights with special responsibility for women and children should be established and that the Secretariat should prepare a position paper on this proposal and circulate it to Ministers Responsible for Women's Affairs for their consideration. The Secretariat is preparing a position paper modifying the original proposal to reflect the practice and approaches of the Commonwealth. The paper will be submitted shortly to the Ministers Responsible for Women's Affairs.

The Women's and Youth Affairs Division

10. Ministers Responsible for Women's Affairs requested the Secretary General to set up a Commonwealth Expert Group to review, assess and recommend options for revitalising the Commonwealth Plan of Action on Women and Development. The Expert Group will hold its first meeting in December 1993, subsequent to which its Report on the Renewed Plan of Action will be submitted to governments. The renewed Plan of Action will be an integrated and up-dated strategic plan for the Commonwealth towards the year 2000 and beyond. It will have a specific Commonwealth orientation and be grounded on the essential principles and goals of the Commonwealth, such as the

Harare priorities and fundamental political values, and on its effective consultative and consensual approaches. Priority will be given to working on legal and constitutional issues which will be reviewed and strengthened in the new Plan of Action.

11. The Women's Affairs Department of the Women and Youth Affairs Division provides technical assistance to member governments on the implementation of the Commonwealth Plan of Action on Women and Development. The Department is responsible for managing and co-ordinating the Secretariat's programme on "Equality for Women". The Department liaises with United Nations and other international and regional agencies, and NGOs, on gender issues.

12. In the area of women's rights the Department has focused on activities related to the UN Convention of Elimination of All Forms of Discrimination Against Women, and combating Violence Against Women. Activities include: organising workshops, attending conferences and producing training manuals, such as, "The Reporting Process: A Manual for Commonwealth Jurisdictions", assisting member countries to fulfil their reporting obligations and implement CEDAW.

13. In April 1992, in conjunction with the UN Division for the Advancement of Women, the Women and Development Programme organised a Caribbean Re-

gional Workshop on the CEDAW. In December 1992, a similar workshop for the Africa Region was organised, in the Gambia. The workshops brought together representatives from Women's Bureaux, Ministries of Foreign Affairs and the Judiciary, to examine issues related to ratification and the reporting process of the Convention. The Africa Region workshop acted as a catalyst, as the Gambia government ratified the Convention on the first day of the Workshop.

14. The Department has produced so far three manuals on violence against women, targeting women and women's organisations, lawyers and law enforcement officers, and Police officers. These manuals are:

1. Confronting Violence: A Manual for Commonwealth Action
2. Guidelines for Police Training on Violence Against Women and Child Sexual Abuse.
3. Violence Against Women: Curriculum Materials for Legal Studies

In June 1992, an update of Confronting Violence - A Manual for Commonwealth Action, was published.

15. The Women's Affairs Department participated in the preparatory activities for the World Conference on Human Rights in Geneva, supporting women's rights as human rights.

The Lusaka Statement on Government Under the Law

**A Memorandum by the Commonwealth Secretariat and
a Paper prepared by the Hon Rodger Chongwe, SC, MP, Minister of Local Government and
Housing, Zambia**

The relevance of administrative law to just and honest government has never been more significant than today. Inherent in the Harare Commonwealth Declaration is the recognition by Commonwealth Heads of Government that the protection and promotion of fundamental rights of their peoples requires adherence, inter alia, to democratic processes, the rule of law and protection of the independence of the judiciary.

Prior to Harare, the Legal Division, now retitled the Legal and Constitutional Affairs Division of the Commonwealth Secretariat had initiated a series of judicial colloquia on the domestic application of international human rights norms. These colloquia have continued. In October 1992, a workshop, the first of its kind, was held in Lusaka, Zambia bringing together members of the judiciary, lawyers, academics, senior civil servants and other government representatives as well as the media, to discuss ways in which the administration of government business can be improved. The initiative for the Lusaka workshop, taken by the Commonwealth Secretariat, stemmed from suggestions made in the past by the Hon Rodger Chongwe, SC, MP, Minister of Legal Affairs of Zambia at the time, who had called for the strengthening of the judicial remedies available to members of the public who may feel aggrieved by the actions or decisions of government officials. It therefore seemed appropriate to us to invite the Hon Chongwe, to prepare this paper to aid the discussion by Law Ministers the agenda item relating to the Harare Declaration. At the end of the workshop the participants had agreed a concluding statement which is appropriately called **the Lusaka Statement on Government under the Law** which is in large measure an amplification of the just and honest government aspects of the Harare Declaration and which Ministers are invited to endorse.

*Legal and Constitutional Affairs Division
Commonwealth Secretariat
London
September 1993*

THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

1. Introduction

The four-day workshop on Administrative Law organised by the Commonwealth Secretariat drew its participants from Judges of the High Court and the Supreme Court, Permanent Secretaries, members of the Police Force and lawyers in the Ministry of Legal Affairs. The participants discussed fundamental issues relating to a just and honest government in the context of administrative law and practice including the role of the courts, the citizen's rights of redress and ways in which civil servants and Ministers should exercise their discretionary powers. The Lusaka Statement on Government under the law is reproduced in this article and appears as Appendix A. Those of us who studied constitutional law under the guidance and readership of "The Law of the Constitution" written by Professor Albert Venn Dicey are familiar with the Professor's comments that the English Common Law knew no administrative law. According to Professor Dicey, this phenomenon of the English Common Law distinguished it from the Civil Law of France where administrative law was then largely practised. Professor Dicey's lectures were delivered at the turn of the last century and if he were today to rise from his grave, he would be somewhat surprised to find that administrative law is very widely practised in the common law jurisdictions. These jurisdictions include the United Kingdom itself, the United States of America, Canada, Australia and New Zealand where the presence of Administrative Law Courts abound. The question may be posed; what has led to this growth and popularisation of administrative law? The answer would appear to me to be in the growth of administrative and executive power during the major part of the present century. Dicey would have remembered, if he were to come back today, of a letter which was written to him in 1896 by that great legal historian, Professor F.W. Maitland in which he said "the only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its common law."¹ In so stating, Maitland was a greater prophet than even he could have foreseen; for, "it is the common law legal history which has enabled the present generation to shape the development of our administrative law by building on but un-

¹ See Cosgrove - The Rule of Law: Albert Venn Dicey: Victorian Jurist (1980) page 177.

hampered by our legal history."² Ministers of law as administrators of the law are concerned mainly with administrative justice both at the level of the quasi-judicial tribunals and the courts. In the early 1960s when I was at the Law School, it was generally thought that the prerogative orders of certiorari, prohibition and mandamus only lay against persons or bodies with judicial or quasi-judicial functions and did not lie against an authority exercising administrative powers. This distinction between judicial and administrative activities was swept away in 1964 by the decision of the House of Lords in England in *Ridge v Baldwin* 1964 AC 40. As Administrators of the law, we are concerned mainly with administrative justice both at the level of the quasi-judicial tribunals and the courts. Today judicial review lies against an inferior court or tribunal or against any persons or bodies which perform public duties or functions. In *R v Panel on Take-overs and Mergers Ex-parte Datafin Limited* (1987) 1 All ER 564, the English Court of Appeal held that the judicial review would lie against the take-over panel notwithstanding the fact that it is part of the "self-regulatory system" in the city, and does not derive its authority or powers from statute or the exercise of the prerogative.

In Zambia, with the political change that has taken place and with the determination by the new rulers to introduce economic and political reforms, our country has seen an unprecedented development of new laws affecting the lives of our people and the creation of statutory bodies, agencies, tribunals and ministerial powers under those laws. In turn these laws have placed demands on all those entities that make decisions. The Zambia Privatisation Act, the Securities Act, The Investments Act, The Financial Institutions Act, The Local Government Act, 1991 and the Bank of Zambia Amendment Act illustrate the new laws recently added to our Statute Book. The Local Government Act, 1991 has restored the autonomy and independence to the City, Municipal and District Councils which was taken away from them by the provisions of the Local Administration Act of 1980. The latter piece of legislation has since been repealed. Because of the growth of the power of the executive branch of government and the wider range of powers exercised by Administrators, it has become very necessary for their decision-making process to be reviewed.

2. Concept of Natural Justice

An individual seeks justice at the hearing of his case by administrators and finally when the administrator's decision comes up for judicial review. Not only does he expect and demand that the rules of natural justice are followed strictly by the administrator but he also expects to gain easier access to the courts to challenge ad-

ministrative action which adversely affects his rights. These expectations are rightly claimed by the individual as it is a fact that the executive in this country and elsewhere has assumed a disproportionate control over the social and executive life of the citizens; for example, the granting or refusal of licenses, and the conferring and withdrawal of privileges at an ever increasing rate. The welfare of an individual has therefore come to depend more on his rights against the executive rather than on his rights against fellow citizens. The Neil Report on administrative guidelines for the courts which was produced by a private body in England in 1988 makes very good reading. The Report's recommendations consists of good administrative guidelines for the court to adopt and adapt for appropriate circumstances and in the view that I take would form a good basis for an administrative law reform statute. At the closure of the four-day workshop, I made remarks in my speech regarding the intention by the Ministry of Legal Affairs to draft a bill styled the Administrative Justice Act in order for us to streamline administrative law in Zambia. To be included in the bill will be a statement of principles defining what constitutes good administration.

3. The Decision in R V Panel on Take-over and Mergers Ex Parte

DATAFIN LIMITED

The decision in this case lays down principles which constitute good public administration by stating that:

- (a) Good administration is concerned with substance
- (b) Good administration is concerned with speed in decision making
- (c) Good administration requires proper consideration of the public interest
- (d) Good administration requires proper consideration of legitimate expectation of interests of individual citizens however rich or powerful they may be and whether they are natural or juridical persons; and
- (e) Good administration requires decisiveness and finality unless there are compelling reasons to the contrary.

As has already been said elsewhere in this article, the Zambian Government has taken bold steps to liberalise the economy. This has meant the deregulation of most of the administrators' powers. The dangers of bureaucracy and corruption may play havoc in such a fertile field. This may stifle investment. In some instances investors have had to go to great lengths to obtain a commercial license of any kind. Our Administrative Justice

2 Civil Service [1984] 3 All ER at page 955.

Act which is being proposed will include provisions that will eliminate bureaucracy and at the same time require licensing authorities to observe statutory requirements for the granting of licences.

4. Distinction Between Private and Public Law

The popular view today is that where a person seeks to establish that a decision of a person or body of persons infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action whether for a declaration or an injunction or otherwise (see *O'Reilly v Mackman* 1982 3 All ER 1124). If a person commences an ordinary action where he should have applied for judicial review, the action will be struck out by summary process... "It would ... as a general rule, be contrary to public policy and as such an abuse of the process of the court to permit a person seeking to establish that a decision of public authority infringes rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 of the Rules of the Supreme Court for the protection of such authorities (See Lord Diplock at page 1143.)" The intention of the proposed *Zambian Administrative Justice Act* is to override the above decision so that:

- (a) the term public law should cease to exist as the key to identifying cases that require an application for judicial review;
- (b) the leave requirement should be abandoned;
- (c) the court should have a right to order that proceedings wrongly commenced by a Writ of Summons should continue as if they were proceedings for judicial review.

A statutory provision will be included to solidify the natural justice principles so that administrators will follow rules of natural justice in their decision-making process. It is fundamental to fair procedure that both sides are heard in accordance with the *audi alteram partem* rule. This is the most far-reaching of the principles of natural justice since it embraces almost every question of fair procedure or due process. It is broad enough and it includes the rule against bias.

Under the *European Convention on Human Rights and Fundamental Freedoms* in Article 6(i) and the *Universal Declaration of Human Rights* in Article 10, it is provided that:

"In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Although "civil rights and obligations" may have a technical meaning which will not include administrative matters generally, the *European Court of Human Rights* has held that these words include the rights determined by an administrative commission

and therefore falls within the ambit of administrative law.

5. The Principle of Legitimate Expectation

In the case of the *Council of the Civil Service Unions and others v the Minister for the Civil Service* (1984 3 All ER 935) the House of Lords elucidated the principle of legitimate expectation as meaning that the decision of the tribunal or of the Minister must affect some other person in the following manner:

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law;
- (b) by depriving him of some benefit or advantage which either:
 - (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it and on which he has been given an opportunity to comment;
 - (ii) or he has received assurance from the decision-maker that it will not be withdrawn without first giving him an opportunity to advance reasons for contending that it should not be withdrawn.

To most of our ordinary people, what has been stated here would appropriately be dismissed by them as legal trivia. To him the question is whether the judge hearing his case is sufficiently activist and sensitised in deciding in his favour in the face of the omnipotent power vested in Ministers, top administrators, and their minions.

6. The Role of the Courts

In my part of Africa, our judges have been somewhat reluctant to take a strong and activist stance where the liberty of the person has been affected. This perhaps can be explained away by the attitude of the authority which in most applications for prerogative writs took the view that the State was right and where the Courts decided in favour of the citizen, the State immediately reversed that decision by taking a political decision. The citizen expects balanced and fearless decisions from the Courts in cases where administrators have made decisions which have affected the citizens' rights. For our *Zambian judges*, I would safely say that during the latter part of the one-party state rule of our country, they had shown their courage and fortitude that as a court they could decide in favour of the citizen where his rights were violated against the State. On the other hand, the State machinery itself had matured; it was no longer necessary to reverse the court's decision by rearresting the defendant outside the courtroom. In the case of *James Chanda Kasamanda v the Attorney-General*

(Supreme Court of Zambia Appeal Number 5 of 1989 unreported), in which the appellant was detained under Regulation 33(i) of the Preservation of Public Security Regulations on the grounds that the appellant had communicated Zambian intelligence matters to South African intelligence officers; it was proved at the hearing of the case that the additional grounds upon which the appellant was detained did not exist at the time of his detention. The Supreme Court held that the grounds of detention must exist at the time that the detention order is made otherwise there can be no legal basis giving rise to such detention. These grounds must be furnished to the detainee in writing and in a language that he understands as a matter of urgency; and in any event not more than 14 days after the commencement of the detention in compliance with the provisions of Article 27(1)(a) of the Constitution. The appellant's appeal was allowed and he was set at liberty.

7. Conclusion

The nature and scope of judicial review of administrative action as a remedy is concerned with reviewing and not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is therefore important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. In the words of Lord Diplock in the case of the Council of the Civil Service Unions and Others v the Minister for the Civil Service, judicial review is aimed at remedying "illegality," "irrationality" and "procedural impropriety" in the decision making process by a member of the executive or by an Administrator.

Concluding statement of the Workshop on Administrative Law held in Lusaka, Zambia, from 12-15 October 1992

THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

MEMBERS of the Government of the Republic of Zambia, the judiciary and the civil service, meeting in Lusaka on 15 October 1992 together with members of the legal profession, the media and the wider public [see pages 34-39 for details] at the conclusion of a three-day seminar organised by the Commonwealth Secretariat, adopted the following statement drawn up in the light of the proceedings at the seminar:

WE express our joint belief in the central place enjoyed by an independent, impartial and informed judiciary in the realisation of just, honest, open and accountable government. These are the hallmarks of the democratic

society which our people are guaranteed by our Constitution, and which our people are entitled to expect.

WE believe that it is entirely consistent with best democratic practices for the actions of governments to be scrutinised by the courts at the instance of citizens, to ensure that decisions taken and administrative practices followed comply in all respects with the Constitution, with relevant statute and other law, and with best administrative practices - namely that administrative decisions be taken fairly, reasonably and according to law. In developing our jurisprudence in this area, the fundamental human rights provisions of our Constitution are of particular importance.

BY providing for judicial review of administrative action, the law provides not only a means for citizens to seek redress where they believe they have a grievance against official action, but also for them thereby actively to promote good administrative practice. In the non-judicial sphere the office of the Investigator-General also plays a most important role.

THE essential requirements of administrative law are that administrative action be confined to areas authorised by the law; that the rules of natural justice be followed; that each case be dealt with on its merits and without taking account of extraneous factors; that similar cases be treated in the same way; and that persons taking decisions should not have any personal or other interest in the outcome.

THE following principles reflect good administrative practice and in many instances are enforceable through the courts.

GUIDING PRINCIPLES

An administrative authority, when exercising a discretionary power should:

1. pursue only the purposes for which the power has been conferred;
2. be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
3. observe the principle of equality before the law by avoiding unfair discrimination;
4. maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
5. take decisions within a time which is reasonable having regard to the matters at stake;
6. apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Procedure

7. Availability of guidelines: Any general administrative guidelines which govern the exercise of a discre-

tionary power should either be made public or communicated (in an appropriate manner and to the extent necessary) to the person concerned, at his or her request, whether before or after the taking of an act concerning the person;

8. Rights to be heard: In respect of any administrative act of such a nature as is likely to affect adversely his or her rights, liberties or interests, the person concerned should be entitled to put forward facts and arguments and, in appropriate cases, submit evidence which should be taken into account by the administrative authority; in appropriate cases the person concerned should be informed, in due time and in an appropriate manner, of these rights;

9. Access to information: Upon request, the person concerned should be informed, before an administrative act is taken and by appropriate means, of all factors relevant to the taking of that act;

10. Statement of reasons: Where an administrative act is of such a nature as to affect adversely the rights, liberties or interests of a person, the person concerned should be informed of the reasons on which it is based either by stating the reasons in the act itself or, upon request, by communicating them separately to the person concerned within a reasonable time;

11. Indication of remedies: Where an administrative act is given in writing and which adversely affects the rights, liberties or interests of the person concerned, it should indicate the specific remedies available to the person as well as any time-limits which may be involved.

Review

12. An act taken in exercise of a discretionary power should be subject to judicial review by a court or other competent body; however this does not exclude the possibility of a preliminary review by an administrative authority empowered to decide both on legality and on the merits.

13. Where no time for the taking of a decision in exercise of a discretionary power has been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so should be open to review by a competent authority;

14. A court or other independent body which controls the exercise of a discretionary power should possess such powers of obtaining information as are necessary for the proper exercise of its functions.

Implementation

15. In their implementation, the requirements of good and efficient administration, the legitimate interests of third parties and major public interests should be given due weight, but where these requirements make it necessary to modify these principles in particular cases or specific areas of public administration, every endeavour

our should be made to conform with these principles and to achieve the highest possible degree of fairness.

ADMINISTRATIVE law in these and other ways provides a firm basis for the guidance of ministers of government and civil servants in the discharge of their duties. By upholding these principles, the judiciary serves the public interest, not only in specific cases but by providing both guidelines for future administration and remedies where these are appropriate and proper procedures have not been followed.² There is thus a creative tension between two branches of government - the executive and the judiciary - which endures to the public benefit. While it lies to the government to make and execute policy, it rests with the judiciary to ensure that policies are both made and implemented within the parameters prescribed by our Constitution and by our country's laws, and for its decisions in these as in other matters to be respected.

HOWEVER the judiciary has a broader role than this. In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This includes ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all.

FOR such procedures to function properly it is essential that:

- * the executive ensures that senior civil servants enjoy appropriate security of tenure and have a full appreciation of, and are encouraged to discharge, their own responsibilities for good administrative practice, and of the proper role of the judiciary;
- * senior civil servants ensure that their own staff receive appropriate training and guidance in good administrative practice and the basic requirements of administrative law, so as to ensure that best administrative practice is followed and that the room for individual citizens to feel aggrieved is minimised;
- * the judiciary be well-versed in the judicial review of administrative action (including, if need be, the establishment of a Division within the High Court comprising specialist judges) and be adequately resourced with up-to-date legal materials, including promptly produced Zambian law reports;
- * the legal profession be equipped both through proper training in law faculties and through continuing legal education programmes to discharge their own vital function in preparing cases that

should be brought before the courts for consideration;

- * the general public be informed - and be kept informed - of their rights and fact that the law can provide redress in cases of arbitrary, discriminatory and unfair administrative action by government, and be assured of appropriate access to legal aid; and
- * the legal procedures for judicial review of administrative action be reviewed, and kept under regular review, to ensure that it meets the expectations of Zambian society and reflects best prevailing Com-

monwealth practices.

IT IS OUR belief that if the above programme of action can be implemented effectively, the quality of administration will be consistently improved and sustained, to the ultimate betterment of the lives of all our citizens. We therefore solemnly pledge ourselves to its fulfilment and urge others who may have a part to play to join us. Our people are entitled to no less.

Lusaka

Zambia

15 October 1992

The Harare Declaration: The Role of the Judiciary and the Protection of the Rule of Law

A Paper prepared by Hon. Justice Philip Nnaemeka-Agu, Former Justice of the Supreme Court of Nigeria

Among the many laudable achievements of the Commonwealth Secretariat, there can be no gainsaying the fact that it has been very active in the areas of promotion of good governance and the Rule of Law as well as promotion of a culture for the protection of human rights. It has performed the former through organisation of regular meetings of Commonwealth Heads of Government, such as the one held in Singapore in 1971 which produced the Declaration of Commonwealth Principles, and another in Kingston in 1975 and yet another in Harare in 1991, to mention just a few. One common thread which runs through these meetings is a recognition and reaffirmation by Commonwealth Member States of their common inheritance of history, language, culture and above all commitment to the Rule of Law and good governance. The Harare meeting produced the Harare Commonwealth Declaration, 1991 (to be herein referred to simply as the Commonwealth Declaration).

But before I consider this important document in any detail, I should mention a second line of activity of the Commonwealth Secretariat which, coincidentally had produced another Harare Declaration. With Interights (International Centre For The Legal Protection of Human Rights) it has every year from 1988 to 1993 organised and sponsored six Judicial Colloquia on the Domestic Application of Human Rights Norms and Government under The Law - at Bangalore (India), Harare (Zimbabwe), Banjul (The Gambia), Abuja (Nigeria), Balliol College, Oxford (U.K.), and Bloemfontein (South Africa) Although each of them produced its very useful conclusions, what is important in view of the theme of this paper is that the second colloquium held in Harare in 1989 produced what is now referred to as The Harare Declaration of Human Rights, of 1989 (to be herein referred as the Declaration).

So, we have before us two Harare Declarations, one by the Commonwealth Heads of Government and the other by eminent Judges and Jurists of the Commonwealth in a judicial colloquium. But let me add quickly that although they emanated from two different bodies, there were substantial similarities in their targeted objectives and results. It can be said that:

1. Each re-affirms the importance of, and the commitment of the Commonwealth to, the promotion and protection of human rights. By each accepting that the

International Bill of Human Rights is the cornerstone of international human rights, each expressly or impliedly accepted such positive rights as liberty, equality of rights of individuals under the law, security of human beings, fair trial and effective remedy by competent national tribunals, freedom of movement, peaceful assembly and association, nationality, right to own property and right to take part in the government of one country. These are guaranteed, also they express their commitment to certain freedoms such as freedom from discrimination, torture, arbitrary arrest, detention and exile and degrading and inhumane treatment.

2. Each accepts it as a fact that due to modern developments, particularly in the areas of communication and transportation, the world is no longer locked in the cast iron confinement of cold war, isolationist territorialism, or other physical or ideological constraints. Rather the current theme is universality - democracy everywhere and justice for all - in the spirit of the United Nations and other international institutions.

3. Both the Heads of Government on the one hand and the Judges and Jurists on the other reaffirmed their strong collective commitment to the principles of justice and the Rule of Law and independence of the judiciary.

4. Whereas in the Commonwealth Declaration the Heads of Government addressed such political issues as the future of the Commonwealth, the importance of development administration, South Africa, disarmament sanctions, Namibia, Mozambique, Angola, Belize, Cyprus, the Mediterranean, the Middle East, Asia, terrorism, drug abuse, world economic order and other and global issues, in the Declaration, the Judges and Jurists underscored the vital role of judges and jurists in the promotion and enforcement of human rights, their necessary preparation and equipment for carrying forward their task in that regard and their correct approach thereto.

5. In a nutshell, both documents laid special emphasis on good governance as a *sine qua non* for security, peace and progress in the Commonwealth.

My assignment is to take the judicial angle and take a closer look at the role of the judiciary in the proper execution and furtherance of these vital objectives, a separate paper having been prepared from the point of view of the Attorney-General.

ESSENCE OF GOOD GOVERNANCE

In the best tradition of the Commonwealth, indeed all common law countries, the essence of good government is to rule according to law and social justice. The aspect of social justice which deals with distributive justice is in the province of the responsibility of the politician and, therefore, outside the scope of this paper. What concerns us here is justice according to law; justice administered by the courts. In short, we are concerned with the Rule of Law.

THE RULE OF LAW

In ordinary parlance, the expression Rule of Law, derived from the French phrase *le principe de légalité* (the principle of legality), means a state of governance based on principles of law and not the rule of men. Dicey saw it as entailing:

- (i) Absence of discretionary powers in the hands of government officials - a rejection of arbitrariness.
- (ii) That the act of governance must be according to the ordinary laws of a country, administered by ordinary courts - that is absence of special privileges for government officials and public functionaries; that every body must be governed by and according to law duly passed by the appropriate organ of government and administered by the ordinary courts.
- (iii) That the rights of the people must be determined according to law.

Sir Edward Coke also propounded:

- (iv) That no-one is above the law.

The point that must be emphasised is that the concept of the Rule of Law represents an ethical code for the government's exercise of its powers in any democratic country. It has both positive and negative aspects - its dos and don'ts. Its powers must be exercised according to the constitution, the laws and the rules, including the rule of natural justice - as interpreted and applied in ordinary courts and tribunals.

MODERN APPLICATION

In trying to apply the concept of the Rule of Law to our present day principle of good governance within the Commonwealth, it must be observed that most Commonwealth countries, with the exception of Great Britain, have constitutions which are not only written but supreme. Whereas in Britain most of Coke's and Dicey's ideas of the implications of the Rule of Law still hold good, it is important for courts in countries where the written constitution, and not parliament, is supreme, to note that the concept of the Rule of Law has wider implications. In such countries, it implies:

- (i) That the constitution is the yardstick of measurement of the validity of all laws, regulations, and

rules and that any of them which is inconsistent with or runs contrary to the letters or the spirit of the constitution can and ought to be declared *ultra vires* and void to the extent of the inconsistency. Several cases decided by the Supreme Court and the Court of Appeal of Nigeria illustrate this principle. Reference may be made to Anretioila v Labiyi [1977] 4 NWLR (PT.63) 34, CA, Hausban (Nig.) Limited v Irinoye [1989] 2 NWLR (PT. 104) 458, AG Ogun State v Aberuagba [1985] IN WLR (PT.3) 395, SC. Every court in such a country should therefore see the constitution as the organic law from which other laws must draw their validity.

- (ii) It also implies that each arm of government or agency thereof confine itself within its area of responsibility, in accordance with the constitution and must not abut into the province of the other arm. This is the doctrine of basic structure, according to the Supreme Court of India in the case of Kesavananda Bharati v State of Kerale [1973] 4 SCC 225.

A similar line was taken by the court in the case of Indira Nehru Ghandi v Raj Navain [1975] Supp. SCCI and P Sambamurthy v State of AP [1987] ISCC 362. The same was taken by the Court of Appeal and by the Supreme Court of Nigeria in the case of Ojukwu v Governor of Lagos State [1985] 2 NWLR 806, CA and Governor of Lagos State v Ojukwu [1986] IN WLR 621, SC in which the governor used armed soldiers and policemen to evict Chief Ojukwu from a property in dispute between him and the government while the case thereon was pending in court. In the Court of Appeal, I held that whatever right of self-help that might have been available to the Executive it terminated when the matter was turned over to the courts for adjudication. I relied upon the principle of separation of powers enshrined in sections 4, 5 and 6 of the Constitution, 1979. The great French political thinker, Montesquieu, had in his *Spirit of The Laws*, in the 18th century, thought that the secret of success and stability of the British Constitution was the separation of legislative, executive and judicial functions of government among the three arms thereof. Although, as Professor G H Sabine has observed,¹ he started upon wrong premises and based his judgement upon evidence which was substantially defective, his main conclusion in this regard has been accepted. He said:

"Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go ... To prevent this abuse it is necessary from the nature of things that one power should be a check

on another ... There will be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers".²

This view which was accepted by James Madison, one of the founders of the United States, found expression in the Constitution of the United States. It has also been accepted in the written constitutions of many states of the Commonwealth. Applying the principle in *Ojukwu's case* (supra), I had no difficulty in finding that the action of the Executive at a time when the case was pending in court was unconstitutional. Agreeing with me, the Supreme Court called the action of the Executive "executive lawlessness" which tantamounted to a deliberate violation of the Constitution. Obaseki, J S C, summed up the point at page 636 where he stated:

"In the area where the Rule of Law operates, the rule of self help by force is abandoned ... Once dispute arises between a person and government or authority and the dispute has been brought before the court, thereby involving the judicial powers of the state, it is the duty of government to allow the law to take its course and allow the legal and judicial process to run its full course."

Problems sometimes arise when a country has fallen into a military regime, and not under a civilian government. The Military often passes laws which virtually collect all the powers of the three arms of government into one. The recent experience in Nigeria where the Chief Executive decided upon report that an election had been rigged and ought to be nullified is a case in point. One may ask: why was it not left to the judiciary to examine all the available evidence about the election and alleged rigging to find out whether in fact it was rigged contrary to the report of all the international observers? However, as this is still a live issue, I shall confine this paper to normal democratic situations.

(iii) The third implication of the concept of Rule of Law in such a state is that each arm, functionary and/or agency of government performs its functions properly according to the constitution and the laws and that no-one within the state is above the law. The position and functions of each of them are usually defined and circumscribed by the constitution and the laws.

Each of them is expected to perform within the purview of the constitution and the law: any act outside the ambit of the constitution and the laws is unconstitutional or unlawful.

(iv) The fourth implication of the concept is that every individual in the state enjoys a plenitude of his fundamental rights which have been selected, enshrined and guaranteed in the constitution of his country as well as other human rights stated in in-

ternational instruments, general or regional, to which he is entitled by virtue of their ratification and incorporation by his state. In this regard, it is noteworthy that the two Covenants of 1966, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights, which set out to transform the 30 Articles of the universal Declaration of Human Rights (1948) - "The common standard of achievement for all peoples and all nations" - to a code of binding international law have, through adoption of multilateral treaties, been incorporated into the laws of many Commonwealth countries through ratification and accession. By June, 1987, the International Covenant on Economic, Social and Cultural Rights had 90 state parties, 19 from the Commonwealth. By the same time, the International Covenant on Civil and Political Rights had 87 state parties, 17 from the Commonwealth.³ Many more states have since followed suit. These Covenants now constitute the core of international human rights law, as universally agreed, and define and underscore the obligations of states with respect thereto. Added to these are the Conventions on Slavery, Genocide, Torture, Refugees, Apartheid, Racial Discrimination, Discrimination Against Women and one on The Rights of the Child. Furthermore, there are Regional Covenants to which many of the countries of the Commonwealth are parties. The European Convention on Human Rights, The European Charter, The Inter-American convention on Human Rights come within this category. I scarcely need to mention that an obligation which a state has undertaken under international law is as binding as one, say, under a contract in municipal law. Besides, experience shows that most manifestations of turmoil and violence in society in different parts of the world are traceable to violations of these rights, which states have undertaken to protect but fail to.

(v) The next implication of the concept is that no person within the state shall suffer any criminal or civil disability without due process of law. At common law the courts have always insisted that all procedure - criminal, civil and administrative - must always be not only lawful but also fair and reasonable. No discretion given to any authority is deemed to be absolute: *Padfield v Minister of Agriculture* [1968] AC 997. The concept of unfettered discretion to an administrative body is a constitutional blasphemy. As first conceived in the United States, (See e.g. *Bank of State v Cooper*, 2 Verg. 599, 603 (1831) and *White v White* 5 Barb 474, 484 (1849)) and it later found constitutional expression in the 14th Amendment to the U S Constitution, the expression simply means that legal procedure must be lawful, fair and feasible in the

light of existing values and capabilities.

Further, it was provided in section 10 of the Administrative Procedure Code, 1964, that a reviewing court shall hold unlawful and set aside agency action, finding and conclusion found arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

This provision was interpreted and enforced in many cases decided by the US Supreme Court, including *Citizen to Preserve Overton Park Inc. v Volpe* 425 F. 2d. 79 (1970) and *Barlow v Collins* 397 US 159 (1970). So, the concept of due process is one which has set a standard test of validity for all persons or authorities for their exercise of their discretion. Such a discretion cannot be exercised arbitrarily or absolutely. This is another important implication of the Rule of Law.

(vi) The last, but not least, important implication of the Rule of Law concerns all those who have to decide issues affecting the rights and freedoms of individuals in a state. I am dealing with it last, not only to emphasise its importance but because it covers another area in which the Commonwealth Secretariat has carried out and sponsored a special and important exercise. Moreover, it covers an area in which all who have to decide anything in government - heads of government, ministers, public and corporation servants come face to face with most members of society. The principles are even applicable to non-government organisations - trade unions, professional bodies, and so on - all areas of our judicial review.

From the 12th to the 15th of October, 1992, the government of Zambia in collaboration with the Commonwealth Secretariat, under the able leadership of Mr Jeremy Pope, mounted a workshop on Administrative Law, at which all sectors of The Administration and corporate bodies in Zambia were represented by 109 officers. I happened to have been one of the three Consultants, the other two from the United Kingdom and India. The need for and importance of this workshop was informed by the frequency with which administrative decisions were upset by the courts when they came under judicial review.

The situation is not peculiar to Zambia. Indeed, in the United Kingdom by 1974 the number of cases in which administrative decisions were upset by the courts in exercise of their power of judicial review had risen to 1,230 in England and Wales and to almost the same number in Scotland. The urgent need was felt for government to give some guidance to those who had to decide for government and its agencies as to how they could do so without falling foul of the law. The Management and Personnel Office of the Cabinet Office had to issue an

administrative pamphlet titled "The Judge Over Your Shoulder" for these purposes. This has been very helpful in reducing the number of faulty decisions in the United Kingdom. In Nigeria, suspected wrong-doers in government,⁴ in the Universities,⁵ in professional bodies⁶ and so many other areas have had decisions against them aborted or reversed by the Courts.

Back to Zambia: after the workshop and after fully deliberating upon and considering the issues raised by such decisions, a final statement now known as "The Lusaka Statement of Government Under the Law" was issued. Concluding that judicial review of such decisions was not only a desideratum but an absolute necessity a number of guiding principles which, if implemented, could avoid the undesirable and unpleasant consequences of any upset were issued. For reasons of limitations of time and space, I shall set out only the general guidelines.

GUIDING PRINCIPLES

"An administrative authority, when exercising a discretionary power should:

1. pursue only the purposes for which the power has been conferred;
2. be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
3. observe the principle of equality before the law by avoiding unfair discrimination;
4. maintain a proper balance between any adverse effects which its decision may have on the rights, liberties of persons and the purpose which it pursues;
5. take decisions within a time which is reasonable having regard to the matters at stake;
6. apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case."

Then it proceeded to set out the desirable procedure and dealt with such specific issues as availability of guidelines, right to be heard, access to information, statement of reasons and indication of remedies. Then it also examined the issue of judicial review, implementation, the role of administrators and the judiciary and factors which can enable the set procedures to function properly. These are in my view, the attributes of the Rule of Law as well as the essentials of good governance in the process of deciding issues in a democratic state.

THE JUDICIAL ANGLE

It must be conceded that in a democratic state, a constitution and laws with a human face, clear and unambiguous statements of principles and of rights and

freedoms in the constitution and other international instruments which have been incorporated into the laws of the particular state, good laws and rules of their application are all essential. But without an efficient, courageous, knowledgeable, incorruptible and independent judiciary all those fine statements in the constitution and the laws will come to very little in practical terms, because they will not be effective. This is because the judges of a democratic country are the guardians of its constitution, the promoters and enforcers of human rights, the interpreters and enforcers of all laws, the adjudicators in any dispute between the citizen and the state or between citizens *inter se*.

It must be pointed out that the position usually assigned to the judiciary by most, if not all, the constitutions of such countries is a delicate but most vital one. It is expected, as the guardian of the constitution, to oversee the functions and roles of the other two arms of government. At the same time, it is expected to play its constitutional role with reasonable care, caution and restraint; it is not expected to throw its weight about or open its mouth with reckless abandon.

Several cases decided in Nigeria during the Second Republic (1979 - 1983) show how the national judiciary ably played this role with the requisite care, caution and restraint. In the case of Shugaba Abdulrama Darman v The Federal Ministry of Internal Affairs [1981] 1 NCLR 4, the courts held that the President exceeded his executive powers when he tried to deport a citizen from his country. Similarly, in Attorney-General, Bendel State v Attorney-General of the Federation & 19 Others [1982] 3 NCLR 1, the Supreme Court checked the National Assembly from abusing its legislative power by delegating its legislative powers over a money bill to a committee of nineteen rather than having it dealt with by the whole membership of the Assembly as contemplated by the Constitution.

But the courts had always to apply their delicate powers in this respect with necessary care, caution and restraint. It always refused to interfere with matters which were the exclusive preserve of and the internal affairs of the other two arms of government. Adefarasin, C J., made this point very clear in the case of Senator B C Okwu v Senator Dr Wayes & Others. [1981] 2 NCLR 522, at pages 527-528 where he was called upon to adjudicate on aspects of the new Standing Rules of the senate. He stated:

"I am of the firm view that the courts cannot interfere with the internal affairs of the National Assembly or the arrangement or conduct or organisation of its business. The court cannot sit in judgment over its deliberations or otherwise reverse its decision unless there has been a violation of any provisions of the constitution With respect, this court (and if I may say so, any court in Nigeria) cannot interfere in the internal proceedings of the Legislature. Any such interference would amount to

an arm of the Government (in this case the judiciary) imposing its control in the house of another, who is master there".

Similar pronouncements were made by other Judges and other courts in the system.⁷

OTHER LIMITATIONS

In view of the topic of this paper, other limitations to the exercise of judicial power ought to be mentioned. Paramount is the issue of jurisdiction. The court must always satisfy itself that it has jurisdiction before it can exercise its power. Without jurisdiction any exercise of its powers will be contrary to the concept of the Rule of Law. See: Bronik Motors Ltd. v Wema Bank Ltd. (1983) 6 SC 158. Akin to this is the court or judge being called upon to perform a function which is not judicial, such as being asked to give its/his advisory opinion in advance, say, in order to forestall future litigation. The court or judge must always resist and refuse to play such a role. As early as 1792 the issue arose in the United States. In Hayburn's case where the judicial arm was required to give its advisory opinion on a legislation under consideration by Congress and the Executive, the Supreme Court of the United States stated:

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the circuit courts by this act are not of that description (as) it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature, whereas by the Constitution neither the Secretary at War, nor any other executive officer, nor even the legislature, are authorised to sit was a court of errors on the judicial acts or opinions of this court".

It follows from what I have been saying that no member of the judicial arm of government has a constitutional role to hover around the corridors of power, be they of legislative or executive power. Such a manoeuvre erodes the independence of the judiciary. Also, as the basic function of the judge is to interpret and apply the constitution and the laws in matters in litigation before the courts, such extra-judicial undertakings, no matter how necessary for the other arms of government, are unconstitutional. Exercise of judicial power is limited to "cases", and "controversies": Marbury v Madison, 1 Cranch. 137, 2 L. Ed. 60 (1803). The proper adviser of government in such a case is the Honourable Attorney-General with his Ministry of Justice. The next important limitation to the exercise of judicial power is the question of standing. Without a *locus standi*, a plaintiff cannot prosecute a suit on an issue as the court has no business with busybodies. See Adesanya v The President [1981] 5 SC 112. Where a plaintiff has a *locus*

standi and there is a dispute or controversy with his adversary over a justiciable issue, then there is a cause suitable for judicial resolution. Other questions, which often go with standing but are procedural rather than going to the *vires* of the court are those of ripeness and limitation by statute. The court cannot to into the case of all unless in fact the cause of action has accrued and is not statute-barred.

When none of the above limiting factors are present in a case and the matter is properly before the court, then the court in a democratic country can then exercise judicial powers over it. Unfortunately the military sometimes intervenes, but, as I have stated, the military in government is an aberration which I do not want to deal with in this paper. But, happily, experience in Nigeria during the Second Republic (1979 - 1983) shows how as elsewhere the judiciary was able to fulfil its role. It played a very well its role as the guardian of the Constitution: I have already cited *Shugaba's Case* (supra) and the case of *Attorney-General of Bendel State v Attorney-General of the Federation* (supra where it checked the excesses of the Executive and the Legislature respectively). I have shown how it applies restraint in so doing. It also ably protected the fundamental rights and liberties and enforced other rights and obligations of individuals. I cited the case of *Ojukwu v Governor of Lagos State* (supra) in this respect. When it found itself in the political arena by being called upon to adjudicate in cases of disputed election then, as it could not like its US counterpart avoid it because it raised a political question it tried to do its best, although no less a person than Professor B O Nwabueze thought that the judiciary should have been saved the pains.⁸ By invocation of its powers of judicial review, it intervened in many administrative decisions that were made contrary to principles or the rules. I referred to cases of *Garba* (supra) and *Laoye* (supra), as examples.

The above are but instances of the important roles of the judiciary in a democratic state. I believe it is apposite to conclude this paper by quoting and adopting part of the Lusaka Statement where it says:

"In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This includes ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all".

I should quickly add that there are two faces to the coin, two co-ordinates to justice and the Rule of Law, to wit; the bench and the bar. It hardly needs emphasis here that Attorney-General is the Chief Legal Adviser of the government, particularly in the discharge of its legislative functions and, in practical terms, to its delegate the Executive, as well as the official head of the bar. The position and functions of the Attorney-General are, however, outside the purview of this paper, much as I would have liked to draw from my two-and-a-half experience as an Attorney-General. But I would simply make to short points. So much of proper guidance of the other two arms of government depends on the Attorney-General. It is also important to emphasise that when the judicial arm does its work well, but has to, and does, decide against the government, it does not do so because it wants to be confrontational. It had to do so in the true spirit of its constitutional function and duty: it is by the constitution a constructive opposition to government. As such, it supports when it can properly do so; it guides when it needs to; and it blocks when it must.

REFERENCES

1. See Sabine: *A History of Political Theory* (ed).
2. See *The Spirit of the Laws*, Book 11, Translation by T Nugent.
3. See: Seighart: *An Introduction to the International Covenants on Human Rights* (Commonwealth Secretariat) at pp.2-3.
4. See eg. *Laoye v Federal Civil Service Commission* [1987] 2 NWLR 652 S C, *Garba v Federal Civil Service Commission* [1988] 1 NWLR 449, SC.
5. See eg. *Garba v University of Maiduguri* [1986] 1 NWLR 550, SC.
6. See eg. *Legal Practitioners Disciplinary Committee v Fawehinmi* [1985] 2 NWLR 300. SC.
7. See Chigbue J in *Bello v Sani & Others* [1981] 3 NWLR 831; Balogun, J, in *Ladejobi v A G Federation* [1981] 3 NCLR 563; The Court of Appeal in *A G Oyo State v L O Adeyemi (Alafin of Oyo) & Others* [1981] 3 NCLR 846; and Nasir P Kazeem, Nnaemeka-Agu, K Whyte and JJCA (as they then were) and Eite, JCA in *President of Nigeria v Adesanya* [1981] 3 NCLR 306.
8. See: Nwabueze: *Nigeria's presidential Constitution 1979 - 1983*, Chapter 14.

The Commonwealth Heads of Government Meeting at Limassol, Cyprus 21-25 October 1993

A Memorandum by the Commonwealth Secretariat

The Commonwealth Heads of Government at their Cyprus Meeting discussed several topics of importance for Law Ministers. Some of them were specifically referred to the Law Ministers' Meeting for consideration. Others were commended for action at the national level. The purpose of this memorandum is to draw attention to these areas and to the conclusions, recommendations and concerns of Heads of Government in relation to them expressed in their Communique and in the Report of the Committee of the Whole on Commonwealth Functional Co-operation which the Heads of Government endorsed. Relevant extracts of each appear as Annex A.

he Rule of Law and Human Rights

Heads of Government reaffirmed their commitment to democracy, fundamental human rights, the rule of law, the independence of the judiciary and just and honest government, as essential ingredients of the Commonwealth's fundamental political values. They reiterated their commitment to the International Bill of Rights, reaffirmed their belief that women's rights were an integral part of human rights and expressed support for the principles embodied in the Vienna Declaration on Human Rights and the Convention on the Rights of the Child.

In this context they urged all Commonwealth governments who had not done so to:-

- (i) make every effort to become party to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights by 1995;
- (ii) ratify by 1995 the Convention on the Elimination of All forms of Discrimination Against Women; and
- (iii) adopt the draft UN Declaration on the Elimination of Violence Against Women.

In relation to the promotion of democratic values, human rights and the rule of law the Heads of Government noted with appreciation the work of the Secretariat. They pointed to the successful monitoring of nine elections since the Harare meeting and observed that it might be valuable to hold periodic meetings of experts to assess the Commonwealth's experience in this field and to build on existing success.

A full treatment of the human rights aspects of the Heads of Government's Communique and the Report of the Committee of the Whole on Commonwealth Functional Co-operation in the context of the work of the Commonwealth Secretariat's Human Rights Unit appears in paper LMM(93)43 before the Meeting.

Possible action by the Meeting

The Meeting may wish to:-

- (a) endorse the sentiments expressed at Limassol;
- (b) request the Secretariat to provide any necessary assistance;
- (c) examine ways in which existing Commonwealth experience in these various fields might be shared so as to keep to a minimum the calls made on central Commonwealth resources; and
- (d) place the matter on the agenda for the next meeting of Senior Officials of Commonwealth Law Ministries for a stocktaking of progress made towards meeting the wishes of CHOGM in this respect.

International Crime and Mutual Legal Assistance

Heads of Government considered the increasingly international problems of money laundering, commercial crime and the illicit traffic in drugs. It was urged that member states take steps swiftly to implement the 40 recommendations of the Financial Action Task Force (which appear in Annex B to this memorandum) as an important step in combating each of these aspects of international criminal activity.

(a) Money Laundering

In relation specifically to money laundering Heads of Government and the Committee of the Whole welcomed the formation of the Caribbean Financial Action Task Force. They also stated the importance of Law Ministers examining how Commonwealth countries could best work together to combat the laundering of the proceeds of all types of crime through the enactment of appropriate domestic legislation and enforcement of regulatory standards. The paper submitted to the Meeting by the British Government on money laundering is reproduced as Annex B to this Memorandum.

Possible action by the Meeting

The Meeting may wish to highlight the need to implement the 40 recommendations of the Financial Action

Task Force and consider the best approach thereto, including the possible role for the Meeting of Senior Officials of Commonwealth Law Ministries.

(b) Illicit Drugs

The Committee of the Whole on Commonwealth Functional Co-operation considered the problems of the illicit traffic in drugs and substance abuse itself. Its recommendations, endorsed by Heads of Government were:-

- (i) that all Commonwealth countries not yet party to the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna, adhere to the Convention and enact the necessary domestic legislation as soon as possible;
- (ii) that member states support the UN Drug Control Programme and, if appropriate, take advantage of the advisory and assistance facilities available in the Dublin Group of donor countries;
- (iii) that the Secretariat, in collaboration with UNDCP and other relevant bodies, continue to organise appropriate training and other activities to counter aspects of both supply and demand for illicit drugs;
- (iv) that all Commonwealth countries adopt appropriate domestic legislation to trace, freeze and confiscate the proceeds of drug trafficking;
- (v) that all Commonwealth countries develop bilateral and multilateral approaches to deal with illicit trafficking.

A breakdown of the existing state of Commonwealth country membership of multilateral drug conventions appears at Annex C.

Possible action by the Meeting

The Meeting may wish to identify any problems which assistance might overcome with regard to individual countries becoming party to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

(c) Mutual Legal Assistance

In addition to the swift enactment of domestic legislation in the above areas the Committee also called for enhanced international co-operation in combating both international financial abuse and illicit trafficking in drugs. It urged:-

- (i) the implementation of the Commonwealth Scheme for Mutual Assistance in Criminal Matters;
- (ii) the priority attention on the part of Law Ministers to legislative programmes enabling legal assistance to be given to other countries in respect of any drug trafficking offence.

Possible action by the Meeting

The Meeting may wish to consider whether the Secretary General should take the initiative to bring about a fully international meeting of central authorities. This would facilitate effective collation and exchange of Commonwealth and other international experience and develop the familiarity with other legal systems on which successful mutual assistance is based. (Ministers will wish to be aware of the wish of the United Nations that such a conference be held but that it is presently impossible for a conference to be organised under its auspices.)

The Meeting may wish formally to place all three matters treated under paragraphs (a)-(c) above on the agenda for the next Meeting of Senior Officials for a stocktaking of progress made towards meeting the various wishes of CHOGM in these respects.

The Commonwealth of Learning

Heads of Government received with satisfaction the Report from the Commonwealth of Learning (the "COL") and an independent Progress Review commending the achievements of the organisation. They noted, however, the grave financial situation now facing the COL: the COL's current budget of C\$6 million reflects a reduction of 25% from that of the last two years and funds in prospect for 1994-5 are in the region of only C\$3.5 million. The Meeting made a strong appeal for increased contributions from member countries with the intention of perpetuating the COL's valued work and of ensuring the pan-Commonwealth character of the organisation.

Possible action by the Meeting

After reviewing the distance learning training scheme for legislative drafters, Law Ministers may wish to impress upon their own funding agencies for the Commonwealth of Learning the importance of the contribution the organisation has to make, inter alia, in the field of promoting just and honest government.

International Criminal Court

The Committee of the Whole welcomed the work of the International Law Commission on the development of a draft statute for an international criminal court. It recognised the difficulties of the project but stressed the value of its implementation. The recommendation of the Committee accepted by the Heads of Government was that Law Ministers undertake such further consideration of the issues involved and means of progressing with the proposal as might be appropriate. A commentary on the ILC's draft statute for an International Criminal Court appears as Annex D to this memorandum.

Possible action by the Meeting

The Meeting may wish to:-

- (a) request the Secretariat to prepare an appropriate paper, drawing attention to any issues of difficulty;

and

- (b) invite the next Meeting of Senior Officials to discuss the paper and to report to Ministers accordingly.

Disarmament

Heads of Government welcomed the recent START I & 2 treaties. They also welcomed the decision of the Conference on Disarmament to work for a universal and verifiable Comprehensive Test Ban Treaty and urged all states possessing nuclear weapons to stop their testing programmes pending its conclusion. The Meeting called for the earliest possible ratification of the Chemical Weapons Convention by member states and for the strengthening of the provisions contained in the Biological Weapons Convention.

Possible action by the Meeting

The Meeting may wish to:

- (a) endorse the need for action as identified by Heads of Government requesting the Secretariat to produce an appropriate "accession kit" as an aid to adopting the Chemical Weapons Convention; and
- (b) place the matter on the agenda for the next Meeting of Senior Officials for a stocktaking of progress made towards meeting the wishes of CHOGM in this respect.

The Commonwealth and the Promotion of Human Rights

A Memorandum by the Commonwealth Secretariat

Background

The fundamental principles which have guided the Commonwealth association over the years were first articulated in the Singapore Declaration of Commonwealth Principles at the Commonwealth Heads of Government Meeting in 1971. They were reaffirmed *in extenso* most recently in the Harare Commonwealth Declaration of 1991, at the Commonwealth Heads of Government Meeting in Zimbabwe. Both documents reflect statements of principle and intent reached by consensus by Commonwealth Heads of Government, which attach priority to the promotion of democracy, human rights and sustainable development. These were reiterated in the recent communiqué from the 1993 Limassol Meeting. For the information of Ministers relevant extracts from this communiqué appear as Annex 1.

2. From its inception, these concerns have infused virtually every aspect of the activities of the Commonwealth Secretariat, whether it be combating racism and apartheid in South Africa or promoting debate on key economic developmental issues. Secretariat programmes have addressed needs in the fields of health, women, education, youth and the law, to mention but a few.

Creation of the Human Rights Unit

3. In 1977 it was proposed by The Gambia that the Secretariat should, in addition to these varied roles, have a specific mandate to promote human rights, drawing on the various international and regional human rights instruments and on relevant Commonwealth declarations.

4. The proposal was the subject of a discussion and study, and the Human Rights Unit was formally established in January 1985 initially within the International Affairs Division (now Political Affairs Division) of the Commonwealth Secretariat. It was charged with acting as a focal point for human rights activities, working in close co-operation with member governments and with other relevant Secretariat Divisions. It was agreed that it would not be appropriate within a Commonwealth context, for such a Unit to have any investigative or enforcement role. The Unit was also to ensure that, within the Secretariat itself due account is taken of human rights considerations in the work of all Divisions.

Location within the Secretariat

5. There has always been a strong legal element in the human rights work of both the Unit itself and within the various work programmes of the Legal and Constitutional Affairs Division (previously known as the Legal Division).

6. During the recent process of restructuring of the Secretariat, the question of where the Unit might operate most effectively was given careful consideration and the weight of opinion was in favour of the Unit being relocated within the Legal and Constitutional Affairs Division.

7. Given the legal basis of many human rights it is suggested that this move is appropriate. At the same time, the political aspects of human rights promotion, and particularly in the field of non-justiciable rights, required that the Unit continues to maintain close links with the Political Affairs Division (formerly the International Affairs Division). In practice, the Unit seeks to work with several other Divisions on common human rights concerns, for example, with the Women's Affairs Division on women's human rights, with the Education Department on matters related to human rights education etc, and the Economic Affairs Division on the right to development.

The Unit's Work Programme

8. The Commonwealth Governmental Working Group of Experts on Human Rights, convened by the Commonwealth Secretary-General in accordance with the directive given by the Heads of Government in Kuala Lumpur in 1989, reviewed Commonwealth co-operation in human rights and recommended possible avenues for further cooperation and action. Their Expert Group's Report submitted in July 1990, and endorsed by the Heads of Government in Harare and reaffirmed at Limassol, set out the following objectives for the Commonwealth:

- (a) to increase knowledge of international human rights standards and obligations among officials in Commonwealth countries; and among the populations at large;
- (b) to encourage and sustain high professional standards in the judiciaries and law enforcement agencies of Commonwealth countries in dealing with human rights matters, and to reinforce the independence of these judicial systems;

(c) to promote the adherence of Commonwealth countries to the main international human rights instruments, and to assist their effective implementation;

(d) to facilitate the promotion of human rights by governments, and exchanges of information on human rights programmes and activities.

9. The Report also identified specific programme areas to meet the broad objectives identified above:

- (i) A National Institutions Programme;
- (ii) A Regional Institutions Programme;
- (iii) An International Instruments Programme;
- (iv) A Professional Support Programme;
- (v) A Public Affairs and Information Programme;
- (vi) A Partnership Programme;
- (vii) A Commonwealth Human Rights Resource Directory;
- (viii) A Human Rights and Development Programme.

Implementing the Harare Mandate: Promoting the Fundamental Political Values of Democracy, Human Rights, the Rule of Law, Independence of the Judiciary, and Just and Honest Government

10. Since the promotion of the fundamental values of the Commonwealth is a multi-sectoral concern with political, economic, social and cultural dimensions, the Commonwealth Secretariat has sought to adopt an integrated approach in carrying out its mandate. Intra-Commonwealth development cooperation activities in key sectors together with Commonwealth strategies for promoting more effective global partnerships in pursuing sustainable development, seek to establish the foundation necessary for the promotion of its fundamental values. In the particular areas of democracy and human rights and law, the Secretariat concentrates on those activities where it is best placed to make an impact. These include:

A. National Institution and Capacity-Building

11. Since 1990, the Commonwealth Secretariat has intensified its efforts, at the request of member states, to assist in strengthening the capacity of key institutions. These include parliaments, public service commissions, electoral commissions, judiciaries, statutory human rights bodies and women's bureaux, as well as other organisations which sustain democracy and civil society and help to promote and protect human rights. In seeking to assist member countries in this area, the Secretariat has been careful to adopt a supportive and consensual role, working with and in support of relevant sectors of a member country in devising strategies which meet local needs and have local support. Assistance is essentially of a practical nature, aimed at devel-

oping self-sustaining local institutions and processes.

12. With this emphasis on practical assistance, the Commonwealth has, for example, developed what is now widely recognised as an effective system of election monitoring which is an important element in the setting up of a democratic system. As a result of its experience in observing ten major national elections over the last three years, the Commonwealth has been stressing the importance of action to create an environment conducive to the democratic process well ahead of polling day. Certain benchmarks have been identified which include a constitution that makes for a representative and accountable government; electoral laws that ensure proper registration of voters; fair nomination procedures; conditions that allow a secret ballot; adequate access to the publicly-owned media for contesting parties; and well-trained and vigilant political party agents whose work is complemented by national and international observers. Finally and most importantly, it is recognised that democratic structures cannot be imposed from outside but must be sustained from within, and that attention needs to be paid to the development of an indigenous democratic culture. This is a complex, dynamic and demanding process. This aspect of the Secretariat's work programme falls under the Political Affairs Division.

13. Another significant Commonwealth involvement in the area of furthering democratic development and human rights through institutional change has been in South Africa. The Commonwealth has had a long involvement in the campaign against apartheid. This has ranged from active pursuit of sanctions against apartheid in South Africa to the decision at Harare by Commonwealth leaders that the association should render whatever practical assistance it can to the negotiating process in South Africa. Following the UN Security Council Resolution 772 of August 1992, the Commonwealth presently has a Group of Observers in South Africa, working alongside monitors from the UN, the OAU and the EC in monitoring the violence that threatens to undermine progress towards the establishment of a non-racial, democratic government in South Africa. It has also been assisting the efforts of various professional and other groups who have been fostering dialogue on the shape and structures of the new South Africa.

14. Recently the Secretariat organised in collaboration with Inter-Rights the sixth in its series of high-level judicial colloquia as part of its programme of colloquia for judges on the domestic application of international human rights norms. For the first time a major Commonwealth event took place in South Africa with key topics of discrimination and freedom of expression chosen as being of particular relevance in a post-apartheid society. The Bloemfontein Statement is attached as Annex 2. In order further to strengthen the Secretari-

at's contribution in this field and in response to requests from judges at colloquia in Abuja and Banjul, the Secretariat and Inter-Rights are jointly establishing a central database of human rights jurisprudence for use in domestic courts, which would supplement the Commonwealth Law Bulletin.

15. The establishment and strengthening of national human rights institutions is being widely recognised as an important part of national mechanisms for the promotion and protection of human rights. The Secretariat has sought to play a facilitating role by encouraging discussions between governments and non-governmental groups on national strategies for human rights aimed at identifying structures and mechanisms necessary for the effective promotion and protection of human rights. The role that NGOs and community-based organisations (CBOs) can play in co-operation with national institutions is also being examined. As more than half of the Commonwealth members are small states, special attention is being given to the specific institutional needs of such countries. Assistance was recently given to The Gambia in establishing a national human rights commission.

B. Promoting Information Sharing and Exchange of Experience

16. The Commonwealth Secretariat has sought to facilitate cross-fertilisation of ideas, experiences, expertise and the dissemination of human rights educational materials as a way of supporting and strengthening national (including community and grass-roots activities) as well as regional efforts for the promotion of democracy, the rule of law and human rights. It has sought to achieve this in a variety of ways. It has, for example, sent experienced constitutional and electoral experts to emerging multi-party democracies in the Commonwealth to assist in the drafting of new constitutions based on democratic principles, and to help establish institutions and practices vital to the proper functioning of a democratic system. Again, by no means all of this work is undertaken by the Human Rights Unit as other Divisions are heavily involved.

17. Towards the same goal of strengthening democratic systems, the Secretariat has brought together senior officials and judges in member countries to examine ways of promoting judicial review of administrative action. This exercise has produced a landmark set of guidelines for such a process which appears in paper LMM(93)17 which is before the meeting. Significantly, the government of Zambia then announced its intention to undertake a full-scale review of the law with a view to providing easier access to the courts for citizens aggrieved by government decisions. Similar exercises are being planned for other countries who have recently moved, or who are presently moving, from one party to multi-party democracies.

18. The Secretariat has also sought to assist in the domestic implementation of international human rights norms, mentioned earlier through the holding of colloquia with senior judges. These have had a direct impact on major court decisions in a significant number of Commonwealth countries and beyond. The scope of the colloquia is being extended to cover the domestic implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women.

19. On human rights, in addition to promoting useful exchange in areas such as institution-building as mentioned in the previous section, the Secretariat seeks to pay special attention to the rights and survival concerns of vulnerable social groups, which include female-headed and women-maintained households, working and street children, migrant workers, refugees and displaced families and indigenous and tribal communities. In this area, the Secretariat seeks to provide much-needed and meaningful assistance through strengthening networks amongst those engaged in improving the conditions of such vulnerable groups; dissemination of information on appropriate and effective initiatives for establishing access of disadvantaged groups to basic material and social needs; and making available a range of training materials and techniques.

20. Commonwealth exchanges at the regional level have also addressed, at the request of member countries, issues of concern which require regional co-operation for their resolution. In all such instances, the Secretariat has sought to ensure that the genuine concerns of communities have been represented through the presence of professional and non-governmental organisations. Such efforts have contributed towards a better understanding of common problems and sometimes to closer co-operation between governments and non-governmental groups in devising ways of dealing with particular problems.

C. Training

21. Commonwealth programmes have particularly in recent years focused on education and training activities in democratic practices and human rights with the objective of promoting just and honest government and the development of civic society. A wide range of human rights educational and training material is being developed for the use of officials, including those from foreign ministries, women's affairs, police, prison authorities as well as the judiciary. Particular attention has been paid to women's human rights concerns and resource material has been produced on the problems of violence against women and child abuse.

22. The training of trainers has been a part of this educational activity. Programmes have involved various government ministries, parliamentary and electoral institutions, trade unions, the media, etc. Because of the Secretariat's concern to ensure that its training pro-

gramme was reaching the grass-roots level, a full-scale evaluation was undertaken in 1992/3. The evaluation team concluded that the programme that had been developed was insufficiently focussed and targeted. It made a number of constructive recommendations which are under consideration for implementation. (These are attached as Annex 3).

23. The Secretariat is providing specialised training to a number of member states' personnel responsible for reporting obligations under international human rights treaties as well as regional treaties. Here again the Secretariat has pursued its well-tried strategy of bringing experienced practitioners together with newcomers to the field and has thereby promoted a fruitful learning process. The Commonwealth Training Manual on the reporting procedure of the Women's Convention has proved to be a useful resource and a similar manual is being developed for the reporting procedure under the African Charter.

Conclusions

24. In giving practical expression to its shared commitment to the promotion of democracy, the rule of law, human rights and just and honest government the Commonwealth Secretariat is uniquely positioned to provide timely and helpful advice and guidance. In the light of the endorsements by successive CHOGMs, its focus will continue to be on those areas of activity where it can make the most effective and meaningful contribution. In all its work, the Secretariat is able to call on a wealth of expertise and experience available in the Commonwealth. Various Commonwealth fora, ranging from the biennial Heads of Government Meetings to those of Ministers and officials, plus workshops and seminars, provide ongoing opportunities for such exchanges. In particular, the Secretariat looks to this Meeting for advice and guidance as the most fruitful way ahead.

*Human Rights Unit
Legal & Constitutional Affairs Division
October 1993*

ANNEX 1

Extracts from the Communiqué of Commonwealth Heads of Government Meeting and from the Report of the Committee of the Whole on Commonwealth Functional Co-operation Endorsed by Heads of Governments in Limassol, Cyprus, 21-25 October, 1993

Democracy and Human Rights

Communiqué

7. Heads of Government expressed particular satisfaction at the increasing appeal of and commitment to democratic ideals, both within the Commonwealth and elsewhere. They reaffirmed, *inter alia*, their commitment to democracy, fundamental human rights, the rule of law, the independence of the judiciary and just and honest government, as essential ingredients of the Commonwealth's fundamental political values. Affirming the importance of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in June 1993, they reiterated that all human rights were universal, indivisible, interdependent and interrelated. They stressed that democracy, development and respect for human rights and fundamental freedoms were interdependent and mutually reinforcing. They welcomed the reaffirmation of the right to development, as stated in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

8. Heads of Government further reiterated their commitment to the International Bill of Human Rights, and called on member governments which had not already done so to make every effort to become party to the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights by 1995.

9. Heads of Government reaffirmed that women's rights were an integral and indivisible part of human rights and supported the principles embodied in the Vienna Declaration on Human Rights and the Convention on the Rights of the Child. They urged all Commonwealth governments to ratify by 1995 the Convention on the Elimination of All Forms of Discrimination against Women. They regarded violence against women as a contravention of women's rights and called on all governments to adopt the draft UN Declaration on the Elimination of Violence against Women.

10. Heads of Government expressed their appreciation for the proclamation of 1993 as the International Year of the World's Indigenous People as a reaffirmation of the commitment of the international community to protect the human rights and fundamental freedoms of in

igenous people and ensure respect for the diversity of their cultures and identities.

11. Heads of Government expressed serious concern at the continuing trends of ethnic chauvinism, xenophobia, racism and other related forms of intolerance, in particular their contemporary manifestations, which posed increasingly grave threats to peace and communal harmony. They pledged their commitment jointly and severally to combat discrimination in all its forms in their own countries, with emphasis on maintaining the rule of law and measures to promote the development of human rights institutions and other enduring strengths of pluralist society.

Role of the Commonwealth

Communiqué

56. Heads of Government also noted with satisfaction the Secretariat's efforts to promote human rights in all its aspects, through the dissemination of information; the provision of opportunities for consultation and the sharing of experience and expertise; human rights education and training; and assistance with the establishment or strengthening of national human rights institutions and mechanisms. They asked the Secretariat to provide for increased allocations to that area as much as available resources would allow.

57. Reiterating the important role played by non-governmental organisations in the area of promotion of human rights, Heads of Government encouraged increased practical co-operation between the Secretariat and NGOs.

58. Heads of Government reaffirmed the support given at Harare for the Report of the Commonwealth Governmental Working Group of Experts on Human Rights and its recommendations.

Child Survival and Development

Report of the Committee of the Whole on Commonwealth Functional Co-operation

24. The Committee welcomed the call made by the Vienna World Conference on Human Rights for universal ratification of the Convention on the Rights of the Child by 1995. In that context, it urged member governments that had not yet done so to ratify the Convention and recommended to Heads of Government that they discuss at their 1995 CHOGM progress made towards its realisation. They requested member governments to adopt means for the effective implementation of the Convention, particularly by bringing their national laws and practices into conformity with its provisions.

Women and Development

Report of the Committee of the Whole on Commonwealth Functional Co-operation

27. The Committee urged all governments to ratify the

Convention on the Elimination of All Forms of Discrimination against Women by 1995 and to endorse the draft UN Declaration on the Elimination of Violence against Women. It expressed support for the proposal that special measures as appropriate be taken to increase women's participation at all levels of the political and decision-making process at national level and in Commonwealth organisations. Acknowledging the value of mainstreaming gender issues into all policies and programmes in order to achieve sustainable economic and environmental development, it urged governments to ensure that immediate action was taken towards implementation of the Ottawa Declaration on Women and Structural Adjustment and Agenda 21, especially the chapter in the latter focusing on 'Global Action for Women Towards Sustainable and Equitable Development'.

ANNEX 2

THE BLOEMFONTEIN STATEMENT

1. Between 3-5 September 1993, a significant event took place in Bloemfontein, South Africa, when for the first time senior judicial figures from around the Commonwealth and the United States of America joined with South African judges and jurists in a judicial colloquium on the domestic application of international human rights norms.
2. The Colloquium, the sixth in a series, was held in South Africa in response to the wishes of a broad section of South Africans, who wished to use the opportunity it presented to assist the transition process by furthering informed discussion on the interpretation and implementation of human rights provisions.
3. The Colloquium was administered by INTERRIGHTS (The International Centre for the Legal Protection of Human Rights) with assistance from the Commonwealth Secretariat and with financial support from the British Overseas Development Administration, the Commission of the European Communities, the Kagiso Trust, the Canadian Embassy Dialogue Fund and the British Council.
4. The participants reaffirmed the general principles stated at the conclusion of the Commonwealth judicial colloquium in Bangalore, India, in 1988, as developed by subsequent colloquia in Harare, Zimbabwe, in 1989, in Banjul, The Gambia, in 1990, in Abuja, Nigeria, in 1991 and in Balliol College, Oxford, United Kingdom, in 1992.
5. The participants welcomed the movement towards a non-racial democracy in South Africa devoid of apartheid and discrimination, with a constitution which guarantees the protection of fundamental human rights.
6. Participants were keenly aware that their own meeting, attended as it was by a large preponderance of males, itself reflected a legacy of discrimination against women over many generations and in many societies and which needs urgent remedial action.
7. The participants believe that the provision of equal justice requires a competent and independent judiciary trained in the discipline of the law and sensitive to the needs and aspirations of all the people. They stressed their conviction that it is fundamental for a country's judiciary to enjoy the broad confidence of the people it serves; to the extent possible, a judiciary should be broadbased and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society. They saw this as being of special relevance in cases involving complaints of discrimination in all their countries and so of being of the highest impor-

tance in the context of the judiciary which will interpret and enforce a new South African constitution with a justiciable Bill of Rights.

8. The Colloquium affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.

9. The specific subject matter of the Bloemfontein Colloquium was the effective protection through law of the fundamental rights to equal treatment without any discrimination and to freedom of expression.

10. There was substantial consensus that the principle of equality requires public authorities to take affirmative action to diminish and eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms. Such affirmative action must be appropriate and necessary to achieve equality. Discrimination takes many forms in all societies. It may be indirect and unconscious as well as direct and deliberate. The principle of equal treatment forbids not only intentional discrimination. It also forbids practices and procedures which have a disparate adverse impact upon particular groups and which have no objective justification. It is essential to secure the elimination of indirect discrimination of this kind.

11. In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law.

The judges bear particular responsibility for ensuring that all branches of government the legislature and the executive, as well as the judiciary itself conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.

2. Where derogations from fundamental human rights and freedoms are permissible they must be strictly construed so as to avoid weakening the substance of the rights and freedoms themselves and only to the extent demonstrably necessary in an open and democratic society.

ANNEX 3

Evaluation Study of Commonwealth Fund for Technical Co-operation/Commonwealth Secretariat (International Affairs Division/Human Rights Unit) Assistance for Human Rights Training for Public Officials

V Conclusions and Recommendations

61. The Commonwealth Secretariat programme of human rights training for public officials fits Commonwealth traditions of cooperation and technical assistance, matches the mandate of the HRU, was specifically endorsed by the Working Group of Experts, is valued by many Governments, has pioneered certain approaches, has demonstrated the benefit of sharing Commonwealth experience, and has particular advantages compared with those of other agencies. With the Commonwealth and international changes since the Harare Declaration it is possible for a more flexible phase of the programme, consolidating lessons learned, to evolve in a more supportive environment.

Recommendations:

- (i) The Secretariat should plan a new phase for the programme, covering the next four years, taking account of this study and discussions with individual Governments. In view of the significance of the programme in the light of the Harare Declaration, such discussions may appropriately be conducted at Deputy Secretary-General and Director level.
 - (ii) In devising such a plan, the HRU should take care to review the current contributions of the UN and independent human rights training providers, and the needs of member Governments. It should heed the advice of the Working Group: "the Commonwealth should build on its specific strengths. It should recognise the value of cooperation with other bodies such as the UN or regional organisations, and undertake activities only where it can make a distinct contribution and without duplicating existing efforts."
 - (iii) A new, more flexible phase for this programme deserves endorsement at the Limassol CHOGM. Training public officials in human rights is one of the most effective ways in which an inter-governmental body can underline its commitment, and support at the highest political level will assert a collective determination tempered by a sensitivity to the needs of each member.
62. The Secretariat has been right to treat this as a major programme, with reasonable resources attached. However, the same funds could have trained more people or financed longer workshops if at least some of these had been non-residential events for one nation.

The programme in the past has reached only 40 people a year. Training-the-trainers was not necessarily the cost-effective and catalytic strategy it purported to be when, for a variety of reasons, the great majority of workshop participants did not carry out training on their return to post.

Recommendations:

- (i) Adopting a menu model, the HRU should aim to train 70 persons a year, hold three workshops a year, and allocate staff time and resources to preliminary negotiation on content and participants, and to subsequent follow-up. A commitment on this scale is likely to involve half the time of a professional member of staff, with secretarial help. At least one workshop a year should be non-residential, for one country's nationals, and at least one should be regional and residential, serving several countries. Consideration should be given to making the regional workshops last four days and the national ones five. HRU staff should always participate in an HRU workshop.
 - (ii) Efforts should be made to cooperate with other agencies, partly to bring in additional funding, but also to increase the impact and deepen the constituency of interest in human rights for public officials. In the Pacific region, for example, it might be possible to work with the South Pacific Forum or the Pacific Islands Law Officers Meeting.
 - (iii) Local cost contributions should be sought from the Government concerned when a workshop for one country is being negotiated: it would help to cement the collaboration with the Secretariat, and to guarantee utilisation of the benefits.
63. The particular model pursued by the HRU, of workshops to train officials to train colleagues in human rights, was inflexible and not well adapted to the circumstances of most Commonwealth countries. In its planning, and its negotiation with Commonwealth Governments, the HRU should offer a menu and choice of training possibilities.

Recommendations:

- (i) The choice should include a regional or national workshop, training for and with public service training agencies as compared with persons from a variety of Ministries, specialist or generalist training, and training of persons to train others as compared with the training as an end in itself. At least one of these workshops over the four years should be at the most senior relevant level (eg Permanent Secretaries, or Directors of national Human Rights Commissions, or Directors of Police Training Colleges).

- (ii) In a more user-friendly programme it will often be necessary for an HRU official to visit a country or region in advance to negotiate an agenda, identify workshop resource persons (especially where there are competing NGOs and experts), to target participants, and to establish which is the agency or national focal point responsible for follow-up. The most crucial collaborator to identify will be the institution (public service, Ministry or academic), and the individual within that institution, which has the authority and resources to carry through effective follow-up.
- (iii) Even in a workshop which retains a training-the-trainers orientation it will be necessary to include rather more conceptual knowledge and discussion, and to provide more relevant written material, than has been the case in the past. For workshops of all types it will be essential that some materials reach participants before the start, that they should include items directly relevant to that country or region (eg regional human rights instruments, legal precedents from Commonwealth countries, administrative norms, reports from the UN Human Rights Commission and international NGOs), and that extra material shall be issued in the course of the workshop itself for retention by participants.
- (iv) In order not to waste effort, and to consolidate work done, it would be desirable to hold workshops over the next two years for those groups of officials for whom new Manuals have been drafted - law enforcement officers, the judiciary, prison officials, and Foreign Ministry personnel. They could then be published in the light of this and other comment.

64. In general the workshops seemed effective at the time and created enthusiasm. Participants recorded a positive verdict and were sensitised to human rights and training issues. However, the subsequent training fallout was small, and appears to have been tiny until the introduction of the special Fund to assist training.

Recommendations:

- (i) Much higher priority must be given to all matters relating to follow-up if public officials and their Governments are to be helped. This issue should be discussed before and during a workshop. After its completion the HRU should strengthen its responsibility to those who have participated, and they should be contacted twice, after six and twelve months respectively, to check progress and see whether they need assistance. The HRU newsletter could become a major channel for human rights training in the Commonwealth. As a matter of accountability, and to help guide the development of a more flexible programme, a short two-page evaluation report should be agreed by participants and

trainers before the end of each workshop. These should be collated on an annual basis with an introduction by the Head of the HRU and be made available to Governments, qualified Commonwealth NGOs and other appropriate bodies, and conclusions should be summarised in the HRU newsletter.

- (ii) The Secretariat should coordinate the supply of resource materials on human rights and training to countries in need. It should not continue its special Fund after present resources are used up because it is difficult for the HRU to manage and it implies that training will only take place with the external inducement of Commonwealth funding. However, the Secretariat should be prepared to respond to programmatic requests for assistance and expertise for human rights training for public officials, according to the usual procedures. In exceptional cases, involving significant innovation or the needs of smaller or poorer states, the HRU could provide modest funding for follow-up events on condition that the results are publicised.
- (iii) Future workshops should employ more varied and visual techniques. They should provide conceptual material, and guidance on human rights in practical administration, as appropriate to the audience. They should refer to Commonwealth experience (common law precedents, the role of NGOs, experience with Human Rights Commissions and devices to underpin probity and accountability in government, the advisory services of the Commonwealth Secretariat).
- (iv) Where appropriate the HRU should join forces with other arms of the Secretariat in arranging workshops - for instance, on women's and children's rights.
- (v) The HRU should be more actively involved with Governments in the selection of workshop participants. For example, where participants are supposed to come from several Ministries or agencies it should prevent a build-up of nominations from anyone.
- (vi) The continuing participation of NGOs in the workshops should be cherished. Care should be taken in the selection of NGO resource persons and, where only one or two can participate actively, others could be invited as observers. Other types of expert could also be utilised. Proven training resources, such as staff from the African Centre for Democracy and Human Rights Studies, could be employed again.
- (vii) Closer attention should be paid to the assessments given by participants at the end of each workshop: the HRU should be willing to change style, content and format in the light of such comment. A spirit

of frankness and objectivity should be encouraged when preparing an evaluation report at the end of each workshop: the report should be seen as a diagnostic tool for the future and any drawbacks or difficulties must be referred to. It may be desirable to invite a respected independent person, not hitherto involved in the workshop, to chair the evaluation session and to sign the agreed report on behalf of all.

65. There was a global imbalance in utilisation of the programme in its first phase. It was biased towards Commonwealth Africa and the island states of the Caribbean and Pacific. In spite of overtures by HRU, it was not used at all by 15 member countries, including such significant Commonwealth states as Britain, India, Canada, Pakistan, Bangladesh and Malaysia. In consequence it may have had some negative perceptions, as indicating that a Commonwealth input into the training of public officials is not relevant for all, but only to certain developing countries. Amongst those which did participate there was a disproportionate benefit to the two countries which hosted three workshops.

Recommendations:

- (i) The next phase of the programme should give preference, in the location of workshop venues, to countries which have not hosted an event before. If, as recommended, there are three workshops a year, they should be shared around the main regions of the Commonwealth. No country should host more than one workshop in a four year period.
- (ii) It should be emphasised that the next phase of the programme rests squarely on a Commonwealth consensus, a set of values set out in the Harare Declaration as representing the aspirations of all members of the association, and is not aiming to impose the values of some members on others. The needs of differing countries will receive appropriate offers of assistance. The specific Commonwealth experience which could be helpful will be identified in the preparatory discussions.
- (iii) The Secretariat should consult all the 15 Governments which have not hitherto participated in the programme to see whether, in a phase of greater flexibility, they may wish to take advantage of it. It goes without saying that not every Government may wish to do so, but the Secretariat should work to the principle that all could. The fact that 35 Governments have already used the programme testifies to the value that the majority of members put on training public officials in human rights. In view of the significance of this programme, within the priorities laid down at the Harare CHOGM for the 1990s and beyond, it would be right for HRU staff to be supported in their negotiations with Governments by the direct involvement of a Deputy Secretary-General and the relevant Directors

(for Legal and Constitutional Affairs, as the International Affairs Division will be known).

(iv) In prioritising Commonwealth partners and venues in future the HRU should seek to be equitable, though responding favourably to Governments responsible for large populations, or those particularly eager for such collaboration. It should underline the fact that training in human rights is a standard requirement for good administration in every Commonwealth state, and avoid any impression that it is a service exclusive to nations where human rights are thought to be exemplary, or thought to be problematic.

VI Lessons Learned and the Future

66. A major lesson from this evaluation is that where the objectives of a programme are as tightly defined as was the case here -- namely that success was to be judged by the number of subsequent training activities that were instigated -- the management of a Secretariat programme itself is exposed to a tight yardstick. It is necessary to be sure of an accurate feedback, and to make modifications where a programme falls short of the objectives. In this case, following the extension of the workshop from two days to three after the Gambian trial in 1989, there were no significant modifications until the introduction of a small grants Fund in the second half of 1992 and the testing of a Trainers' Guide in St Vincent at the end of that year.

67. A related point is that, in retrospect, it was probably mistaken to adopt such precise targets for effectiveness. Human rights training for public officials was a new programme. When it began in 1989 -- it was conceived even earlier -- Commonwealth activity for human rights was still controversial in some member states. The end of the Cold War and the Harare Declaration still lay in the future. In the circumstances, a more exploratory approach, following more detailed consultation with Governments likely to use the programme, could have led to more open-ended and flexible guidelines.

68. The attempt to combine training about human rights with the training of trainers to prepare colleagues to operate human rights norms and conventions was extraordinarily ambitious. It too easily assumed that, with one day of overview on the conventions, and a simulation exercise, the public officials at the workshops would be capable of running effective programmes of their own. The enthusiasm generated at the workshops concealed serious difficulties: the officials who attended did not always have preexisting knowledge, the workshops did not get into enough detail on the challenge of operating to human rights criteria in practical administration, the time and resources for follow-up by these particular officials rarely existed. A more modest approach could have brought greater dividends.

69. A particular weakness was the lack of a governmental counterpart in each country from which workshop attenders came who would take responsibility for supporting implementation on their return home. Whether described as a national focal point, or a line Ministry (or even someone in a Human Rights Commission or public service training agency), such a defined person in a defined organisation is a prerequisite for effective follow-up. Even in countries which hosted the workshops there was confusion; by often relying on NGOs to make local arrangements for a workshop the HRU had forgone the opportunity of consolidating governmental responsibility in advance, while the fact that attenders came from a scatter of Ministries and agencies meant that none of them had the national authority to oversee subsequent training.

70. With regard to the future, there is every reason for the Commonwealth and its Secretariat to consolidate the programme which commenced in practice in 1989. Even though imperfectly attuned to their needs it has already been used by the majority of Governments, and enjoys their goodwill. There is a real likelihood that some Governments which have not used it hitherto will participate in the next four years, especially if it evolves in a more flexible manner. It has already produced rich experience, and sensitised a core group of public officials. It would be a waste, a defiance of the priorities laid down at Harare, and an avoidance of some of the most significant challenges faced by public administration in all Commonwealth countries if the programme was now to be abandoned or curtailed.

71. However, in planning ahead it will be necessary to recall that there are other training providers in this field and that the Secretariat will never have the resources to be a provider on a vast scale. It is quite likely that, due to international interest, there will be a steady growth in funding and professionalisation elsewhere. This sug-

gests that the HRU should look to areas of comparative advantage for the Commonwealth. Furthermore the situation is steadily changing within Commonwealth countries themselves. For example, more are establishing Human Rights Commissions (as in India), which could be partners in training. Governments are increasingly collaborating with NGOs and academic experts in their own countries to provide specific training and courses. The effectiveness and impact of the Commonwealth programme may be judged against increasing competition, and the quality of the HRU "after-sales service" will be crucial.

72. In guiding the development of the programme the HRU will need to get as much feedback as possible. If, following the recommendation in the report by the Working Group of Experts, it is decided to establish a Programme Advisory Group of Commonwealth officials to assist the work of the Unit, then one of its chief tasks should be to comment on the progress of this training programme.

73. Continuing political support, at various levels, will ensure the success of the programme in future. In this connection a strong endorsement of training in human rights for public officials at the Limassol CHOGM would be valuable. This could be complemented by expressions of support, and input on their own professional needs, from specialist meetings of Commonwealth Ministers - in particular the Law Ministers (especially because their officials have been the largest beneficiaries in the past), the Ministers Responsible for Women's Issues, and the Education Ministers. It could also be helpful if qualified Commonwealth non- governmental bodies - such as the Commonwealth Parliamentary Association and the Commonwealth Human Rights Initiative - could be encouraged to take a supportive interest in the programme.

Independence of the Judiciary in Canada

Paper submitted by Canada

In Canada, the Independence of the Judiciary is a constitutional and legal principle of foremost importance. This principle received recognition in Canada's constitution and has continued to be developed and strengthened in Canada's laws as both Parliament and the Courts have moved to ensure that this bulwark of the rights of Canadians is real and vital.

The basic constitutional provisions with respect to the Independence of the Judiciary in Canada are those set out in sections 96 to 101 of the Constitution Act, 1867. These provisions state:

VII - JUDICATURE

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organisation of a

General Court of Appeal for Canada, and for the Establishment of any additional Courts for the Better Administration of the Laws of Canada.

Section 96 has two important functions, one apparent, one not so apparent. By mandating that judges will be appointed by the federal level of government, the effect of narrow, local concerns and pressures on the judiciary is minimised. As well, section 96 has been interpreted and applied by the courts as guaranteeing that the essential jurisdiction of these courts cannot be eroded, on the argument that the power of appointment might thereby be rendered meaningless. Section 96 therefore promotes independence from local pressures and constitutes a guarantee that the jurisdiction of Canada's superior courts will not be unduly eroded.

The intended effect of the other constitutional provisions is somewhat more apparent. The effect of these provisions is that judges are given very substantial guarantees against arbitrary interference or removal from the executive level of government and that the fundamental status of members of the judiciary, as well as their salaries, allowances and pensions, are constitutionally guaranteed.

Another provision which serves to entrench the concept of the independence of the judiciary is the preamble to the Constitution Act, 1867, which states that Canada shall have a constitution similar in principle to that of the United Kingdom.

In addition to the above basic provisions relating to the judiciary and its independent status, certain of the rights established in the Canadian Charter of Rights and Freedoms by implication guarantee the independence of the judiciary by establishing minimum standards for the courts and tribunals in Canada which adjudicate in respect of criminal offences and certain fundamental rights. Of particular importance are sections 11(d) and 7 of the Charter:

- 11.** Any person charged with an offence has the right
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- 7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

On the basis of these Charter provisions, the constitutional independence of Canadian Courts has been recognised and affirmed in the strongest terms by Canadian Courts in the cases of Valente v The Queen [1985] 2 S.C.R. 673 and The Queen v Beauregard [1986] 2 S.C.R. 56. In these cases it was indicated that the principle of judicial independence is a fundamental precept of the Canadian Constitution and requires that Canadian judges be completely separate in authority and function from all other participants in the justice system, and not in any way dependent on the legislative, and particularly the executive, branches of government.

The three essential components of Canada's justice system identified by Canada's highest court in these two cases were financial security, the security of tenure of the judges, and the constitutional independence of the tribunal with respect to matters of administration bearing directly on its judicial functions.

Great care is taken to ensure that these three conditions are met. The structures which have been established to ensure that these constitutional guarantees are effective, include statutory provisions, administrative structures and even many of the practices and traditions of Canada's courts.

A very illustrative example is the statutory and administrative structure which has been established to ensure that the constitutional guarantee of independence of the judiciary with respect to their financial security is maintained. In Canada, judicial salaries are not established by the executive. By the Constitution this function must be performed by Parliament and Parliament undertakes this very serious responsibility with the utmost caution to ensure that judicial independence is truly preserved.

The procedure followed by Parliament has its basis in legislation. The Canadian Judges Act, section 26 provides:

- 26 (1) Within six months after April 1, 1986 and within six months after April 1 in every third year thereafter, the Minister of Justice of Canada shall appoint not fewer than three and not more than five commissioners to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
- (2) Within six months after being appointed, the commissioners shall submit a report to the Minister of Justice, containing such recommendations as they consider appropriate, and the Minister shall cause the report to be laid before Parliament not later than the tenth sitting day of Parliament after he receives it.
- (3) For the purposes of subsection (2), "sitting day of Parliament" means a day on which either House of Parliament sits.

Parliament does not approach this responsibility in a partisan spirit. Under this section, an independent commission of three to five persons, is appointed to hold hearings as necessary and to prepare an independent set of recommendations with respect to the level of judicial salaries and other related issues of judicial compensation, including pensions.

Pursuant to this mandate a report is produced which is tabled by the Minister of Justice for discussion and consideration in Parliament, with the accompanying public debate, before the ultimate decisions are taken on the appropriate levels of judicial salaries.

Following consideration by the Standing Parliamentary Committee on Justice and Solicitor General with the accompanying open and public debate, which generally has a non-partisan tone, the Judges Act, which provides for the salaries and other benefits of judges, will be amended to establish the new levels of salaries and other remuneration which this open process establishes is appropriate.

In the way that the important issue of salaries is treated, the importance of independence of the judiciary may be seen. The Supreme Court of Canada has identified financial security as one of the three essential conditions of true independence. The process of establishing judicial salaries has a totally independent commission as its origin and basis, the process is statutorily mandated, and the ultimate level of judicial remuneration is established by Parliament only after careful consideration and a full open and public debate. At every stage all of the mechanisms of both the law and the democratic process are brought to bear to ensure that judicial independence has real content and meaning.

Similar care is exercised with respect to judicial tenure. In Canada, members of the judiciary are appointed until age 75 unless, prior to that date they voluntarily resign or are removed from office or die.

Removal is only possible pursuant to the provisions of section 99(1) of the Constitution Act, 1867 by the Governor General of Canada on address of the Senate and House of Commons. To this date, in Canada, this procedure has never been relied upon for the removal of a judge.

There have, of course, been situations in which issues of judicial discipline or judicial behaviour have surfaced which require a careful, considered attention. At present, the same high standards that apply in other matters of judicial independence in Canada are preserved by assigning this function to a Council made up solely of members of the judiciary itself. This statutorily established Council, the Canadian Judicial Council, is composed of the Chief Justices and Associate Chief Justices of Canada's superior courts and the Tax Court. The Canadian Judicial Council is charged with the responsibility to inquire into and investigate situations

where there are allegations that a member of the federal judiciary may have become incapacitated from the due performance of his duties through age or infirmity, misconduct, a failure to duly execute his office or otherwise having placed himself in a position incompatible with the execution of his office.

By placing the important function of inquiring into judicial behaviour and conduct directly into the hands of the judiciary itself, the Canadian system clearly signals the importance that it places on the maintenance of the essential security of tenure of the Canadian federal judiciary. It should be noted that, in respect of provincially appointed judiciary, the systems relating to the assessment of the conduct of members of the judiciary in general parallel the federal model.

In recognition of the principle that the judiciary must be independent with respect to matters of administration bearing directly on its judicial functions, the systems by which the courts and judicial affairs are administered in

Canada have been structured with similar care. A foremost concern has been to ensure that the assignment of members of the judiciary to specific cases, the establishment of judicial workload and similar issues are matters not subject to administrative or executive pressures. In practice, such decisions are taken by the judges themselves, usually in a collegial fashion under the authority of each court's chief justice.

It is clear that in Canada, strong constitutional and statutory guarantees ensure that the judiciary will be truly independent. These guarantees are of course important, indeed essential, in themselves. But also of great importance is the tradition which they manifest and to which they owe their origins. Judicial independence must be founded on the constitution, on legal principles and, where appropriate, on democratic principles and free and open debate. It is Canada's belief that the very important tradition of judicial independence will continue to be an essential element of Canadian society.

The Harare Declaration: The Roles of the Attorney-General and the Judiciary and the Protection of the Rule of Law

Paper by The Hon Dr E N Tjiriange, Minister of Justice of the Republic of Namibia

I wish to make a brief statement on the role of the judiciary and the protection of the rule of law.

It cannot be gainsaid that the most powerful institution in a country and therefore the one which is most likely to violate individual human rights and freedoms in general and the rule of law in particular is the State through its public administration machinery. Therefore a country which is disposed to protecting the rule of law has the duty to establish a system which is capable of controlling the exercise of governmental authority and thereby remove arbitrary rule by the executive.

In practical terms, under such a system, there should be laws that are capable of protecting the basic rights and freedoms of persons as against government authority, and when violation do occur, there must be laws which would allow persons who are aggrieved by such abuses to obtain remedies. Such a system underlies the rule of law as opposed to a government of will.

In this connection, the rule of law requires that there should be a judicial system which is both impartial and independent of the executive and legislative authorities. That is, a judiciary that is capable of giving relief when one's rights or interests are infringed by an executive act, without being subjected to extra-legal pressures.

We must not lose sight of the fact that the impartiality and independence of the judiciary can be reinforced and rendered more meaningful by an independent legal profession. That is to say, the independence of the judiciary can have true meaning in a jurisdiction where lawyers are free from official or official-sponsored harassment in pursuit of their profession. In other words, in order to promote the independence of the judiciary, it is equally important that conditions are created under which legal practitioners would have nothing to fear when representing and assisting their clients even if the opposing party is a government institution.

In Namibia two prominent Articles that give constitutional support and practical effect to the principle of the rule of law are Article 18 and Article 78, paragraph (3) of the Namibian Constitution.

Article 18 which is aptly entitled "Administrative Justice" reads:

Administrative bodies and administrative officials shall act fairly and reasonably and com-

ply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court of Tribunal.

Article 18 forms a part of the Bill of Rights of the Namibian Constitution. As the right guaranteed to persons is justiciable, the Article constitutes a firm basis for respect for and the promotion of the rule of law in Namibia. Its provisions are meant to instil in government officials, including Ministers, a sense of justice and fairness in the discharge of their official duties. In this connection, the main object of administrative justice as a justiciable right is to enable the people to rely on the law to ensure that the power of administrative bodies and officials is exercised in a manner compatible with the ideas of fair dealing, good administration and good governance.

The independence of the judiciary which is one of the touchstones of the rule of law is also protected by constitutional provisions. Article 78, paragraph (3) of the Constitution provides:

No member of the Cabinet or the legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to the terms of this Constitution or any other law.

While the independence of the judiciary is vital for the protection of the rule of law, it must be pointed out that the judiciary alone, particularly in the developing countries, cannot ensure the rule of law to any marked degree with respect to the greater majority of our people. The judicial process and procedures remain highly technical, stereotyped and, above all, too expensive thus making the protection of many people by the courts against bureaucratic despotism beyond the reach of the average person in most developing countries. In this connection, it is important for Governments to establish or encourage Non-Governmental Organisation (NGO's) to establish extra-judicial institutions which would expeditiously and cheaply deal with public complaints against government authorities. The Ombudsman is such a body that can be established by Government.

Arbitration

A Possible Commonwealth Arbitration Service

A Discussion Paper prepared for the Commonwealth Secretariat by Mr Sharad Rao

Advocate of the High Court of Kenya

Introduction

1. At the 1990 Commonwealth Law Ministers Meeting held in Christchurch, New Zealand, Prince Bola Ajibola SAN, Attorney General of the Federation and Minister of Justice of Nigeria posed the question "whether the time has not come for careful examination of the possibility of setting up an international arbitration centre for the Commonwealth that could be an assignment that could be given to the Commonwealth Secretary General to consider and come back to us and give us some working papers on...."

2. The purpose of this paper is briefly to explore this possibility and to make suggestions as to how the matter might proceed. As little use has been made of intra-Commonwealth state arbitration, this paper offers brief observations only in regard to inter state arbitration and somewhat fuller observations in regard to international commercial arbitration. These may be expanded as necessary.

The Prospects for a Commonwealth International Arbitration Centre

A. *Inter State Disputes*

3. The concept of arbitration as a form of dispute settlement as distinct from adjudication by a court has existed in all countries and cultures. However, its evolution in modern international law was confined to a group of states from Europe and America with similar inter related cultures and similar legal traditions. Exercising as they did considerable power and influence internationally they were the principal creators of modern international law. In their hands arbitration evolved as an essentially judicial process with emphasis on the application of substantive and procedural rules, and the process which had hitherto certain "flexibility" became more rigid in its rules and procedures adopting the more formal process of judicial settlement.

4. Countries which played little, if any, part in this evolutionary process have a different perception of the arbitral process. To them arbitration although conducted "on the basis of respect for law" should take into account a wide variety of considerations including, where possible, the context in which the dispute occurred and a process under which neither party emerged as a winner or loser. In other words the award should have a "somewhat mediatory quality".

5. Difficulties arising out of these differing perceptions and differences as to the implications of a State's consent to submit to arbitration has among a variety of other reasons resulted in a reluctance on the part of States to engage in inter-state arbitration.

6. As against 66 inter-state arbitrations recorded in the period 1901 to 1910, 37 in the period 1911 to 1920, and 66 in the period 1921 to 1930, the popularity of inter-state arbitrations declined with only 16 recorded in the period 1931 to 1940, 6 between 1941 to 1950, 12 between 1951 to 1960, 9 between 1961 to 1970, 4 between 1971 to 1980 and only 3 between 1981 to 1990. (The three latest arbitrations being the agreement between US/Iran dated 19 January 1981, the Guinea/ Guinea - Bissau (Maritime boundary) agreement dated 18 February 1983, and the Egypt/ Israel (Taba) agreement dated 11 September 1986).

7. The Hague Convention for the Pacific Settlement of Disputes of 1899 brought into being the Permanent Court of Arbitration. In a classic definition of the arbitral process the Convention declared that "international arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law".

8. Today the Court of Arbitration exists side by side with the International Court of Justice, for the purpose, it seems, of serving either as an alternative mechanism for resolving legal disputes or as a means of settling other types of disputes or both. While the function of the International Court of Justice is to "decide disputes in accordance with the law", in arbitrations under the auspices of the Permanent Court of Arbitration differences are to be settled "on the basis of respect for law".

9. The Permanent Court of Arbitration is, of course, in no sense a court. It is in reality a panel of international lawyers nominated by states parties to the Hague Convention. Members of the panel are available to states wishing to select arbitrators from amongst them. The Court has a Bureau comprising a Secretary General, an Assistant Secretary General and a Secretary for day to day Secretarial work. Its Administrative Council comprises the Foreign Minister of the Netherlands as President and heads of the diplomatic missions at the Hague of States parties to the Convention.

10. Arbitrators selected from the Court heard thirteen

cases before the outbreak of the First World War, but after the creation of the International Court of Justice calls on the Court of Arbitration dwindled and it has in recent years played little or no role in the international arbitral process.

11. Two regional dispute settlement mechanisms were established subsequently, namely, in 1948 and 1957 by the Atlantic States of Europe and America and are worthy of note:

- (i) The American Treaty on Pacific Settlement (Pact of Bogota) of 1948, under which the parties agreed to settle their differences by regional pacific procedures before referring them to the United Nations Security Council. It provides a range of settlement mechanisms which include binding arbitration for "differences of any kind".
- (ii) The European Convention on the Settlement of Disputes of 1957 under which the parties are required to "submit to arbitration all disputes which may arise between them other than those mentioned in Article 1 and which have not been settled by conciliation, either because the parties have agreed not to have prior recourse to it or because conciliation has failed." (Article 1 refers to "International legal disputes", a term further elaborated by examples along the lines of Article 38 of the Statute of the International Court of Justice). It has thus indicated arbitration as the appropriate mode for resolving non legal disputes.

12. The International Law Commission's Model Rules on Arbitral Procedure completed in 1958, contemplated their general applicability by all States. These Rules specify the law to be applied along the lines of Article 38 of the Statute of the International Court of Justice referred to above, and restricted the power to decide "ex aequo et bono" only if agreement between the parties so provide. The Rules failed to find support of the developing countries and of Eastern Europe who opposed it on the ground that they violated what in their opinion was a basic principle of arbitration - the autonomy of the will of the parties.

13. Recognition of the problems associated with the use of arbitration to resolve inter-state disputes in its essentially judicial mode has given rise to several proposals as to how the arbitral process could be developed and applied. In "The Function of International Arbitration Today" in *Recueil des Cours* 1963, Professor Louis Sohn reviews several of these proposals for settlement of non legal disputes between states expressing his own preference for referring "non legal disputes to an international arbitral tribunal empowered to decide ex aequo et bono either in all cases or, at least, in so far as there is no rule of international law applicable to the particular dispute".

14. Perhaps the shared concepts and common expectations of the Commonwealth could benefit from an approach similar to the European Convention on the Settlement of Disputes of 1957. The topic needs detailed consideration with specialist advice to determine whether an understanding can be arrived at which could find general acceptance within the Commonwealth.

B. *International Contract Disputes*

15. International arbitration has established itself as the most widely adopted method for settling international contract disputes. Arbitration offers significant advantages in on-going commercial relationships in which the parties hope to be able to resolve any dispute which may arise without serious disruption of the relationship. It assures a measure of certainty: an assured channel of dispute resolution agreed in advance, which avoids the risk that any party may be faced with a choice of law or forum which it regards as either potentially biased or simply unfamiliar. It is flexible, expeditious and generally regarded as cost effective.

16. Efforts have been made from time to time to develop a uniform law for arbitration and uniform rules of procedure for application in international arbitration. Both ad hoc and institutional rules have been drawn to suit various disciplines and approaches to the conduct of dispute resolving process for example the 1975 Rules of the International Chamber of Commerce Court of Arbitration, Rules of the International Centre for the Settlement of Investment Disputes, the 1985 Rules of the London Court of International Arbitration, and Rules on Commercial Arbitration formulated by the International Law Association in 1950. A Uniform Law on Arbitration in Respect of Relations of Private Law was developed by UNIDROIT in 1935, revised in 1954, and amended by the Legal Committee of the Consultative Assembly of the Council of Europe in 1957. In 1966 the European Convention on International Commercial Arbitration of 1961 held under the auspices of the United Nations Economic Commission for Europe promulgated its ECE Rules for International Commercial Arbitration. In 1976 UNCITRAL adopted the UNCITRAL rules for ad hoc arbitration and suitable for adoption by arbitral institutions generally.

17. The UNCITRAL Arbitration Rules, which are gaining in popularity, were designed primarily to provide an international set of rules for commercial arbitration that would be acceptable in countries with different legal and economic systems. They were intended to serve a dual purpose, first, as rules of procedure of direct application, available to parties entering into an arbitration agreement, and, second, as a model set of arbitration rules to be incorporated into the rules of national and international arbitration centres. With

the expansion of international arbitration beyond traditional areas, the applicability of the UNCITRAL rules has extended to such fields as investment, joint ventures, transfer of technology, and other forms of industrial, technical and economic cooperation and include controversies and claims regarding the breach, termination, or invalidity of a contract.

18. Although originally intended as rules for ad hoc proceedings, the UNCITRAL arbitration rules are increasingly being used in institutional settings. A number of arbitral institutions which have their own established arbitration rules have accepted, in a variety of ways, the use of the UNCITRAL rules if parties so wished. Some institutions have adopted the rules with or without modifications as their own rules of procedure for international arbitration. These include the Regional Centre for Arbitration Kuala Lumpur, the Australian Centre for International Arbitration, and the British Columbia International Commercial Arbitration Centre. Others such as the London Court of International Arbitration embodied that option into their established institutional rules; yet others, such as the Euro Arab Chambers of Commerce, use the UNCITRAL rules as an alternative to their own rules, if the parties so desire.

19. Increasingly the question when to arbitrate is taking on a new meaning. It is becoming associated with the choice of whether to engage in a conciliation proceeding before considering the need for arbitration. Conciliation, too, is receiving growing attention as an alternative method for resolving international trade disputes.

20. Conciliation is a non binding process which involves the use of third persons to assist the parties to reach a settlement. Agreement to conciliate does not exclude the possibility of arbitration if the conciliation is not successful. The ICC has had conciliation rules for many years.

21. The United Nations Commission on International Trade Law adopted the UNCITRAL Conciliation Rules in 1980. These are regarded as the most complete and comprehensive conciliation rules available. The rules are flexible, yet are more specific than most other rules in provisions designed to safeguard the rights of the parties. They were developed by representatives of all geographic regions including capitalist and socialist states as well as developed and developing economies and are likely, therefore, to receive broad and world wide acceptance.

22. The parties and the arbitrators in these various established systems come from both civil law and common law jurisdictions and have a different approach towards the conduct of the process particularly as regards reception of evidence, both oral and written. The common law lawyers are accustomed to the adversarial

approach and the laying out of a case for judicial consideration and those with civil law background preferring an inquisitorial approach.

23. The process of international commercial arbitration, originating as it did, in Europe, has been largely influenced by the civil law system of continental Europe with its greater emphasis on the exchange of written pleadings as compared to the common law focus on oral hearings. Witnesses, if any, are heard only after a series of exchange of briefs and documents by both parties. Witnesses are called by the court rather than the parties and are examined by the Court itself. Counsel may put questions to adduce complementary testimony but their role is secondary. Common law proceedings place emphasis on hearings, oral testimony and the examination of witnesses. Documentary evidence play a secondary role.

24. The arbitrators tend to apply procedures which they are familiar with and apply principles of the legal system which they know best. But arbitrators may choose to apply procedures which are common to both systems or adopt certain features of each system, provided the essential elements of a fair procedure are respected and applied so that the award is enforceable. These elements comprise what is termed 'arbitral due process' which includes the right to be heard, the right to be informed of proofs and arguments, and the right to obtain an award based on the arbitrator's own opinion and judgment and not that of others. These generally recognised principles are common to both systems.

25. The Rt Hon Sir Michael Kerr, President of the London Court of International Arbitration said at a conference in Hong Kong (in 1980) that he favoured the use of the inquisitorial approach in arbitrations. He said that "in long and complex cases the Continental inquisitorial procedure is often more effective than our adversary system. It is better for the tribunal to limit discovery in the first instance, to appoint its own experts, and then to exercise control over the volume of discovery and the witnesses whom it wants to hear..."

26. The greater emphasis on written pleadings would reduce the amount of time the parties and the arbitrators must physically be together, thus reducing costs. The conduct of proceedings too is thought to be more flexible, enabling the arbitrators to study the contentions of the parties at their convenience, to confer without the need to travel except for the hearing proper, which would take less time as many of the matters will have been dealt with in the written pleadings.

27. Considered in the light of such conflicting principles and attitudes the establishment of an arbitral system for the Commonwealth which shares a common law heritage and concepts deserves consideration.

28. There has been in recent years an emergence of a considerable number of arbitral institutions offering

their services to settle international commercial disputes. The most important and widely used institution is undoubtedly the International Chamber of Commerce. Parties who arbitrate under the ICC rules are offered a full range of secretariat services by the Court of Arbitration of the International Chamber of Commerce. Similarly the London Court of International Arbitration offers comparable services to parties who wish to arbitrate under the LCIA rules. The UNCITRAL rules do not lay down secretariat services. However the rules contemplate that the arbitrators may arrange with an institution to provide such assistance.

29. The International Chamber of Commerce is located in Paris and is represented by national committees in over 50 countries. The Court of Arbitration of the International Chamber of Commerce is the international arbitral body of the ICC and its members are nominated by the different national committees. The ICC Court of Arbitration does not itself engage in arbitration. It supervises and assists in international arbitration proceedings conducted by arbitral tribunals established on a case by case basis according to the ICC rules. The conduct of the proceedings and the award rendering process fall within the domain of the particular arbitral tribunal. The Court of Arbitration meets three times a month, once in plenary session and twice in a committee of the court to decide on issues such as confirmation of or challenges to the appointment of arbitrators, approval of draft awards, fixing of fees and costs of arbitration.

30. There has been a steady increase in the submission of disputes to ICC arbitration. In 1977 the Secretariat of the ICC Court of Arbitration registered 205 arbitration cases; by 1987 that number had increased to 339 and by 1987 to approximately 700. By comparison the other known arbitral institution the International Centre for Settlement of International Disputes had between 1971 when the first request was filed before the ICSID and 1987, 23 additional requests lodged before it. The LCIA which had at the end of 1987, 21 pending arbitrations currently has around 60 pending cases and new references are filed at the rate of around 35 to 40 a year. Almost all cases have at least one non UK party and in over 80% of the cases the parties are non UK parties.

31. Over the last three years parties to disputes under the LCIA Rules included parties from 8 Commonwealth countries, namely Australia, Belize, Bermuda, Brunei, The Channel Islands, Hong Kong, Malaysia, and the United Kingdom.

32. Despite its international name and reputation the ICC is primarily a Western European institution. During the 9 years period between 1979 and 1988 over half of 5676 parties (54.5%) to ICC arbitrations came from Western Europe, 13.5% from Asia and the Far East, 6.2% from North Africa, 4.4% from the Middle East, 4% from sub-Saharan Africa, and 3.8% from Latin

America and the Carbine. Of these the Commonwealth content was as follows:

Western Europe: UK 275, Channel Islands 8, Cyprus 8, Malta 3

Far East: India 49, Australia 35, Pakistan 21, Singapore 20, Sri Lanka 17, Hong Kong 16, Malaysia 12, Bangladesh 9, New Zealand 5, and Brunei 2.

Africa: Nigeria 28, Kenya 7, Zambia 5, Seychelles 5, Ghana 4, Botswana 3, Namibia 3, Mauritius 2, Tanzania 2

America and the Caribbean:

Canada 60, Bermuda 29, Bahamas 22, Cayman Islands 14, West Indies 10

Total 674, Percentage of Total 11.87%

33. The ICC receives approximately 300 requests annually. Of these in one out of three cases proceedings take place in Paris. The jurisdiction of the ICC Court of Arbitration is limited to "business disputes of an international character". This term is not defined and the Court tends to interpret it broadly. The rules respect party autonomy including determination of the place of arbitration, selection of arbitrators, and stipulation of applicable law.

34. The International Centre for Settlement of Industrial Disputes (ICSID) was created by a treaty that obliges the signatory states to recognise an ICSID award as though it were a judgment of their own national court. It is located in Washington and is affiliated with the World Bank. However, the ICSID arbitration is available only if one party is a state or state agency. Like the ICC the ICSID does not itself engage in arbitration but provides simply the facilities. In contrast to the ICC (and UNCITRAL rules) the ICSID fixes the fees for the arbitrators. The current fee is 600 special drawing rights per day for meetings and hearings, or for any 8 hours work day. In addition the arbitrators are paid a per diem allowance of \$145.

35. The American Arbitration Association is an independent, non governmental, nonprofit organisation. The Association is governed by a Board of Directors and has a staff of over 400. It administers over 45,000 arbitrations annually. Just over 150 of these are international, and have involved on an average parties from thirty-five different countries. The AAA has developed supplementary procedures for International Commercial Arbitration. The AAA has adopted a specific set of administrative procedures for cases under the UNCITRAL Arbitration Rules setting forth in detail how the AAA would perform the functions of an appointing authority and provide administrative services in conformity with the UNCITRAL rules.

36. The London Court of International Arbitration is perhaps the oldest and best known facility offered within the Commonwealth. It was inaugurated in 1892 as the London Chamber of Arbitration on the initiative of the Corporation of London. It operates under the general direction of a Joint Committee of Management composed of representatives of the Chartered Institute of Arbitrators, the Corporation of the City of London and the London Chamber of Commerce. It consists of twenty six members who are leading practitioners in the field of international commercial arbitration.

37. The London Arbitration Centre consists of a complex of court rooms, retiring rooms and library, telex, fax and other communicating facilities, research and information services and staff support services. The functions of the LCIA court include:

ensuring the application of the rules; proper selection and appointment of arbitrators; dealing with challenges to arbitrators; ruling on disputes which may arise in the course of the proceedings; ensure the smooth functioning of the arbitration proceedings; and keeping the Rules under review.

38. In 1987 the LCIA introduced the concept of "users" councils, each with its own secretariat, covering the major trading areas of the world. "Users" are defined as corporate lawyers and others from international and multi national industrial, commercial and trading organisations; international lawyers and firms of lawyers; and practising arbitrators and number approximately 450 in just over 40 countries. The councils are designed to provide a more formal and structured relationship between the LCIA and the users. There are four councils at the present time, namely -

- (i) LCIA European Council covering all European and adjacent countries including Eastern Europe and the Middle East.
- (ii) LCIA North American Council covering North America and the adjacent countries;
- (iii) LCIA Asia Pacific Council covering South East Asia and the Pacific rim;
- (iv) LCIA Pan African Council covering sub Saharan Africa.

39. A Regional Centre for Arbitration was established in Kuala Lumpur in 1979 under the auspices of the Asian African Legal Consultative Committee in cooperation with and with the assistance of the Government of Malaysia. The centre is a non-profit making institute and has been established with a view to provide a system for settlement of disputes for the benefit of parties engaged in trade with and within that region.

40. The Vancouver Centre for Commercial Disputes was established in 1986 with funding from the provincial government and additional federal funding. The centre functions under the ICA Foundation of British

Columbia with trustees representing the provincial government, The University of British Columbia Law School, The Vancouver Board of Trade and the commercial, legal and arbitration communities. The centre is housed in Canada Place at Vancouver Harbour and provides facilities which include conference rooms, counsel rooms, witness retiring rooms, a library and communicating facilities. The centre also provides interpreters, and translators.

41. A number of other Commonwealth countries also offer secretariat services. These include Nigeria, India, Malta, Hong Kong, Singapore, and Australia.

42. Staffing - ICC and LCIA

(a) The ICC Secretariat is headed by a Secretary General who is assisted by a General Counsel. Immediate responsibility for the progress of each case file falls on the Counsel. There are 5 of them - generally young lawyers. They are identified to litigants as the persons responsible for the file. Each counsel (with the help of an assistant and a Secretary) takes responsibility for all aspects of the case.

(b) The LCIA has a Registrar, a Deputy Registrar (who is a qualified Solicitor) and secretarial and clerical staff.

Administrative Fees and Costs

43. Each request for arbitration under the ICC rules must be accompanied by an advance of \$2,000 in respect of administrative costs. The administrative costs charged are subject to a maximum. Fees are assessed by the Court at time of final award based on the degree of complexity, duration and any other particular circumstance. Costs are estimated at commencement, and each party is required to pay 25% of it at the outset, and the remaining 50% prior to the entering into effect of terms of reference. Interest from the advance is not credited to the parties and has become an important source of revenue for the ICC. ICC fees can be inequitable. If a claim is for a large amount, but is not complex and requires only one or two hearings the arbitrators fees are out of proportion to the work involved. Similarly administration fees are not directly proportional to the extent of the facilities used.

44. For large cases, ICSID arbitration is less expensive than ICC arbitration. This is so because the parties benefit from the World Bank's infrastructure and the arbitrators' fees are fixed on a per day rate.

45. The LCIA has chosen to fix the arbitrators fees on the basis of the time spent on the case rather than the amount. By way of guidance these are in the following range :

- £600-1,500 per day for meetings and hearings.
- £100-300 per hour for other time spent.

There is a provision which enables the court to disregard the schedule in order to avoid unjustifiably high

arbitrators fees when a case is settled early or resolved more easily than anticipated. A registration fee of £500 is payable in advance, and the time spent by the Secretariat is charged at the rate of £100 per hour.

46. The UNCITRAL rules do not prescribe administrative and arbitrators fees. The tribunal may request each party to make an equal deposit in advance to cover the cost of the arbitration, and later request supplementary deposits. UNCITRAL costs are defined to include fees of the arbitrators, their travel and other expenses, costs of experts appointed by the Tribunal, costs of witnesses, attorneys' costs, fees and expenses of the appointing authority. They prescribe that the fees of the arbitrators must be "reasonable in amount" taking into account the amount of time spent, the amount of the claim and the complexity of the case.

Establishment of an Institution for Arbitration

47. The minimum requirements of an institution of arbitration appear to be :

- (i) To arrange and provide facilities for hearings
- (ii) To arrange interpreters and transcripts
- (iii) To act as a conduit for exchanges of papers among parties and arbitrators.
- (iv) To arrange for deposits to cover the arbitrators' fees and other expenses.
- (v) Establishing and reviewing the arbitrators' fees
- (vi) Providing other secretariat assistance.

48. The centre would set the standard qualifications for arbitrators, establish and maintain a panel of arbitrators, set up and keep the rules of procedure up to date, set the administrative fees for services rendered to the parties and to receive and disburse all funds deposited by the parties in the course of their arbitration. The actual upkeep of a panel once it is established, is a continuing one if the parties are to be assured of available and competent arbitrators. The preparation of rules and clauses once established have also to be kept up to date. New conditions, current court decisions, or changes in laws require constant examination of these rules. There are at least a dozen standard clauses in current use. They are dictated by trade conditions, government regulations, or other factors that require special types of clauses. A constant analysis of these changes must be made.

49. It is pertinent here to examine the basic items of costs of establishing and maintaining such a system. In addition to staffing costs, and the cost of arranging the various matters referred to in Paragraphs [32 and 33] above, not in itself inconsiderable, there would be the initial outlay in providing equipment such as computers, type writers, copying machine, fax, stationery etc.

50. A system of arbitration cannot, therefore, be successfully established unless there is a sponsoring organ-

isation that is willing and able to finance its establishment, maintenance and operation. In the event that it is felt that a Commonwealth international arbitration service be established this could be done under the patronage of the Commonwealth Secretariat, within or in association with its Legal Division.

51. International commercial arbitration is a service industry and is subject to the same standards and exigencies as those which generally govern the business community notably in terms of competence and cost effectiveness.

52. The functions performed by an administrative institution greatly facilitate the conduct of the practical details of the case. But bearing in mind that excellent facilities are already available in various parts of the Commonwealth (such as for instance the London Court of International Arbitration in London, the Regional Centre for Arbitration in Kuala Lumpur, the Vancouver Centre for Commercial Disputes in Vancouver, and similar facilities in Singapore, Hong Kong and Australia and indeed in Nigeria, as referred to above) bilateral arrangements should be possible with these various centres to provide venues and services in the various regions of the Commonwealth and yet centrally administered without having to incur the added expense of providing such further facilities.

53. The executive functions of the organisation would be performed by professionally qualified staff, the judicial functions by members of Panels under established Rules of Procedure. Staffing could be modest at least initially. An Executive Director or Registrar, assisted by a Senior Administrative assistant and one or possibly two Secretaries could with the support services of the Legal Division be able to establish and provide these services competently yet economically.

54. The income sources:

- (i) Grants or contributions to be solicited from Governments and commercial bodies.
- (ii) Membership: By way of guidance the LCIA membership and fees are as follows:
 - (a) Large international and multi-national companies £500-650
 - (b) Law firms .. £350 to 450
 - (c) Small and medium sized companies, firms and associations .. £250 to 350
 - (d) Individual members .. £85 to 125

[A rough count of LCIA membership indicates a total membership of just over 450, of which 225 are Law firms, 75 are companies, 150 are individuals. Income from membership is approximately £150,000. The Commonwealth content of membership is estimated to be of the order of 240, and income from Commonwealth membership approximately £70,000.]

(iii) Fees from parties for administrative costs.

55. It should be borne in mind that whereas a centre may be "open for business" as soon as its rules of procedure, administrative structure etc are established it will not be "in business", so to speak, until its services are requested, and for this to happen the parties would have first agreed to refer its dispute to it. The staffing may, therefore, be staggered over a period of time as the situation may demand.

56. A small working group could be appointed to recommend a suitable set up and draw up rules of procedure. UNCITRAL rules with suitable modifications, if necessary, could be a useful starting point.

57. The International Bar Association has after detailed consideration on the subject made by members of a variety of common law and civil law systems drawn up Supplementary Rules of Evidence in International Arbitration designed to define procedures acceptable to parties from diverse systems of law.

Possible Commonwealth Scheme for Arbitration, Conciliation and Mediation

A Working Paper prepared for the Commonwealth Secretariat

by Dr. Barry Sen, former Secretary-General of the Asian African Legal Consultative Committee

1. The proposal to examine the possibilities for a Commonwealth Scheme for provision of services in the field of arbitration, conciliation or mediation originated from suggestions at the 1990 Commonwealth Law Ministers' Meeting in Christchurch, New Zealand. The communique then invited the Commonwealth Secretary-General to explore the possibility of providing such services and to report the result, at the next meeting of the Commonwealth Law Ministers. This paper is in response to that invitation and sets out the available options for consideration by Ministers.

2. The Hon Prince Bola Ajibola (Attorney-General and Minister of Justice, Nigeria) in the course of his statement requested careful consideration of the possibilities of setting up an International Arbitration Centre for the Commonwealth. He had observed that some other organisations of less significance in terms of numbers had been able to set up various types of systems for international commercial arbitration or international arbitration. The Minister added that if the type of centre he had in mind could be created, it might seriously address the issue of mediation, conciliation as well as that of arbitration. He further emphasised that the system be less expensive and if possible to be less complex than the existing ones and it should be able to function expeditiously.

3. In order to examine the question of a dispute settlement scheme for the Commonwealth three basic issues call for consideration, namely:

- (1) the types or classes of disputes sought to be resolved through a Commonwealth initiative;
- (2) the modalities to be employed for dispute settlement under a Commonwealth scheme; and
- (3) the organisational pattern of the facility to be created.

4. Before addressing these issues it ought to be emphasised that any Commonwealth scheme aimed at providing assistance in the matter of settlement of disputes must have as its objective the rendering of services exclusively in relation to (a) disputes and differences between two or more Commonwealth Governments or (b) other disputes, including commercial disputes between private parties, which have sufficient *nexus* with the Commonwealth. Such an exclusive use of the facility by Commonwealth entities is likely to provide the justification for the proposed initiative.

5. It may be stated that even the facility created under the auspices of the World Bank for settlement of investment disputes could be availed of by a State party of ICSID Convention 1965 or a national of a State party. Similarly the forums created for settlement of disputes by regional organisations arising out of interpretation or application of constituent treaties can be availed of only by the State parties or their nationals.

I. TYPES OR CLASSES OF DISPUTES THAT COULD BE BROUGHT WITHIN THE PURVIEW OF A COMMONWEALTH SCHEME

6. To facilitate examination of this question it is necessary to identify the situations where disputes and differences may arise as between or relating to Commonwealth countries. It is also pertinent to consider the existing modalities for resolution of disputes, to evaluate the efficacy or the shortcomings experienced, and to investigate the areas where a Commonwealth initiative is likely to prove productive.

A. Disputes and differences between states or governments in areas governed by Public International Law

7. Since the Commonwealth is a voluntary association of free nations, it is conceivable that disputes and differences would arise between two or more Commonwealth Governments in the same manner as between any other sovereign independent states. It is seen from past experience that the areas where controversies mostly arose between states were related to territorial claims or treatment of nationals. However, in recent years such disputes and differences have arisen more often over such matters as delimitation of maritime zones, border disputes, fishing rights, flights of aircraft, sharing of waters of international rivers, trans-frontier pollution, protection of investments and a variety of other matters. These can lead to protracted and very public disputes being heard before the International Court of Justice at The Hague.

Existing modalities for settlement of disputes and differences

Mediation and Conciliation

8. The traditional mode for settling disputes and differences when negotiations failed between the states has been to have recourse to the 'good offices' of another state or an individual dignitary to mediate, conciliate or

arbitrate on the dispute. In the days when the international community was confined to the European States, the use of 'good offices' of a third state or a group of states, or the mediation by a powerful monarch or the Pope had proved to be an effective means of settling disputes and differences.

9. In recent years, although on several occasions offers of mediation by eminent personalities are known to have been made for resolving disputes, very few of them appear to have been availed of. It had limited success in Latin America and the best known example where mediation seems to have proved effective was in the case of *Argentina v Chile* in regard to the disputes over the Beagle Channel, where after an effort to resolve the disputes through arbitration, the two countries sought the mediation of His Holiness Pope John Paul the II. Other recent examples where the Secretary-General of the United Nations was called upon to use his good offices, was over the "Rainbow Warrior" dispute between France and New Zealand and also in relation to the situation in Cyprus. Also the Organisation of African Unity had set up a Commission for conciliation, mediation and arbitration for resolving disputes between its member states but information is not readily available as to how far the services of the Commission have been availed of by the states concerned. The Arab League also provides machinery for the purpose of settling disputes between its member states through conciliation, mediation and arbitration, but to date this has not been fully utilised.

Arbitration

10. Arbitration through *ad hoc* tribunals composed of members chosen by the parties appear to have been resorted to more often as a means for settling differences between states. It has not been possible to monitor all cases where states have had recourse to this modality since little publicity is attached to some of the cases or they are not considered sufficiently important to be commented upon in legal literature. The absence of or minimised publicity available in the comparatively private arbitration procedure (in contrast to the limelight drawn to litigation before the Courts) could well be a distinct advantage to many Governments.

11. The classic examples where disputes had been resolved through arbitration can be found in the awards of *U.S. Mexico Claims Commission*, which related to the treatment of U.S. Nationals and their property, and the *Trail Smelter Arbitration* between the United States and Canada concerning Trans-Boundary pollution. Among the disputes submitted to *ad hoc* tribunals for arbitration since the year 1955 the following may be regarded as more important: -

- (a) *France, Great Britain and the United States of America v Federal Republic of Germany, 1955-1966*
Issue: Property, Rights and Interests in Germany.

- (b) *Argentina - Chile Frontier Arbitration, 1965-1966*
Issue: Boundary.
- (c) *Lac Lanoux Arbitration, 1957*
Issue: Use of International Rivers.
- (d) *Rann of Kutch (India v Pakistan) Award, 1965*
Issue: Territorial Dispute.
- (e) *Canada v United States of America, 1968*
Issue: Claims of United States citizens for real property damage occurring along the South Shore of Lake Ontario.
- (f) *Kingdom of Greece v Federal Republic of Germany 1972*
Issue: Claims originating from judgments of the Greek-German Arbitral Tribunal.
- (g) *Rio Encuentro: 1965-1968*
- (h) *France British Continental Shelf-Arbitration 1978*
- (i) *Dubai-Sharjah Frontier Delimitation Arbitration*
- (j) *Young Plan Loan Arbitration (Federal Republic of Germany v Belgium, France, United Kingdom and the United States of America, 1960.*
- (k) *Egypt-Israel - territorial claims 1988.*
- (l) *Iran-United States of America Claims Tribunal (Ongoing) - Property rights of U.S. Nationals.*

12. It may be stated that the disputes referred to the Iran U.S. Claims Tribunal, established as a part of the package contained in the Algiers Accords of 19 January 1981, are voluminous in number. It would be noticed that one of the major arbitrations was between two Commonwealth countries, namely India and Pakistan, in regard to certain territorial claims.

13. The main problems experienced in resorting to *ad hoc* arbitration have often been the difficulty in reaching agreement on a *comprise*, the determination of applicable rules, both substantive procedural, as well as the selection of the tribunal or its chairman in cases where the tribunal is composed of one member to be nominated by each party and the chairman to be chosen by agreement of the parties. Moreover, the protracted nature of the arbitration proceedings and the costs involved by way of fees of the arbitrators, the expenses of the secretariat as well as costs of representation through counsel, which are enormous and at times prove to be prohibitive, have prevented smaller nations from resorting to arbitration.

International Court of Justice

14. Another modality for resolving dispute is through recourse to the **International Court of Justice**. There are two possible avenues of approach to the Court, namely (i) under article 36(1) of the Statute of the Court where parties refer their disputes by means of a special agreement and (ii) under article 36(2) of the Statute where the Court exercises compulsory jurisdiction in

respect of legal disputes between states which had made declarations accepting such compulsory jurisdiction of the court.

15. Although the practice to have recourse to the Court was not uncommon during the first decades of the Court, the later years revealed a gradual decline in the number of cases being referred to the Court. It might be stated that out of 42 cases filed in the Court pursuant to its compulsory jurisdiction under article 36(2) of the Statute, more than one-half were instituted during the decade 1950-60 whereas in the decade following only four cases were instituted. In the 'seventies, a total of ten cases was instituted - and, indeed, since the second half of that decade the Court was concerned only with two such cases, and during the 'eighties, only two cases were instituted.

16. However, with regard to cases referred by agreement of parties some six cases were instituted during the past decade. The decline in the number of cases referred to the International Court of Justice was partly due to the general reluctance on the part of several states to accept the compulsory jurisdiction of the Court and partly due to other reasons such as the complicated procedural rules, heavy costs of representation through counsel and the composition of the Court. It was generally felt that the hearing of cases by fifteen judges was inappropriate for speedy solution of disputes, and the fact that the parties could have no choice in selection of the tribunal had also proved to be a disincentive.

17. However, after amendments to the rules of the Court, which made it possible for a case to be heard by a chamber of five to seven judges, the position improved. This, indeed, accounts for a larger number of cases being referred to the Court by virtue of special agreements during the past few years, some of which were to be heard by a chamber. Among the cases referred to the Court a Commonwealth Government was a party in four, and were between two Commonwealth Governments.

B. Interpretation and Application of Treaties and Conventions

18. Almost all Commonwealth countries/Governments have bilateral treaty relations with several other Commonwealth countries on a wide range of subjects, such as treaties of friendship and treaties of commerce, treaties providing for most favoured nation treatment for their respective nationals, treaties for extradition, air traffic agreements, treaties for sharing of natural resources including river waters etc. Commonwealth countries are also parties to numerous multilateral conventions including those which have been promoted under United Nations auspices. It is not uncommon for disputes and differences to arise which would involve the question of interpretation or application of a treaty and the same may have to be resolved through a dispute settlement mechanism between the states concerned.

Existing modalities for settling disputes

19. Normally a treaty or convention would spell out the modality or modalities for resolving differences arising out of interpretation or application of the particular treaty or convention. If the treaty is silent on the matter, the modality for dispute settlement would be determined by reference to the Vienna Convention on the Law of Treaties 1969. The usual modalities for settling disputes of this type is basically the same as for settling disputes in matters falling within the sphere of public international law namely, negotiation, conciliation, mediation, arbitration or through the International Court of Justice.

20. There are several treaties which provide for settlement of disputes through arbitration and among the cases where this modality was invoked mention may be made by way of example to the *Arbitration between Italy and USA 1965* and *Arbitration between France and the U.S.A. 1963-1978* concerning air transport agreements. Another case which went to arbitration relating to interpretation of a treaty was between *Austria & Germany in 1972*. In earlier years the general trend was to incorporate a provision in treaties and conventions for disputes to be settled through recourse to the International Court of Justice. However, during the sixties in most of the international conventions the provision for referring disputes to the Court had to be put in an optional protocol in view of the fact that the Court's jurisdiction for settling disputes arising out of the interpretation and application of the convention was not found acceptable to a large number of states. From the seventies the general trend has been against incorporating a provision in conventions and treaties for settlement of disputes by the International Court of Justice.

21. It may be mentioned that there are some multilateral conventions of a global character as well as conventions for regional co-operation which have in-built special mechanisms for settling disputes arising out of interpretation or application of the convention. An example of this is the treaty establishing the International Civil Aviation Organisation which provides for a machinery of its own for settling certain classes of disputes concerning air flights. Another is the U.N. Convention on the Law of the Sea 1982 which provides for several options for settling disputes and establishing a Law of the Sea Tribunal to which certain types of disputes can be referred by parties to the Convention. The treaty establishing the European Economic Community also provides for a European Court of Justice for determining matters which relate to the interpretation or application of the Treaty of Rome and other related treaties. The basic framework treaty for the establishment of the Preferential Tariff Area (PTA) and the Southern African Development Co-operation Council (SADCC) (both of which embrace a number of Commonwealth countries) also contemplates special machinery for set-

tlement of disputes. However, some treaties do not contain any such special machinery - like those constituting ASEAN and SAARC.

C. Disputes between a State and the Nationals of Another State

22. This type of case may arise when a foreign national suffers harm or bodily injury in the state of his or her residence or sojourn, or his or her property rights are affected through governmental action or the acts of a governmental agency or at the hands of a private person. In modern context such complaints are known to have been made where a person complains that he or she had been treated in violation of his or her human rights or has been denied right of residence, or the right to carry on a vocation contrary to the provisions of a bilateral or multilateral treaty such as the Treaty of Rome. There has also been occasion for complaint when foreign investments have been affected by change of law and the investor had been denied control over his or her investments or the right to repatriate profits. Such instances are not uncommon even in some of the Commonwealth countries in respect of the nationals, including bodies corporate of other Commonwealth countries.

23. In traditional international law, an individual aggrieved by the action of a foreign state resulting in loss or damage to his person or property could only approach the state of his or her nationality to take up his cause, because an individual had no right to proceed against a state before an international forum. The state of nationality in the exercise of its right of diplomatic protection of citizen abroad alone was competent to take up the matter with the foreign state concerned, and if differences persisted it could have the dispute resolved through one of the recognised modalities for settling disputes between states. It was the usual requirement that the aggrieved individual should pursue available remedies before the appropriate national forums of the foreign state concerned as a prerequisite to his or her claim being taken up by the state of his or her nationality.

24. However, in recent years some exceptions to this rule have been noticeable. For example, under the European Convention of Human Rights a person complaining of violation of his or her human rights by a state can have direct access to the European Court of Human Rights against that state. Similarly, the European Court of Justice is empowered to adjudicate upon complaints by individuals who are affected by the action of a state in derogation of the provisions of the Treaty of Rome and its subsidiary instruments. These instances can be understood in the context that the multilateral conventions in question themselves expressly provided for a machinery with exclusive competence in regard to interpretation and application of the provisions of those treaties and conventions.

25. It is felt that these precedents should not be extended beyond limited areas and as a general rule a dispute between an individual and a foreign state should be adjudicated before the national courts of the state concerned, and failing redress the state of nationality of the individual should take up his or her cause in the same manner as a state to state dispute.

D. Disputes of a Private Law Nature arising out of Economic and Commercial matters

26. This class of cases may be sub-divided as follows:

- (i) Disputes between a Government or governmental agency and the nationals (including bodies corporate) of another country.
- (ii) Disputes between nationals (individuals and bodies corporate) belonging to different countries.

27. In recent years, the broadening of governmental functions into the private law sphere has often brought government and state agencies into direct contact with nationals of other states. For example, the governments of developing countries and countries following socialistic pattern or economy usually make purchases of arms and equipment for their defence requirements and also make purchases of foodstuffs for maintenance of their rationing system. In addition several countries undertake developmental projects and some countries through state organs are known to carry on industrial, commercial and trading activities resulting in transactions of sales and purchase with nationals of other countries. Several Commonwealth countries are known to carry on activities of the types mentioned above.

28. The respective contracts which are entered into for the aforesaid purposes between a government or governmental agency and nationals belonging to other states usually contain provisions for settlement of disputes. The choice of modality for the purpose is usually a matter of negotiation between the parties. A wide range of dispute settlement procedures are available in this respect. Some contracts provide for resort to the national courts of the country of one of the parties; others sometime contemplate *ad hoc* arbitration by a sole arbitrator or a three member panel, both parties nominating one member each and the third member agreed upon by both the parties. The procedural rules applied in such arbitrations are either the national arbitration rules of the country where the arbitration is to be held or the UNCITRAL Rules of 1976. A number of contracts also provide for arbitration under the auspices of a national or international institution. Among international institutions, the most important is the International Centre for Settlement of Investment Disputes - Washington (ICSID) which was established under a Convention adopted in 1965 at the initiative of the World Bank to promote larger volume of investments in developing

countries. The Centre has its own set of rules for arbitration which provide for adjudication of disputes by a tribunal to be composed of arbitrators to be chosen from a panel maintained by the Centre. Arbitration under the auspices of ICSID can only be availed of in disputes between a state party to the 1965 convention or a state agency on the one hand and nationals of another state which has ratified or acceded to the 1965 convention.

29. The number of contracts which have incorporated the ICSID clause is fairly large and is being progressively used by states in respect of projects which represent investments by foreign nationals. The international dispute settlement procedure which is most widely used is the one provided by the International Chamber of Commerce (ICC) in Paris, which has its own procedures to be applied in arbitration proceedings. The American Arbitration Association which also has its own rules is resorted to in many contracts particularly in the western hemisphere. In recent years, various arbitration centres have been set up to provide facilities for settlement of disputes. Among such centres, mention may be made of the regional centres in Kuala Lumpur, Cairo and Lagos established under the auspices of the Asian African Legal Consultative Committee. Centres for arbitration have also been established in Hong Kong, Melbourne, San Francisco, Vancouver and a number of other places. The rules for arbitration applied by these centres are usually the UNCITRAL Arbitration Rules with suitable adaptation. Arbitration facilities are also provided by several associations of trade in disputes arising out of commodity transaction as well as in regard to shipping. Such institutions are located in London, Hamburg, Tokyo, etc.

II. NEED FOR A COMMONWEALTH DISPUTE SETTLEMENT FORUM

0. Notwithstanding the availability of a number of options in the modality for resolving the diverse types of disputes in the public law sphere as well as in disputes between a state and nationals of other states or between individuals belonging to different jurisdictions in relation to commercial and trading matters, it would seem to be worthwhile pursuing the idea of making available some kind of machinery within the Commonwealth for dispute settlement for more reasons than one.

31. In the first place, it would seem to be reasonable to contemplate that the Commonwealth - being an association of fifty independent nations, both large and small - should make available a forum for dispute settlement which could be availed of by its member nations, and where appropriate, in disputes involving Commonwealth Governments or their nationals in the private law sphere. Secondly, such a forum could be more readily availed of in view of the fact that the Commonwealth countries between themselves basically share a com-

mon system of law and also are able to transact business through the English language. Thus, a Commonwealth dispute settlement forum would be in a position to conduct proceedings in a single language avoiding all problems arising out of multiple interpretation. Moreover, the use of a common system of law on substantive issues could result in avoiding complexities arising out of conflict of laws which often hamper progress of dispute settlement through international forums. Furthermore, the familiarity of Commonwealth Governments and their nationals with Commonwealth institutions is likely to make a Commonwealth forum to be more readily acceptable to many governments, particularly those of the smaller nations of the Commonwealth. As adverted to (see para 10 above) there could also be the advantage of minimised publicity available under a relatively "private" Commonwealth scheme.

32. However, it is necessary to ensure that the use of the Commonwealth forum is entirely on a voluntary basis, that is to say that the forum would be available only where both parties to the dispute are agreed on the reference of a dispute. Experience has shown that compulsory procedures whereby a party could be brought before a dispute settlement forum without its consent have raised many misgivings, since the general trend evidenced in many Commonwealth countries is against acceptance of compulsory procedures. Furthermore, any scheme for a Commonwealth dispute settlement machinery is likely to be more attractive to smaller nations if simpler procedural rules than those applicable at the present in proceedings before international tribunals could be worked out and a system could be evolved for speedy disposal of cases and consequent reduction in costs.

III. CLASSES OF DISPUTES WHICH COULD BE CONSIDERED APPROPRIATE FOR RESOLUTION THROUGH A COMMONWEALTH MACHINERY

33. If a decision is taken to promote a scheme under the auspices of the Commonwealth with a view to assisting the member nations to resolve disputes through suitable modalities, it is suggested that the scheme should be geared to deal with the classes of disputes indicated below. Both the parties to a dispute must however agree upon its resolution by availing of the facilities provided under the Commonwealth scheme. Such agreement should be in express terms and appear from the provisions of a treaty or some other instrument whereby they agree in advance to settle their disputes through a particular mode of settlement of the dispute. The agreement may also appear from an instrument executed between the parties after the dispute has arisen.

A. Disputes between member states of the Commonwealth in the Field of Public Law

34. It is conceivable that some member states of the Commonwealth may wish to avail of the facilities offered through a Commonwealth scheme to settle their disputes and differences in areas broadly falling within the public law sphere such as border disputes, claims concerning maritime zones, the right of exploitation of resources in exclusive economic zones, the question extradition of fugitive offenders, or the question of admission and treatment of nationals in another Commonwealth country.

35. This might particularly be true of those nations which have preferred to keep a dispute unresolved, after arbitral tribunals or the International Court of Justice. Indeed a Commonwealth facility may be singularly attractive to some of the Commonwealth countries as a forum in which they would be willing to repose confidence in view of their familiarity with Commonwealth personalities as well as the applicable laws. Moreover, the possibility of mediation in regard to some of the disputes might become feasible through Commonwealth judges or other eminent Commonwealth personalities whose services may be obtained within the frame work of Commonwealth scheme.

B. Interpretation of Treaties

36. There are several bilateral treaties in existence on a wide range of subjects between states members of the Commonwealth and it is very likely that similar treaties would continue to be concluded between these states. The usual modality for settlement of disputes, generally incorporated in bilateral treaties is through negotiations, mediation or arbitration. It is possible that if disputes and differences between the parties do arise which cannot be resolved through negotiations, the parties may choose to go for mediation or arbitration, and in such cases a Commonwealth facility might become an attractive forum which they may like to approach. Moreover, in several multi-lateral instruments to which Commonwealth Governments are parties, arbitration is contemplated as one of the modes for settling any differences. Here also it is conceivable that if the question of interpretation or application of a treaty provision were to arise between two Commonwealth countries, the same may be sought to be resolved through arbitration under Commonwealth auspices.

C. Technical Assistance and Loan Agreements

37. Several countries of the Commonwealth like Australia, Canada and the United Kingdom provide loans and offer technical or economic assistance to the developing countries of the Commonwealth under bilateral executive agreements for building their infrastructure or undertaking projects of national importance. A Commonwealth scheme for settlement of disputes and differences could well be resorted to for the interpretation or application of such agreements, when the same cannot be resolved through negotiation. In such cases,

the agreements themselves should provide that the disputes and difference arising out of or in relation to the agreement would be settled through appropriate modalities provided for in the Commonwealth scheme.

D. Disputes between a Commonwealth Government and a National of another Commonwealth Country

38. It is felt that any dispute between Government and an individual or body corporate in relation to a matter falling within the field of public law, such as concerning personal or property rights should not be included within the purview of the Commonwealth Scheme. If such disputes were to arise, the individual or body corporate should have resource to the national courts of the country in question or request his own government to take up his case.

39. In regard to commercial or investment disputes between a Commonwealth government and an individual belonging to another Commonwealth country, it may be stated that there are already several international forums available for settlement of such disputes through conciliation or arbitration. It is, however, one category of case where a Commonwealth forum may be useful i.e. in cases where a Commonwealth Government enters into a Commercial transaction or agreement for construction of a project or transfer of technology with a national of another Commonwealth country and that activity is financed wholly or substantially through a programme or assistance or loan by the country of his nationality. It would seem that in many cases where a Government sanctions a loan or provides economic or technical assistance to another country for a particular activity, the recipient government is required to obtain goods, such as plant, machinery, technical know how etc. as well as services from the aid giving country. For that purpose contracts are usually entered by the Government receiving assistance or one of its agencies on the one hand and an individual or body corporate located in the aid giving country on the other, the terms and conditions of which are usually subject to the approval of the latter. It is seen from experience that in the course of execution of such projects, disputes and differences do arise between employer and the contractor. These disputes need to be speedily resolved in order to ensure due progress of the projects but the existing systems of dispute settlement are not sufficiently geared to ensure expeditious disposal of such cases. Moreover, in such cases the Government receiving assistance for the project as well as the government providing aid have a direct interest in the matter of settlement of such disputes.

E. Disputes between Nationals of two or more Commonwealth Countries

40. Disputes of this type normally arise in relation to commercial matters including trade and investments. As already stated, there are several existing modalities

available for settlement of disputes in such matters. It is therefore for consideration whether the Commonwealth Scheme should also make available an additional facility for settlement of such dispute between nationals of Commonwealth countries.

IV. ORGANISATION OF A DISPUTE SETTLEMENT MECHANISM WITHIN THE COMMONWEALTH

41. In determining the pattern of a dispute settlement mechanism within the Commonwealth, it may be pertinent to keep in perspective the basic features of the Commonwealth itself, which is a voluntary association of independent nations. The Commonwealth is not an international organisation in the conventional sense, nor is the subject matter of association between its member nations governed by a multilateral treaty or convention. Nevertheless, the Commonwealth does have a number of the characteristics of an international organisation. For example, every new member has to make a declaration concerning its membership of the Commonwealth; there are procedures and practices governing admission of members; it has a permanent secretariat whose expenses are shared between Commonwealth Governments; and the Commonwealth Secretariat has observer status at the United Nations in the category of being an Inter-governmental organisation.

42. Consistent with these features of the Commonwealth, it is felt that it would not be appropriate to contemplate formulation of a scheme which would introduce any form of institutional structure for compulsory procedures for settlement of disputes. The aim should, therefore, be merely to provide a facility which could be availed of, if the parties so agreed, in certain stated category of cases to assist Commonwealth Governments and other entities to settle their disputes and differences. Such a pattern of Commonwealth assistance might be more acceptable in view of the reluctance of many developing countries of the Commonwealth to submit to compulsory procedures. However, the scheme should provide for some form of organisational machinery so as to facilitate settlement of disputes and differences in an orderly and expeditious fashion. It is therefore suggested that a facility should be created within the Commonwealth Secretariat to be known as the Commonwealth Centre for settlement of disputes.

A. The Commonwealth Centre for Settlement of Disputes

43. The Centre might be established as an organ of the Commonwealth Secretariat, by means of a resolution or decision taken at a meeting of Commonwealth Law Ministers which might be appropriate for the purpose. Alternatively, this could be done by means of an admin-

istrative decision of the Commonwealth Secretary-General pursuant to an understanding reached or recommendation made at an appropriate Commonwealth Heads of Government meeting. The Commonwealth Centre for dispute settlement (hereinafter referred to as the 'Centre') should be headed by a Registrar, who might (at least initially) be the Director of the Legal Division (ex-officio). The Centre might in time require such number of technical and administrative staff as the Secretary-General considered appropriate and as the volume of work might require. Applying a "user pays" principle should mean that the creation of the Centre would have no implications for the regular budget of the Secretariat.

44. It might be stated that in some organisations like the EEC, the Arab League, the Arab Co-operation Council, the SADCC or the PTA where dispute settlement machinery have been created or are contemplated to deal with matters arising out of interpretation or application of the parent treaty creating the organisation or to regulate the relationship among member states in respect of matters covered by the treaty, the disputes settlement machinery is not made a part of the Secretariat. This is because under those schemes the Secretariat of the organisation can in certain circumstances be made a party to the dispute. However, these considerations do not arise in the case of any Commonwealth scheme for dispute settlement, and there would not appear to be any difficulty in making the Centre a part of the Secretariat. This will indeed help in keeping down the administrative costs of the disputes settlement machinery.

B. The Functions of the Centre will include the following

- (a) To provide information concerning the types of disputes that could be resolved through the Commonwealth Dispute Settlement machinery and the modalities that could be availed of for the purpose, through publication of brochures and other appropriate means;
- (b) To formulate rules, subject to the approval of the Commonwealth Governments, applicable to various categories of disputes including the modality for settlement and the procedures to be followed;
- (c) To compile, in consultation with Commonwealth Governments, a list of arbitrators whose services may be available in settling disputes and differences between Governments; and to compile an additional list of arbitrators competent to serve in tribunals to be established in economic and commercial disputes of a private law nature;
- (d) To receive and register requests for settlement of disputes in accordance with the rules; to receive pleadings submitted by the parties to a dispute and to verify their conformity with the rules of the Centre;

- (e) To assist parties in the selection of the tribunal or settlement of disputes, to keep custody of records, to assist the tribunals in the hearing and disposal of cases, to monitor progress of proceedings and to ensure their speedy disposal.
- (f) To receive decisions or awards on the disputes submitted to the Centre, and to communicate them to the parties.

V. MODALITIES FOR DISPUTE SETTLEMENT AND APPLICABLE PROCEDURES

A. Disputes between Commonwealth Governments

(a) In regard to all categories of disputes and differences between two or more Commonwealth Governments which have been submitted to the centre for settlement, there should be an option provided to settle the differences through mediation, conciliation or arbitration and the parties should be asked to agree upon the choice of the modality and indicate the same at the time of filing of their request to the Centre. However they should have the liberty to communicate their choice within a reasonable period as may be provided for in the rules. The parties should also have the liberty, if they so agree, to alter the choice of modality even after communicating their choice to the Centre; for example the parties may initially decide to go for mediation, or conciliation but later in the light of circumstances they may consider arbitration to be a more appropriate procedure; similarly the parties may initially agree to go for arbitration but may later opt for conciliation or mediation as being more effective. However, the choice of modality should not be altered after a particular procedure in accordance with the agreement of parties have commenced. This should be allowed to be completed. There would, however, be no bar to fresh initiation of proceedings, if the parties so agree after the procedures under the modality chosen has failed to resolve the dispute. In the absence of agreement between the parties on the choice of modality after the dispute has been submitted to the Centre, the dispute or the difference should only be resolved through arbitration.

(b) Where parties to a dispute agree upon their differences being resolved through mediation, the parties should communicate to the Centre the name of the agreed person whom they wish to act as Mediator, together with his consent to act as such, at the time of the reference of the dispute to the centre or at any time thereafter within the limitation of time that may be prescribed. Alternatively, they may seek the assistance of the Centre on the choice of a Mediator, in which event the Centre

shall communicate to the parties the names of five individuals who may be prepared to act as Mediator. If the parties fail to agree to any one of those names, the proceedings for mediation shall be terminated. Where a Mediator has been duly appointed, the Centre shall transmit to him the statement of cases filed by the parties together with all relevant documentation. The Mediator shall apply such procedures and principles of law as might appear to him to be just and proper. The Mediator shall transmit to the Centre the result of his efforts which shall be final and binding on the parties and thereafter the proceedings shall be terminated.

- (c) In cases, where the parties choose to submit their disputes and differences to the Centre for conciliation the parties should in the first instance be invited to agree upon the choice of a single conciliator or a panel of three Conciliators. Where the parties fail to reach agreement the Commonwealth Secretary-General shall, after consultation with the parties, constitute the Conciliation Commission composed of a single member or of three members chosen from the panel of arbitrators maintained by the Centre. The procedure for conciliation will be governed by the Centre's rules. It is suggested that in the formulation of the rules by the Centre, the procedures applicable under the UNCITRAL Conciliation Rules and the ICSID Conciliation Rules may be consulted. The ICC Conciliation rules would appear to be simpler and might provide useful guide lines.

(d) In regard to cases where disputes or differences have to be referred to arbitration either because the parties have so requested or where parties have failed to agree on any other mode of settlement of disputes under the auspices of the Centre the following procedure might be followed:

(i) The parties may jointly initiate proceedings by filing a *compromise* with the Centre or by filing a request for arbitration together with the instrument or a copy of the instrument evidencing the agreement of the parties to have the disputes and differences resolved through the Centre. It should also be possible for either party to initiate proceedings by filing with the Centre a request for arbitration if both the parties had earlier executed an agreement to have their disputes and differences settled through arbitration under the auspices of the centre. Upon receipt of such a request the centre shall issue notices to the opposite party named in the request. After the second party has entered appearance or the expiry of period of notice, the Centre shall proceed to constitute the Arbitral Tribunal.

(ii) The Arbitral Tribunal should be composed of three members chosen out of the Panel of

Arbitrators maintained by the Centre. Each party should be entitled to select a member and the third member shall be jointly chosen by agreement of both parties but failing such agreement, the appointment of the third member shall be done by the Commonwealth Secretary-General. If a party fails to nominate its arbitrator, the Commonwealth Secretary-General should be competent to nominate a person chosen from the panel of arbitrators. The Arbitral Tribunal will have the option to appoint experts or assessors to assist in its deliberations.

(iii) After the tribunal has been constituted, the Centre shall transmit to each member of the tribunal a copy of the statement of cases filed by the parties together with the relevant documents. The centre shall render all facilities and provide assistance to the tribunal for hearing of the case.

(iv) The procedure to be followed in arbitration proceedings should be governed by the Centre's rules. Such rules might be based on the UNCITRAL Arbitration Rules or the ICSID arbitration rules or the draft procedures drawn up for the Committee on Peaceful Settlement of Disputes of the United Nations. However, these rules will need to be suitably modified and adapted to make the procedure much simpler. It may be stated that the UNCITRAL Arbitration Rules were recommended by the General Assembly of the United Nations for settling disputes of a commercial nature but these have been used with suitable adaptation and modification even in disputes between governments such as the United States - Iran Claims Tribunal. These rules have also been prescribed for use in arbitrations under the U.N. Convention on the Law of the Sea. The ICSID Arbitration Rules, which were formulated in pursuance of the 1965 ICSID Convention are applied in disputes between states and individuals in the matter of investments. The draft rules prepared for the Committee on Pacific Settlement of Disputes is intended to be applicable in disputes between states but these have not been adopted so far.

B. Panel of Arbitrators

45. The Centre shall prepare and maintain a list of names whose services may be available to serve as arbitrators. The list should include preferably the names of persons who are or have been judges of the highest court of a Commonwealth country on the basis of recommendations received from the Governments. There should be at least one person in the panel from each Commonwealth country unless the Government concerned declines to make its recommendation. The reasons for the suggestion that the arbitrators who may be called upon to decide disputes between the member states of the Commonwealth should be sitting or retired judges of the highest courts of Commonwealth countries are two-

fold. Firstly, in most Commonwealth countries the judges command a great deal of prestige and have generally the reputation of being impartial and independent. Secondly, it could be expected that the judges would be prepared to serve on the tribunals for a moderate honorarium and not charge the fees required to be paid to eminent Queens Counsel or Law Professors of standing. There is also the fact that full use is presently not being made of a number of the Commonwealth's outstanding jurists from developing countries. Recognition of their scholarship and independence in this way might serve to strengthen local judiciaries.

C. Venue

46. The proceedings under the auspices of the Centre whether it be for arbitration, conciliation or mediation should be allowed to be held in any Commonwealth country which the parties may choose as appropriate for the purpose. However, in the absence of agreement the proceedings should be held in London at the seat of the Commonwealth Secretariat.

D. Costs

47. It would be important to ensure that the establishment of the Centre had no ramifications for the Commonwealth Secretariat's regular budget.

48. At the same time, one of the points emphasised by Prince Bola Ajibola at the Commonwealth Law Ministers Meeting in New Zealand was that the Commonwealth facility for dispute settlement should be aimed at keeping down the costs of litigation. This could be achieved if the persons on the panel of arbitrators agree to serve on the tribunals for a modest honorarium and consider their assignment, at least in part, to be a service to the Commonwealth community. The administrative charges of the Centre should be kept at a bare minimum to cover its costs.

49. It would also help if the procedural rules to be followed are less complicated and the proceedings can be terminated expeditiously. The difficulty experienced in *ad hoc* arbitrations have often led some countries to refrain from having recourse to such procedures. A further consideration is the mounting costs which have to be paid in fees to the arbitrators and to the secretarial staff assisting them. In ICC arbitrations concerning commercial disputes, the fees paid to the arbitrators are comparatively low but the administrative charges levied by the ICC Secretariat impose almost a prohibitive burden.

50. In the case of references to the International Court of Justice, the problem is somewhat different since the parties do not have to contribute towards the costs of the court. However, the complicated and protracted nature of proceedings in the International Court of Justice creates an impression that it is only through engagement of most expensive team of lawyers from western countries that a case could be adequately presented. Bearing in

mind the above considerations it is suggested that the Centre should fix a scale of honorarium to be paid to an arbitrator, mediator or conciliator for each day he is engaged on a given case, as well as the administrative costs of the Centre incurred in a particular case.

51. Subject to the above it is suggested that the parties to a dispute should initially bear in equal proportion the costs incurred in a given case. Such costs would include the honoraria and expenses payable to the conciliators, mediators or arbitrators, as the case may be, the expenses incurred by the Centre in providing technical and secretarial assistance to the tribunal as well as the administrative charges of the Centre.

E. Disputes between a Commonwealth Government and the National of another Commonwealth Country or between Nationals of two or more Commonwealth Countries

52. If it is decided that the disputes in the economic and commercial spheres falling within any of the above categories should be included within the Commonwealth scheme for dispute settlement, it is suggested that such

disputes should be resolved through conciliation or arbitration as may be agreed upon between the parties. The Conciliation Commission as well as the Arbitral Tribunal should be chosen from a list of arbitrators to be maintained by the Centre.

53. The list shall be compiled by the Commonwealth Secretary-General after inviting the recommendations of the Governments of the Commonwealth countries and the person included on the panel must be fully conversant with economic and commercial matters. It is suggested that a separate set of conciliation and arbitration rules shall be prepared by the Centre for this category of disputes which may be based on the UNCITRAL Arbitration Rules or the ICSID Rules subject to suitable adaptations or modifications. A separate set of administrative charges of the Centre and the scale of fees payable to the arbitrators or conciliators should also be prepared.

Commonwealth Arbitration

Memorandum by the Commonwealth Secretariat

1. When Law Ministers met in Christchurch in 1990, the Minister of Justice and Attorney-General of Nigeria, Prince Bola Ajibola, (now, of course, a Judge of the International Court of Justice at The Hague), suggested that the time might have come "for careful examination of the possibility of setting up an international arbitration centre for the Commonwealth".

2. In its communiqué, the Meeting noted in para 33 that international arbitration could be both time-consuming and unduly expensive, and agreed to invite the Secretary-General to explore the suggestion that there was potential within the Commonwealth association for enhanced co-operation in this area, and also in mediation and conciliation.

3. In response, the Secretariat commissioned two papers (before this Meeting as LMM(93)27 and LMM(93)28). The papers were given preliminary consideration by Senior Officials when they met in Singapore, but only in so far as the proposals concerned the resolution of international commercial disputes. It was felt that the second question - whether inter-state Commonwealth disputes should be covered by Commonwealth arrangements - required initial consideration at the broad policy level before it was considered in detail by Senior Officials.

International commercial disputes

4. In respect of international commercial disputes, the Senior Officials Meeting decided to establish a small working group to undertake a study of a proposed somewhat more limited arrangement; one which would not establish a new centre but rather would focus on making maximum use of existing (and future) international arbitration centres in various parts of the Commonwealth. The attached Draft Report from the Working Group was prepared by the group's convener in the light of discussions at Singapore and subsequent exchanges of correspondence. It has not been formally agreed, in that some members have not yet responded to the final paper, but it is believed to reflect a consensus view and it is therefore before this Meeting for consideration for adoption.

Inter-state disputes

5. The question of inter-state Commonwealth arbitrations is a matter which raises issues that would need to be discussed at the highest level and therefore re-

quires no more than preliminary consideration by Law Ministers at this stage. Accordingly the Meeting is asked to consider whether, in the light of the two papers above-mentioned, there would be merit in exploring the development of the option for governments, should they wish to do so, to determine inter-state intra-Commonwealth disputes through an appropriate mechanism. If so, such guidance might include how the matter might best be progressed from this point forward. One option would be for the proposals in the papers to be considered in detail by the next Meeting of Senior Officials of Commonwealth Law Ministries, in the light of the discussions at Mauritius under this agenda item.

DRAFT REPORT OF THE WORKING GROUP ON THE PROPOSED COMMONWEALTH ARBITRATION ASSISTANCE SERVICE ("CAAS")

1 Senior Officials of Commonwealth Law Ministries meeting in Singapore from 30 March to 2 April 1992 requested a Working Group consisting of representatives of Singapore (Convener), Australia, Canada, Hong Kong, India, Nigeria, Pakistan and Sri Lanka to study the proposal for the establishment of a Commonwealth Arbitration Assistance Service. The mandate of the Working Group was to undertake such a study and to report its findings. It was also to report on the scope and functions of the proposed Service, its organisational and administrative structure, and the costs and funding implications of having such a Service.

Background

2 At the meeting of Commonwealth Law Ministers held in Christchurch, New Zealand, from 23 to 27 April 1990 Ministers noted that international arbitration could be both time-consuming and unduly expensive, and it was suggested that there was potential within the Commonwealth association for enhanced co-operation in this area, and also in mediation and conciliation. They agreed to invite the Commonwealth Secretary General to explore this suggestion, and to report when next they met.

3 At their Singapore meeting in 1992 Senior Officials had before them discussion papers prepared by Dr Barry Sen and by Mr Sharad Rao, as well as a memorandum on the subject from the Commonwealth Secretariat. At the conclusion of their discussions Senior Officials recognised the need to facilitate an inexpensive yet effective system of dispute resolution for commercial disputes utilising existing resources, expertise and facilities.

4 There was clear consensus among Senior Officials that there should not be a new arbitration centre as such set up on a pan-Commonwealth basis, which could result in duplication of efforts of national centres and would require substantial long-term funding. Accordingly, Senior Officials decided to invite a small working group to undertake a detailed study of the establishment of a Commonwealth Arbitration Assistance Service.

5 Senior Officials agreed that the terms of reference of the Working Group should include making proposals on:

- (a) The scope and functions of the proposed Service, its organisational and administrative structure; and
- (b) costs and funding implications of such a Service.

6 Countries indicating a wish to participate in the Working Group are mentioned in paragraph 1 of this note. It was agreed that the Working Group would be self-financing (ie Governments participating to pay their own costs) in respect of its work and meetings.

Working Group

7 The Working Group conducted discussions through correspondence and is pleased to recommend to the Law Ministers for adoption the formation of CAAS along the lines set out hereunder.

Objectives of CAAS

8 CAAS is a service to provide assistance to Commonwealth users to facilitate an effective and cost-efficient system of dispute resolution for commercial disputes utilising existing Commonwealth resources, expertise and facilities. It is to complement, not compete, with existing Commonwealth national or regional arbitration centres.

9 The objectives of CAAS shall be:

- To assist, encourage, promote and facilitate the resolution of international disputes by arbitration, conciliation and other methods of alternative dispute resolution within the Commonwealth; and
- To harness and optimise the use of existing resources, expertise and facilities within the Commonwealth for this purpose.

Structure and administration

10 The facility is a service arrangement, not intended

to be a functional arbitration centre, for the coordination and handling of information and associated aspects relating to arbitration and for the rendering of assistance to Commonwealth countries and interests in all these matters. The Service will be administered by the Commonwealth Secretariat from its headquarters in London.

11 As the facility is essentially an information service which could be initiated by and within the current mandates of the Legal Division of the Commonwealth Secretariat it is envisaged that its administration will not require any extra staff or substantial funding.

Advisory Committee

12.1 There shall be an Advisory Committee of not more than _____ which will advise and assist the operation of the facility. (The Committee may call for or raise funds to cover any non-recoverable expenses of the Service).

12.2 Members of the Committee shall be persons nominated by Member States from their national arbitration centres. Each member state shall be allowed to nominate 1 person only.

12.3 If there are more nominees than _____, the nominees shall elect from amongst themselves _____ to serve on the Committee.

12.4 The term of the Advisory Committee shall be 1 year but members may be renominated or re-elected.

12.5 The Advisory Committee shall meet at least once a year.

12.6 Each member or nominee shall be responsible for the expenses of their own participation.

Functions

13 CAAS will undertake the following functions:

- (a) Serve as repository for arbitration rules, relevant legislations and judicial or arbitral decisions in the Commonwealth.
- (b) Promote harmonisation of arbitration laws and the accession by Member States to international conventions on arbitration.
- (c) Provide information on the arbitration centres or schemes available in the Commonwealth, and the types of services which those centres or schemes could offer.
- (d) Provide information concerning the types of dispute which could be resolved through existing Commonwealth arbitration centres, and the modalities for their resolution.
- (e) Provide information on the courses or programs available for the training of arbitrators, mediators and other ADR professionals.
- (f) Compile in consultation with Governments and arbitration centres lists of appropriate Common-

wealth persons competent and qualified to serve as arbitrators, conciliators, mediators, tribunal members or willing to serve in any specialist capacity.

- (g) To provide such other related assistance as may be requested by Commonwealth users.

Requests for assistance

- 14 Commonwealth users wishing to seek assistance under the CAAS may make requests through -

The Director
Legal & Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom
Tel: 071 747 6410
Fax: 071 747 6406

Costs incurred by the Commonwealth Secretariat in connection with the requested assistance shall be borne by the requesting party. The Commonwealth Secretariat may charge such administrative fees as it deems appropriate.

Costs and Funding

- 15 Initial start up costs may not be substantial but would necessarily be incurred for:

- (i) collation of information to form basic database on arbitration legislation, rules, judicial or arbitral decisions;
- (ii) setting-up of database including computer hardware, software and database costs;
- (iii) dissemination of information on the service.

- 16 Initial funding may be by way of contributions from Member States. Subsequent funding shall be the responsibility of the Advisory Committee.

- 17 The CAAS should be implemented for a trial period of 5 years. Thereafter Law Ministers may decide to continue or discontinue the service depending on whether the service meets the needs of Member States.

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