

1986 Meeting of Commonwealth Law Ministers

and Senior Officials

Harare, Zimbabwe
26 July — 1 August, 1986

Memoranda



Commonwealth Secretariat

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Harare, Zimbabwe

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MEMORANDA

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PREFACE

Commonwealth Law Ministers from 36 jurisdictions met in Harare, Zimbabwe from 28 July - 1 August 1986. This volume contains most of the Memoranda prepared for, and during, that Meeting. Also included are the Meeting's Annotated Draft Agenda and Communique. The Minutes of the Meeting and classified Memoranda are published separately, and are only available to Member Governments. A major paper, "Issues in Reproductive Health Law in the Commonwealth", is published separately.

A series of meetings of Senior Officials began on 26 July 1986 and continued during the Ministerial Meeting.

Commonwealth Law Ministers meet regularly at approximately three-yearly intervals. They are scheduled to meet next in New Zealand, early in 1990.

CONTENTS

<u>PREFACE</u>	<i>iii</i>
<u>COMMUNIQUE</u>	<i>xi</i>
<u>ANNOTATED DRAFT AGENDA</u>	<i>xxi</i>
<u>MEMORANDA</u>	
PRE-TRIAL REMANDS IN CUSTODY	1
The Increase in Pre-Trial Remands - A Challenge to Criminal Legal Systems (A Paper by Mr W Clifford, Executive Director of the Asian and Pacific Conference of Correctional Administrators, formerly Chief of the United Nations' Crime Prevention Branch, presented by the Commonwealth Secretariat) [LMM(86)9]	Com.Sec. 3
Pre-Trial Remands in Custody (Memorandum by the Government of Hong Kong) [LMM(86)28]	Hong Kong 10
Pre-Trial Remands in Custody (Memorandum by the Government of Ghana) [LMM(86)34]	Ghana 14
Aspects of Pre-trial Criminal Process in Zambia (Memorandum by the Government of Zambia) [LMM(86)50]	Zambia 18
Pre-trial Remands in Custody - Uganda's Experience - (Memorandum by the Government of Uganda) [LMM(86)52]	Uganda 24
Pre-trial Remands in Custody (Memorandum by the Government of Canada) [LMM(86)58]	Canada 30
THE INTERNATIONAL TRACING, FREEZING AND FORFEITURE OF CRIMINAL PROFITS	33
The International Tracing, Freezing and Forfeiture of Criminal Profits (Memorandum by the Government of Ghana) [LMM(86)35]	Ghana 35
Combating Organised Crime (Memorandum by the Commonwealth Secretariat) [LMM(86)40]	Com.Sec. 39
RECENT DEVELOPMENTS IN COMBATING DRUGS TRAFFICKING	51
Drug Abuse and Illicit Trafficking - A Commonwealth Initiative (Memorandum by the Commonwealth Secretariat and a Paper by Dr. S K Chatterjee of the City of London Polytechnic) [LMM(86)21]	Com. Sec. 53
Recent Developments in Combating Drug Trafficking: Areas of Possible Commonwealth Co-ordination (Memorandum by the Government of Britain) [LMM(86)23]	Britain 88
The Hong Kong Experience in Attempting to Reduce the Demand for and Supply of Illicit Drugs (Memorandum by the Government of Hong Kong) [LMM(86)25]	Hong Kong 127

Developments in Combating Illicit Narcotics Trafficking (Memorandum by the Government of Malaysia) [LMM(86)27]	Malaysia	145
Measures Taken by Singapore in Combating Narcotics Trafficking (Memorandum by the Government of Singapore) [LMM(86)42]	Singapore	150
Recent Developments in Combating Drug Trafficking (Memorandum by the Government of Ghana) [LMM(86)43]	Ghana	155
Drug Abuse and Drug Trafficking: The Zambian Experience (Memorandum by the Government of Zambia) [LMM(86)49]	Zambia	159
VIOLENCE AGAINST WOMEN		167
Violence Against Women (A Paper prepared by Jane Connors, B.A. LL.M. (ANU), Department of Law, School of Oriental and African Studies, London and presented by the Commonwealth Secretariat) [LMM(86)26]	Com.Sec.	169
Violence Against Women (Memorandum by the Government of Ghana) [LMM(86)36]	Ghana	210
MUTUAL ASSISTANCE IN THE COMMONWEALTH		213
Commissions of Inquiry Sitting in Other Jurisdictions (Memorandum by the Government of Australia) [LMM(86)16]	Australia	215
The Implementation of The Hague Convention on International Child Abduction within the UK (Memorandum by the Government of Britain) [LMM(86)19]	Britain	222
Multilateral Conventions Relating to International Terrorism (A Paper by Mr David Lloyd Jones, Fellow of Downing College, Cambridge) [LMM(86)31]	Britain	227
The Hague Convention on the Civil Aspects of International Child Abduction (Memorandum by the Government of Canada) [LMM(86)39]	Canada	278
REVIEW OF THE ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD		
Review of Activities of the Commonwealth Secretariat in the Legal Field (Memorandum by the Commonwealth Secretariat) [LMM(86)4]	Com.Sec.	285
The Work of the Commonwealth Secretariat Human Rights Unit (Memorandum by the Commonwealth Secretariat) [LMM(86)14]	Com.Sec.	309
Patriation of Inherited Imperial Statutes (Paper by Professor Keith Patchett, Formerly Dean of Laws, University of Wales Institute of Science and Technology, presented by the Commonwealth Secretariat) [LMM(86)20]	Com.Sec.	315

Volunteer Lawyers: The Untapped Potential (Report by Campbell McLachlan LL.B (Hons.) (V.U.W.), Barrister and Solicitor (New Zealand), Diploma <u>cum laude</u> (Hague Academy of International Law) presented by the Commonwealth Secretariat) [LMM(86)15]	Com.Sec.	339
Course for Government Legal Advisers (Memorandum by the Commonwealth Secretariat and a Paper by Sir William Dale, Director of Studies, formerly Legal Adviser, Commonwealth Office, and General Counsel, UNWRA) [LMM(86)17]	Com.Sec.	349
The Formation and Subsequent Progress of the Commonwealth Association of Legislative Counsel (Memorandum by the Commonwealth Secretariat and a Paper by Sir George Engle, First Parliamentary Counsel, England and Wales, and President of the Commonwealth Association of Legislative Counsel, presented by the Commonwealth Secretariat) [LMM(86)30]	Com.Sec.	352
The Challenge of International White Collar Crime: The need for Immediate Concrete Counter - measures (Memorandum by the Government of Zambia) [LMM(86)48]	Zambia	356
THE LAW OF COPYRIGHT AND COMPUTER SOFTWARE		361
Protection of Computer Software (A Paper prepared by Denis De Freitas, OBE, MA, Consultant and presented by the Commonwealth Secretariat) [LMM(86)37]	Com.Sec.	363
The Law of Copyright and Computer Software (Memorandum by the Government of Zimbabwe) [LMM(86)59]	Zimbabwe	399
NO-FAULT ACCIDENT COMPENSATION SCHEMES		403
No-Fault Accident Compensation Schemes: The Canadian Experience (Memorandum by the Government of Canada) [LMM(86)6]	Canada	405
New Zealand's No-Fault Compensation Scheme - 12 Years On (Paper prepared by the Rt. Hon Geoffrey Palmer, Deputy Prime Minister and Attorney-General and Minister for Justice of New Zealand) [LMM(86)24]	New Zealand	422
The Western Samoa Accident Compensation Scheme (Memorandum by the Government of Western Samoa) [LMM(86)56]	Western Samoa	434
EXTRA-TERRITORIAL JURISDICTION CLAIMED BY THE COURTS OF THE UNITED STATES		441
The Immunity of States from the Jurisdiction of Foreign Courts (A Paper prepared by the Asian-African Legal Consultative Committee and presented by the Commonwealth Secretariat) [LMM(86)7]	Com. Sec.	443
Recent Developments in Relation to United States Extra-territorial Claims (Memorandum by the Government of Britain) [LMM(86)18]	Britain	475

Sovereign Immunity - Australian Legislation - The Foreign States Immunities Act 1985 (Memorandum by the Government of Australia) [LMM(86)41]	Australia	478
Jurisdictional Immunity - The Tanzanian Experience (Memorandum by the Government of the United Republic of Tanzania) [LMM(86)47]	Tanzania	484
DAMAGES IN ADMINISTRATIVE LAW		489
Damages in Administrative Law (A Paper by Professor James S Read, Professor of Comparative Public Law in the University of London and Joint General Editor, Law Reports of the Commonwealth and presented by the Commonwealth Secretariat) [LMM(86)46]	Com. Sec.	491
OPTIONS IN LAW REVISION		507
Law Revision in the Caribbean (A Paper prepared by Sir Clifford Hammett, Regional Legal Adviser with the British Development Division and presented by the Commonwealth Secretariat) [LMM(86)8]	Com.Sec.	509
Options in Law Revision - Emerging Problems and Emerging Trends - The Hong Kong Experience (Memorandum by the Government of Hong Kong) [LMM(86)22]	Hong Kong	518
Options in Law Revision: Emerging Problems and Emerging Trends - A Zimbabwe Perspective (Memorandum by the Government of Zimbabwe) [LMM(86)45]	Zimbabwe	522
Options in Law Revision - The Uganda Experience (Memorandum by the Government of Uganda) [LMM(86)53]	Uganda	529
Options in Law Revision: Codification of the Law - Ghana's Experience (Memorandum by the Government of Ghana) [LMM(86)60]	Ghana	534
MISCELLANEOUS		541
A Pilot Community Mediation Service (A Paper prepared by Ms Jeanette Aickin, Co-ordinator of the Christchurch Community Mediation Service, Christchurch, New Zealand and presented by the Commonwealth Secretariat) [LMM(86)10]	Com. Sec.	543
Proposed Procedures to Simplify the Presentation of Complex Commercial Criminal Cases (Memorandum by the Government of Hong Kong) [LMM(86)32]	Hong Kong	551
Law, Technology and Developing Countries (A Paper prepared by Professor C M Campbell of The Queen's University of Belfast and presented by the Commonwealth Secretariat) [LMM(86)38]	Com.Sec.	577
Legal Practitioner Mobility in the Commonwealth (A Discussion Paper by Campbell McLachlan presented by the Commonwealth Secretariat) [LMM(86)44]	Com.Sec.	583

Working Paper on a Proposed Convention on Airport Security
(Memorandum by the Government of Canada [LMM(86)62])

Canada

590

PUBLISHED SEPARATELY

Issues in Reproductive Health Law in the Commonwealth
(Memorandum by the Commonwealth Secretariat and a Report by
Ms Rebecca Cook of the Development Law and Policy Programme
of Columbia University, New York and Professor Bernard Dickens
of the University of Toronto) [LMM(86)29]

Com.Sec.

COMMUNIQUE

Introductory

1. The 1986 Meeting of Law Ministers of the Commonwealth was held at the International Conference Centre, Harare, Zimbabwe, from 28 July-1 August. The Meeting, attended by Law Ministers, Attorneys-General, other law officers and officials from thirty-six countries, was chaired by the Hon. Dr. E.J.M. Zvobgo M.P., the Minister of Justice, Legal and Parliamentary Affairs of Zimbabwe. The opening ceremony was addressed by the Acting Prime Minister of Zimbabwe, the Hon. Simon Muzenda.
2. Law Ministers expressed appreciation of the practical and well-researched papers prepared for their Meeting by a broad range of Commonwealth Lawyers.
3. They re-affirmed their conviction that the Commonwealth association, committed as it is to guaranteeing the rights of all and to upholding the Rule of Law, and with its shared legal heritage, provides a firm foundation for the highest level of co-operation and mutual assistance in the legal field. The law is a central feature of the Commonwealth association, embodying the core human values for which it stands.
4. Ministers recognised that the Commonwealth had made a distinctive contribution to the struggle for freedom in South Africa, whose system of apartheid is a negation of the principles of the Rule of Law. This had now reached a critical stage requiring further action by the Commonwealth in the spirit of its firm commitment to the principles of freedom and democracy. In addition to the repression and suffering wreaked on the majority population in South Africa, apartheid imposes hardship and very substantial economic costs on the people of the Front Line States, including their host country of Zimbabwe, with whom they expressed their solidarity.
5. Ministers complimented the Group of Eminent Persons for the painstaking efforts they had made to promote a dialogue for political change in South Africa and expressed their deep regret that the authorities in Pretoria had rejected the opportunity offered by the Group's work to start a process of negotiation with the true leaders of the country's black majority. In this context they paid tribute to the dedication and commitment with which the Leaders of the Commonwealth, the Commonwealth Secretary-General and the Secretariat have continued to advance long-established collective Commonwealth efforts towards bringing apartheid to an end. They looked forward to Commonwealth leaders at their meeting in London reaching a consensus which would both assist the cause of freedom in South Africa and preserve the cohesion of their association.
6. The British delegation, without commenting on the substance of the matters in the preceding two paragraphs, expressed the view that they did not fall within the remit of the Meeting and should not therefore be included in the Communique. However all the other delegations, recognised that no meeting of Commonwealth Law Ministers could possibly be held at this time and in this place without recording their commitment to the Commonwealth association, their repugnance of apartheid and the collective determination of their Governments to assist the great majority of the people of South Africa to achieve their freedom.

Pre-trial remands in custody

7. Ministers discussed the problem of growing numbers of persons detained in custody while awaiting trial. The liberty of the individual was of paramount consideration, and the courts should be both empowered and encouraged to ensure that no one was remanded in custody before trial other than for good cause. They recognised that, particularly in the case of those who were subsequently acquitted or given non-custodial sentences, justice delayed was indeed justice denied.

8. The Meeting had before it a paper which highlighted a number of disturbing features. In some countries a fall in the crime rate had been accompanied by an increase in the numbers in prison. Commonwealth Correctional Administrators had identified the problem as worldwide and believed that there was an increasing tendency across the Commonwealth for persons to be remanded in custody instead of being granted bail. The problem was a complex one requiring a case-by-case assessment of all the circumstances, but Ministers concurred in the view that whenever circumstances so permitted, bail not jail should be the norm.

9. Ministers were also deeply conscious of the fact that excessive numbers of untried prisoners greatly increased both financial and social costs, and reduced the effectiveness of correctional systems. The passage of legislation creating new offences could also aggravate the position. Ministers also acknowledged the need for careful consideration of all alternatives before imprisonment was prescribed as a penalty for a new offence.

10. Ministers learned with interest of approaches adopted in some jurisdictions in which strict time limits had been imposed within which the prosecution had to be ready to proceed, and which could only be exceeded in circumstances where the prosecution had not contributed to the delay. They recognised that this approach might be inappropriate in jurisdictions where trained manpower and other resources were in short supply, and that in such circumstances a greater degree of cooperation between prosecution and defence lawyers would be one way of ameliorating the position. However achieved, speedy trials were essential to any satisfactory solution to the problem.

11. Ministers concluded that their discussion had been a particularly useful one. It had served to focus attention on an area of their responsibility which was of concern to many, and it was a matter in which the experience of colleagues was especially relevant.

Forfeiture of the proceeds of crime

12. Ministers recognised that large profits made from organised crime provided not only an incentive to criminals but also capital used in developing criminal organisations large enough to operate on an international scale. They expressed their determination to strengthen national and international legal provisions to enable the proceeds of crime to be identified and forfeited.

13. Ministers adopted a set of provisions which provided a framework for action by Commonwealth governments to assist one another in locating the proceeds of crime, in taking forfeiture proceedings, and by enforcing confiscation orders made in other Commonwealth countries to the extent consistent with their laws. The Meeting heard of legislation already enacted or under consideration in some countries to implement the principles behind these provisions. They would welcome information from countries which had enacted legislation in this field about its operation and effectiveness.

14. The Meeting recognised that the effective use of legal provisions required the close

cooperation of concerned agencies in different countries and increased the responsibilities of the Commonwealth Secretariat's Commercial Crime Unit to facilitate this cooperation. Ministers expressed the hope that all countries would regulate their banking and other financial services so as to reduce the possible manipulation of these services to "launder" the proceeds of crime. The importance of cooperation in all these ways was especially underlined in relation to trafficking in drugs, a subject to which Ministers gave careful attention. Ministers agreed that in addition to its present and necessary responsibilities, the Commercial Crime Unit be mandated to deal specifically with the problem of "money-laundering" by organised crime, and in particular, trafficking in drugs.

Drug-trafficking

15. Ministers reiterated the concern, voiced by Commonwealth Heads of Government in Nassau, at the rising tide of drug abuse and illicit drug trafficking that posed a serious threat to the social fabric and security of many countries. They renewed the determination of their governments to co-operate both to counter the international traffic in illicit drugs and to deny those convicted of drug trafficking the proceeds of their crime. Ministers acknowledged that there was no easy solution to what was a global problem, but emphasised their determination to combat it with all the means at their disposal.

16. Ministers recognised that the illicit trade in drugs was one of the most serious and destructive manifestations of organised crime. Profits derived from illicit trafficking in drugs were "invested" in other criminal enterprises, including terrorism and subversion, or "laundered" and then used to penetrate, and in some cases subvert, legitimate business.

17. Ministers recognised that to be effective any attack on illicit trafficking in drugs required a response on many fronts. Reduction of supply and reduction of demand were both of critical importance. These problems required international initiatives and effective control, and called for a determined process of education. Comprehensive programmes of treatment and rehabilitation for addicts were important, and needed to be adequately funded and constantly improved.

18. The problem of illicit trafficking in drugs was a global one, but Ministers were convinced that the Commonwealth had a significant role to play both within the association and in support of international initiatives. There was a role for the Secretariat in collating and disseminating information on new legislation and procedures developed to combat illicit drug trafficking. Ministers endorsed the work of the Secretariat in facilitating accession to various international conventions.

19. Ministers considered that the Commonwealth Scheme for Mutual Assistance in Criminal Matters they had adopted would materially assist investigators and prosecutors in taking effective action against not only those involved in this activity, but also in attaching their illicit profits. Ministers considered that this device was likely to be a most effective weapon. They expressed their resolve to fashion new laws and procedures which would enable illicit profits to be identified, traced and then forfeited.

Mutual Assistance in Criminal Matters

20. It gave Ministers much satisfaction to adopt two new Commonwealth Schemes. The first, the Scheme for Mutual Assistance in Criminal Matters within the Commonwealth, establishes a framework for greatly enhanced cooperation between the courts, prosecution authorities and law enforcement agencies of Commonwealth countries.

21. Building upon a long tradition of informal cooperation, the new Scheme sets out procedures which, when fully implemented, will greatly ease the task of prosecution authorities in cases where a witness, or crucial evidence, is in another Commonwealth country while respecting the rights of the accused. Under the new arrangements, Commonwealth countries will assist one another in identifying persons, searching for and seizing evidence, and by arranging for witnesses to give evidence, either in their own country or in the country in which the trial takes place. The new provisions for the forfeiture of the proceeds of crime are also incorporated in the Scheme.

22. In adopting the most comprehensive multilateral agreement of its type, Ministers expressed the hope that it would prove a model for still wider international co-operation. It was agreed that reservations of any kind might be made to the Scheme within the period of three months. The same procedure would apply in relation to the other Schemes considered by the Meeting.

Transfer of Convicted Offenders

23. The second new Scheme related to the Transfer of Convicted Offenders within the Commonwealth. Ministers had long believed that there were cases in which a prisoner convicted of an offence in a country other than his own could properly be transferred, with his consent and that of both countries concerned, to serve his sentence in his home country. The new Scheme resulted from a process of consultation which had demonstrated wide support for this concept, including that of Commonwealth Correctional Administrators.

24. The Scheme was based upon sound practical considerations but above all the desirability of furthering the rehabilitation of the offender, and easing his eventual reintegration into society in his home country, by enabling him to serve his sentence where he would be more likely to retain links with family and friends.

Rendition of Fugitive Offenders

25. Ministers adopted two changes to the Scheme for the Rendition of Fugitive Offenders within the Commonwealth, first agreed in 1966, to keep it in line with the increasing modern practice in extradition cases. The first change involved deleting the existing list of extraditable offences and providing that all criminal offences attracting a penalty of two years' imprisonment or more, would be extraditable. The second change introduced provision for the temporary return of prisoners to stand trial for offences committed in another Commonwealth country. A number of additional proposals for improvement were given preliminary consideration.

Monitoring and Further Development of Schemes

26. Ministers recognised the need for the growing body of Commonwealth Schemes for cooperation in legal matters to be kept under regular review to ensure that full advantage was taken of accumulating experience. They invited the Commonwealth Secretary-General, as the need arose, to convene meetings at Senior Official level, between Meetings of Law Ministers, to undertake this task and monitor implementation of the Schemes.

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.

International Child Abduction

30. Ministers were concerned at international child abductions by parents, a topic they had discussed at length in the past. They reaffirmed their belief that the Hague Convention on the Civil Aspects of International Child Abduction offered an effective international mechanism for ensuring the return of a child abducted in violation of custody rights, and that this should serve as the basis for expanding Commonwealth cooperation in this area.

Violence Against Women

31. In their discussions of violence against women, Ministers focussed on the specific questions of domestic violence and rape. They agreed that current strategies, such as the application of the criminal law, were not always in themselves a sufficient response. They recognised the need for greater attention to be given to training police, medical and social welfare agencies to understand and assist women who had been victims of sexual violence.

32. Ministers discussed the need to review such fundamental issues as the meaning of the term "rape". They discussed the question whether this term should be understood as a sexual violation in its widest sense, involving physical and psychological abuse. They also discussed the need to review questions of consent and corroboration, the treatment accorded complainants and the provision of special legal procedures respecting the sensitivity and needs of victims of sexual violence.

33. Ministers viewed domestic violence as essentially a social problem. They were concerned, however, that present police procedures and the civil and criminal law did not always provide sufficient protection to women, whether married or unmarried, who were victims of violent assaults in the home. Ministers expressed interest in reforms being made in some jurisdictions to enable welfare authorities to intervene swiftly in appropriate cases.

34. Ministers appreciated that existing laws and procedures were not always adequate to address the causes of violence against women and the wider implications for society at large. In considering possible preventive measures, they agreed on the need for programmes to educate the general public as well as the police, court authorities, prosecution services and the judiciary. They supported the concepts of rape crisis centres, women's refuges and victims' support schemes.

35. Ministers commended studies in this field undertaken by the Commonwealth Secretariat's Women and Development Programme, and asked that continuing priority be

accorded to the subject of violence against women. In particular, they asked that the Secretariat continue to facilitate exchanges of information between Commonwealth jurisdictions on the subject.

Human Rights

36. Ministers reaffirmed their commitment to the promotion of human rights within the Commonwealth. In welcoming the recent establishment of the Human Rights Unit in the Secretariat in response to a decision taken at their last meeting, Ministers emphasised the importance they attached to their continuing cooperation in promoting adherence to the Commonwealth Declarations and the principal international and regional human rights instruments. They urged all Commonwealth Governments which have yet to become parties to relevant international and regional human rights instruments, to give active consideration to early ratification or accession. In particular, they invited Commonwealth Governments who had not already done so, to consider becoming parties to the International Human Rights Covenants and the conventions on racial and sexual discrimination. They looked forward to the early entry into force of the African Charter on Human Rights and Peoples' Rights, proclaimed in Nairobi in 1981.

37. Ministers asked the Human Rights Unit to continue to facilitate exchanges of information on law reform, national institutions and domestic procedures established in Commonwealth jurisdictions for the promotion of human rights.

38. Recognising as they did the developmental significance of promoting understanding and respect for human rights, Ministers considered that there was value in Commonwealth Secretariat technical assistance in this area, particularly in reviewing legislation and administrative procedures.

39. Ministers attached importance to upholding the principles of international humanitarian law and, in particular, affirmed their support for the role of the International Committee of the Red Cross in furthering the relevant Geneva Conventions and Protocols.

Law Revision

40. Ministers acknowledged the need to provide, at regular intervals, up-to-date editions of their Statute Books to enable the law to be ascertained with certainty and despatch. However, they were concerned at the escalating cost of preparing and printing new Revised Editions of the Laws. This had serious implications for developing countries, and would pose severe handicaps on the proper administration of justice if an early solution were not found. Computerization of the Laws, which offered the possibility of saving printing costs, was an avenue which should be explored.

41. Ministers commended the efforts being made, particularly by less developed jurisdictions, to keep Laws reasonably up-to-date, and hoped it would prove possible for aid agencies to assist with funding in this area of special need.

Terrorism

42. Ministers reiterated the grave concern with which their Governments viewed the increasing level of terrorism world-wide. Several of those present had been victims of terrorism, including State terrorism, since Ministers had last met. In extending their condolences to the countries in question, Ministers pledged their determination to seek by

every possible means to ensure that appropriate domestic and international legal arrangements were put in place. In the light of the paper before the Meeting, they saw an urgent need to examine the extent to which their countries had acceded to the relevant international conventions. They recognised that the law had an important role to play in helping to contain the level of terrorism, but acknowledged that the highest degree of informal as well as formal cooperation between states was essential if progress was to be made.

No-Fault Personal Accident Compensation Schemes

43. The Meeting had a lively discussion of no-fault personal accident compensation schemes which had been adopted by a number of Commonwealth jurisdictions in recent years. These had been preferred to the traditional "fault" concept, whereby those who suffered bodily injury were generally required to show negligence before they were entitled to recover compensation. In the discussions the point was made that the introduction of such schemes depended on local conditions, which could vary considerably from one jurisdiction to another. Ministers felt their discussions of this matter had been most useful and had helped clarify their approaches towards this interesting development.

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

44. Ministers reviewed the extensive and growing range of legal activities undertaken by the Commonwealth Secretariat. They noted, and expressed their gratitude to the Commonwealth Secretary-General both for his own devotion, and that of his staff, to Commonwealth legal needs. Ministers were profoundly struck by the quality and breadth of the services they offered, and expressed anxiety that the unavoidable increase of demands being made on the Legal Division was placing an unrealistic burden upon it. They applauded the Legal Division's catalytic approach, which rendered it highly cost-effective.

45. While endorsing this strategy, they nonetheless recognised that there was an increasing number of areas in which the Secretariat itself was necessarily having to assume direct responsibility to meet requests. They observed that their meeting in Harare had laid the foundation for marked advances in Commonwealth legal cooperation, and were concerned lest the potential for advance in this most vital area be not realised by virtue of it being a wholly unrealistic additional burden to the Division's present establishment. They therefore invited the Secretary-General to review, as a matter of the highest priority, the adequacy of the staffing of the Division as a whole, in addition to the more specific requirements they had noted in respect of the Division's Crime Unit.

46. The meeting commended the Secretary-General for the regular production of the Commonwealth Law Bulletin, which served as an indispensable source of information on contemporary Commonwealth legal developments. They acknowledged its essential place in Commonwealth legal literature. They also expressed appreciation of the publication, initiated by the Division, of the new series of law reports - the Law Reports of the Commonwealth - which was already being regularly cited in Commonwealth courts. They saw it as serving as an essential supplement to the Bulletin.

47. Ministers saw the Legal Division essential as focal point for information on contemporary legal developments, and anticipated this increasing steadily in the years ahead. They were united in the view that they should all make a special effort to ensure that the Secretariat is kept fully apprised of developments in their own jurisdictions. Ministers were particularly concerned that the Legal Division be kept fully abreast of developments concerning the schemes for enhanced mutual assistance they had agreed on.

They saw a central role for the Secretariat in the monitoring and keeping Commonwealth Governments advised of developments, both legislative and administrative, and looked to it to work closely with Governments and officials to ensure that full advantage can be made of these new arrangements.

48. Ministers applauded the very substantial and most necessary assistance which the CFTC and its Technical Assistance Group have continued to provide to many jurisdictions in areas of need. They expressed particular appreciation for the assistance given by the CFTC to most of them in the area of legislative drafting, both by the provision of draftsmen and through training at regular legislative drafting training courses. They expressed the hope that this very useful training course would continue. The full-time draftsman retained for small states was especially valuable.

49. Nevertheless, Ministers remained conscious of the difficulties still being faced by a number of jurisdictions, particularly the small Island States, who are severely handicapped by a profound lack of material and human resources. Ministers acknowledged the very significant contribution being made in the area of the exchange of legal texts and materials by the Legal Division of the Commonwealth Secretariat through its book recovery scheme, whereby a number of jurisdictions have benefited from the recovery (largely from libraries and private practitioners) of often-unobtainable digests, texts, law reports and other useful materials which would otherwise have been discarded.

50. Ministers paid particular tribute to the Commonwealth Secretariat for the way in which it has implemented its special mandate to assist small states. They welcomed a recent example of the assistance given by several Commonwealth Governments, and the CFTC, without which a small island state would not have been able to comply with certain constitutional obligations to hold an independent Commission of Inquiry.

51. Ministers also saw great value in the first law reporting course held under the auspices of the CFTC for the East, Central and Southern Africa region, and expressed the hope that similar courses might be held in other regions.

52. Ministers expressed their appreciation to the Commonwealth Foundation for the assistance it had been able to provide which had made it possible for the Chief Justices of Commonwealth Africa to meet for the first time in what, with further assistance from the Legal Division, had proved to be a most necessary and fruitful gathering.

53. Ministers were also unanimous in their appreciation of the highly valued training assistance given by one Commonwealth country through a government legal advisers course, and commended it to those governments who had not yet taken advantage of the training facility it offered.

54. The Meeting noted with appreciation the project to identify Imperial Statutes of General Application in so far as some small states were concerned, and saw considerable value in the removal of areas of uncertainty in the law that this project would assist in eliminating. They also saw it as contributing to a situation wherein all the laws of the countries affected would be subject to regular scrutiny and updating.

55. The Meeting also welcomed in particular the training activities being undertaken by the Commonwealth Legal Education Association, which operates from within the Legal Division. They noted in particular a judicial training workshop to be held in Zambia later in the month. The Meeting further welcomed the formation of the Commonwealth Lawyers Association and the Commonwealth Association of Legislative Counsel which, together with the CLEA and the Commonwealth Magistrates Association, now meant that the Commonwealth legal fraternity was catered for by four fully functioning organizations. The CLA on its initiative for organising a workshop for law societies and bar associations from developing countries, to be held in Jamaica in September.

56. Ministers expressed their pleasure that, in accordance with their decision in Colombo in 1983, it had been possible for Commonwealth Correctional Administrators to meet in Hong Kong in 1985 in what had been the first truly international gathering of its kind. The report of the Meeting would be of continuing relevance for those with day-to-day responsibility for correctional administrations, and demonstrated the undoubted value of occasional meetings of this kind.

57. Ministers expressed their deep appreciation to the consultants who assisted the Secretariat and Senior Officials in the preparation of the draft schemes they had considered. They expressed their particular indebtedness to Professor David McClean, both for his outstanding contribution to Commonwealth assistance in legal matters over the years, and for his invaluable assistance throughout their meeting.

58. Reviewing the role and work of the Legal Division's Commercial Crime Unit, Ministers emphasised their continued support and looked to Commonwealth law enforcement agencies and other relevant authorities to give the Unit their fullest co-operation. They viewed the Commonwealth initiative in this field as being both unique and effective, orientated as it was to loss prevention. They did not see police-to-police co-operation alone as being sufficient protection against economic crime and abuse.

59. Ministers reaffirmed their concern at the escalating and adverse effects of organised and international economic crime on economic and political stability. Developing, and particularly smaller, jurisdictions were especially at risk and they encouraged the Commercial Crime Unit to continue to give special attention to their problems. Ministers identified an increasing trend of organised crime becoming involved in economic offences, as these offered high returns with relatively little risk of apprehension. The Meeting stressed the importance of developing procedures for the tracing and attachment of the proceeds of such economic crimes, and welcomed the work of the Commercial Crime Unit in this area.

60. Recognising the crucial importance of intelligence in effective loss prevention, Ministers strongly urged that, as a matter of priority, the Commercial Crime Unit be equipped to develop an adequate facility directed to this end. Such a facility would materially assist in tracing and monitoring the funds of organised crime and, in particular, the proceeds of drug trafficking.

61. Underlining the importance of training for prosecution and enforcement personnel to equip them more effectively to combat commercial and organised crime, Ministers welcomed the emphasis being given to the Unit's training role, especially in regard to regional workshops and secondment of officers from Commonwealth agencies to the Unit for limited periods. Ministers from developing countries saw their nation's economic advancement as being imperilled, and in some cases actively retarded by economic abuse and asked that early consideration be given by the Commonwealth Fund for Technical Co-operation to the funding of instructors and training programmes.

62. Recognising the important role of the Commercial Crime Unit in facilitating the fight against serious international crime and in tracing the proceeds of crime, Ministers emphasised the need to ensure at all times that the Unit was adequately resourced to enable it to meet the growing needs and expectations of governments. They particularly asked that the adequacy of its staffing be kept under review.

Legal Education and Practitioner Mobility

63. Ministers recorded their appreciation for the report on legal practitioner mobility within the Commonwealth presented to the Meeting, and expressed the view that the movement

of Commonwealth lawyers between jurisdictions played a useful role in enhancing the flow of professional experience between the countries concerned. They also invited the Commonwealth Secretary-General to explore ways and means of promoting cooperation among the Commonwealth countries in respect of admission of students of other Commonwealth countries in their respective Law Schools, on reasonable terms, and also the mobility of advocates within the Commonwealth.

Sovereign Immunity and Extraterritoriality Claimed by the US Court

64. Time only enabled a very brief discussion of this Agenda item. It was noted as being an important topic, which should be discussed further, at an early date.

Next Meeting

65. Ministers accepted with the greatest pleasure an invitation extended by the Government of New Zealand for it to host their next Meeting, and they looked forward to gathering in a South Pacific setting.

Appreciation

66. From 1980, when Zimbabwe had first sat at these Meetings, Law Ministers had looked forward to gathering at Harare. Their high expectations had been exceeded in every way, and Ministers were unanimous in their expressions of gratitude both for the warmth and generosity of their welcome and of the care taken of them throughout the Meeting. They congratulated the Chairman, the Hon. E.J.M. Zvobgo, for the patient and masterly way he had chaired their deliberations, and requested him to convey to the Government and the people of Zimbabwe their deep appreciation for the manner in which they had been received and looked after throughout their stay in Harare.

Harare,
Zimbabwe

1 August 1986

ANNOTATED DRAFT AGENDA

BACKGROUND

The Annotated Draft Agenda has been drawn up after comments and proposals have been received from Governments in response to suggestions made by the Commonwealth Secretary-General. Papers referred to are those received by the Commonwealth Secretariat as of 21 June 1986.

AGENDA ITEM ONE

PRE-TRIAL REMANDS IN CUSTODY

The problem of persons held in custody awaiting trial was emphasised by Commonwealth Correctional Administrators Meeting in Hong Kong in 1985. In some countries they comprise the majority of the prison population. The Meeting will have before it a paper on the topic, and Ministers may wish to share their experience gained in efforts to restrict the number of persons deprived of their liberty while awaiting trial, including such matters as increasing the availability of bail, streamlining pre-trial criminal procedures, imposing deadlines on the prosecution, and taking into account time spent in custody in fixing any subsequent sentence. The Meeting has before it, a discussion paper, (LMM(86)9), "Increase in Pre-trial Remands - A Challenge to Criminal Legal Systems", by William Clifford, LMM(86)28, "Pre-trial Remands in Custody" by the Government of Hong Kong; and LMM(86) 34, "Pre-trial Remands in Custody" by the Government of Ghana.

AGENDA ITEM TWO

THE INTERNATIONAL TRACING, FREEZING AND FORFEITURE

OF CRIMINAL PROFITS

It is a truism that the enormous profits of international illicit drugs dealings in particular presents legal systems with their greatest single challenge. But the problem is not confined to profits from drugs. Ministers may wish to discuss recent developments in this field, including endeavours to trace, to freeze and to seize the proceeds of criminal activity both at the domestic and at the international level. Among the aspects they may wish to consider is whether there is any legal or logical basis for treating the proceeds of drugs trafficking in a different way from those deriving from other forms of serious criminal offending.

The Meeting will have before it a clause for consideration for inclusion in the draft Scheme for Mutual Assistance in Criminal Matters addressed to this aspect which will have been considered and reported upon by Senior Officials meeting on 26 July, at present contained in LMM(86)12, "Draft Provisions" for the Forfeiture of the Proceeds of Criminal Activities as between Commonwealth Jurisdictions". Also before the meeting is LMM(86)35, "The International Training, Freezing and Forefeiture of Criminal Profits" by the Government of Ghana, and LMM(86)40, "Combatting Commercial Crime" by the Commonwealth Secretariat.

AGENDA ITEM THREE

RECENT DEVELOPMENTS IN COMBATING DRUGS TRAFFICKING

Ministers may wish to address this item in two respects - first, from a domestic perspective and second, from an international perspective. In view of Agenda Item Two, it is suggested that Ministers may wish to refrain from discussing the attachment of the profits of drugs trafficking under this Agenda Item.

(a) The Domestic Perspective

Ministers may wish to share experiences in their endeavours to contain domestic drugs trafficking, including penalties, possession for the purpose of supply based on quantities, and the enforced treatment of addicts both within and outside the criminal law.

(b) The International Perspective

Ministers may wish to discuss ways in which law enforcement and other governmental agencies may be able to enhance existing levels of co-operation in order to combat the international trade in illicit drugs. There is also a need to counter the growing infiltration of narcotics profits into legitimate businesses, and Ministers may also wish to compare notes and seek out ways for effective and co-operative action at the international level to contain this threat to the integrity of legitimate commercial activity.

The Meeting has before it LMM(86)21, "Drug Abuse and Illicit Trafficking - A Commonwealth Initiative", by Dr S.K. Chatterjee; LMM(86)23 "Recent Developments in Combatting Drug Trafficking: Areas of Possible Commonwealth Co-ordination", by the Government of the United Kingdom; LMM(86)25, "The Hong Kong Experience In Attempting To Reduce The Demand For And Supply Of Illicit Drugs" by the Government of Hong Kong; and LMM(86)27, "Developments in Combatting Illicit Narcotics Trafficking" by the Government of Malaysia.

AGENDA ITEM FOUR

VIOLENCE AGAINST WOMEN

There has been a noticeable increase in a number of Commonwealth countries in the levels of violence directed against women. This led to a workshop on the subject, held at Marlborough House in 1985 at the request of Commonwealth Ministers for Women's Affairs. This identified a range of appropriate responses required from various agencies within the justice system, and its deliberations are the subject of a paper prepared by Jane Connors in association with the Secretariat's Women and Development Programme.

Ministers may wish to share their countries' experience in responding to the special needs of victims in this area, including such matters as police training in handling complaints of this nature, the collection and presentation of evidence, the treatment accorded complainants in the context of the criminal trial, and the encouragement given to non-governmental organisations to provide supportive services such as rape crisis centres and counselling facilities.

The Meeting has before it a discussion paper (LMM(86)26), "Violence Against Women" by Jane Connors, and LMM(86)36, with the same title by the Government of Ghana.

AGENDA ITEM FIVE

MUTUAL ASSISTANCE IN THE COMMONWEALTH

Ministers will have before them three draft Schemes for enhanced mutual assistance, two of which have been recommended by Senior Officials for adoption by this meeting. A report from the Chairman of the Senior Officials' Meeting in London in January 1986 is before the Meeting as LMM(86)13. Ministers may wish to discuss matters under this item:

- (a) Scheme for Mutual Assistance in Criminal Matters within the Commonwealth (for consideration for adoption). (LMM(86)13 refers).
- (b) Scheme for the Transfer of Convicted Offenders within the Commonwealth (for consideration for adoption). (LMM(86)13 refers).
- (c) Rendition of Fugitive Offenders within the Commonwealth (for consideration of any proposals for amendment which emanate from the Senior Officials meeting (to be held on 26 July 1986)). (LMM(86)5 by the Government of Australia refers).
- (d) International Abduction of Children by a Parent or Guardian (a brief review of the latest position regarding The Hague Convention on the topic). (LMM(86)19 by the Government of the United Kingdom refers).
- (e) Judicial Commissions of Inquiry sitting in other jurisdictions (a brief review of a recent trend in Commonwealth co-operation focussing on the mechanisms under which this has taken place, including the taking of evidence on oath). (LMM(86)16 by the Government of Australia refers).

- (f) International Conventions addressed to acts of terrorism (in the light of the concern expressed by Commonwealth Heads of Government in Nassau last October, Ministers may wish to review the adequacy of the Commonwealth's collective response to the various multi-lateral conventions aimed at combating the problem). (LMM(86)31 by David Lloyd-Jones refers).
- (g) Protection of the Cultural Heritage (for consideration of the present draft scheme and decisions how to proceed in the light of the Chairman's report). (LMM(86)13 refers).
- (h) Legal education for Commonwealth students and reciprocity of admission (including requirements for admission of students). LMM(86)44, "Legal Practitioner Mobility in the Commonwealth" by Campbell McLachlan, refers in part).

AGENDA ITEM SIX

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

Ministers will have before them LMM(86)4 reviewing the activities of the Secretariat in the legal field over the period since Ministers last met, in Colombo in February 1983. In addition to matters covered in the paper, Ministers may wish to give guidance for the Secretariat's legal work programme over the next three years. As requested by Law Ministers in Colombo, a Human Rights Unit has now been established within the Secretariat's International Affairs Division, whose work has special relevance for the Meeting and is reported upon in LMM(86)14. Also of particular interest and for discussion may be the work of the Legal Division's Commercial Crime Unit, particularly with reference to Agenda Items Two and Three.

Other papers touching on aspects of the Secretariat's work and before the Meeting include LMM(86)20, "Patriation of Inherited Imperial Statutes" by Professor Keith Patchett; LMM(86)17, "Course for Government Legal Advisors" by Sir William Dale; LMM(86)15, "Volunteer Lawyers: The Untapped Potential" by Campbell McLachlan; and LMM(86)29, "Issues in Reproductive Health Law in the Commonwealth" by Rebecca Cook and Professor Bernard Dickens.

AGENDA ITEM SEVEN

THE LAW OF COPYRIGHT AND COMPUTER SOFTWARE

There will be a paper before the Meeting by Denis de Freitas [LMM(86)37] indicating some special difficulties to the law of copyright which arise from computer software. Ministers may wish briefly to discuss approaches to the problem.

AGENDA ITEM EIGHT

NO-FAULT ACCIDENT COMPENSATION SCHEMES

A number of jurisdictions in the Commonwealth have either introduced, or have under consideration, the introduction of 'no fault' accident compensation schemes. It is now some 10 years since New Zealand introduced the world's first comprehensive no-fault accident compensation scheme and a paper on the topic by New Zealand will be before the Meeting. Ministers may wish to share in the New Zealand experience, particularly the impact of the scheme on the justice system, e.g by reducing court case loads, as well as that of other jurisdictions which have introduced the 'no fault' concept on a more restricted basis. To this end, the Government of New Zealand has contributed a paper LMM(86)24, "New Zealand's No Fault Compensation Scheme - 12 years On". A second paper, LMM (86)6, "No Fault Accident Compensation Schemes: The Canadian Experience", has been contributed by the Government of Canada.

AGENDA ITEM NINE

EXTRA-TERRITORIAL JURISDICTION CLAIMED BY THE COURTS OF THE UNITED STATES

There are two suggested aspects to the discussion. A paper by the Asian-African Legal Consultative Committee (AALCC), LMM(86)7, "The Immunity of States from the Jurisdiction of Foreign Courts" is before the Meeting, highlighting in particular problems being encountered by the claims of US Courts to assert their jurisdiction based on an at times slender connection between the United States and a particular transaction, and then (in the case of governments and governmental agencies) applying the provisions of the highly restrictive US Sovereign Immunities Act 1976. This paper suggests that Ministers may wish to discuss the desirability of seeking a degree of uniformity in this area of the law.

A second paper before the Meeting LMM(86)18, "Recent Developments in Relation to United States Extraterritorial Claims", by the Government of the United Kingdom addresses a broader aspect of the problem, including anti-trust cases and export controls ((where US courts claim jurisdiction over certain goods beyond its shores).

The Ministers will recall having discussed the question in the context of the enforcement of US judgements in multiple damages cases at their 1980 Meeting in Barbados.

AGENDA ITEM TEN

DAMAGES IN ADMINISTRATIVE LAW

Awards of damages in administrative law have potentially wide implications for governments, the more so after the growth in governmental activities witnessed in Commonwealth countries over the past decades. Ministers may wish to share their experiences with their colleagues and consider what, if any, appropriate legislative responses may be called for. A paper on the topic will be before the Meeting.

AGENDA ITEM ELEVEN

OPTIONS IN LAW REVISION

A full-scale law revision exercise, in the traditional sense, is increasingly becoming an undertaking beyond the resources of developing countries - and particular small states - both in terms of the drafting involved and, particularly, printing costs. Ministers may wish to share their own practical approaches, including the application of modern technology, to this challenge. To assist, two papers are before the Meeting, LMM(86)22, "Options in Law Revision - Emerging Problems and Emerging Trends", by the Government of Hong Kong, and LMM(86)8, "Law Revision in the Caribbean", by Sir Clifford Hammett.

AGENDA ITEM TWELVE

FUTURE ACTIVITIES

It is likely that, in the course of their discussions, Ministers will have indicated their wishes regarding areas upon which the Secretariat should concentrate in the years immediately ahead. Ministers may wish to consider commenting on or adding to these suggestions. The Meeting may also wish to discuss the potential usefulness of a regular substantive meeting of their officials, as on this occasion, to review relevant aspects of Commonwealth mutual assistance in the legal field which may be causing difficulty or be ripe for review in the height of changing circumstances.

AGENDA ITEM THIRTEEN

THE NEXT MEETING OF COMMONWEALTH LAW MINISTERS

The Meeting will wish to decide the venue and approximate date of their next Meeting.

Pre-trial Remands in Custody

THE INCREASE IN PRE-TRIAL REMANDS — A CHALLENGE TO CRIMINAL LEGAL SYSTEMS

A paper by Mr W Clifford, Executive Director of the Asian and Pacific Conference of Correctional Administrators and consultant for the first Commonwealth Conference of Correctional Administrators, formerly Chief of the United Nations' Crime Prevention Branch.

PRISON POPULATIONS

Time and again studies have thrown doubt on the idea that the numbers in the prisons are necessarily related to the levels of crime in a society. Where there is little crime the propensity to imprison may be relatively high and there are countries with high rates of serious crime and relatively low rates of imprisonment. Thus, the Netherlands, with no less serious problems of crime than the rest of Europe, imprisons only about 30 to 40 persons per 100,000 of its total population whereas other European States are regularly imprisoning 80, 90 and sometimes over 100 per 100,000 of their people. In Bermuda in 1984, when crime fell by about 5 per cent, the prison population went up by 30 per cent. In Canada where, in the 1980's there seems to have been a levelling out of crime - and where violent crime has been 8 per cent and 10 per cent of total crime for the past quarter of a century, the incarceration rate is around 111 per 100,000 of the population - i.e. an increase of about 10 per cent in a decade. In England and Wales between 1973 and 1983, recorded crime nearly doubled whilst the average prison population went up by only about 17 per cent. It is not easy to maintain therefore that imprisonment is a simple function of changes in crime or in population.

REMAND POPULATIONS

2. Correspondingly, the information available, makes it difficult to argue that the rate of remanding persons in custody can be related to the levels of crime or to changes in the populations. The Asian and Pacific Conference of Correctional Administrators has been issuing reports for the last six years dealing inter alia with a steady increase in the numbers of remands in custody in that region of the world.

3. The confirmation that increasing remands may well be a world phenomenon has been provided by a recent meeting of Commonwealth Correctional Administrators. Nearly everywhere in the Commonwealth the numbers of persons being remanded in custody has been growing without any demonstrable relationship with either population changes or crime rates in the particular countries.

4. In England and Wales it seems that the numbers have risen largely because since 1973 the average time spent on remand has doubled - from about 23 days to 47 days. Indeed between 1976 and 1983 the main growth in the prison population in England and Wales occurred in the numbers awaiting trial which, for instance, went up from 3,200 men in 1976 to 5,800 men in

1983. In Canada, 13 per cent of all prison inmates are persons being held on remand. The federal Correctional Service holds no remandees and the increase in the numbers of remandees in the provincial institutions led to a study in 1977-1979 which showed the inmate population in Ontario's jails and detention centres to be 40 per cent to 50 per cent remandees. This led to some drastic action to get out of the institutions those who were non-dangerous and non-violent. Bail verification, bail supervision, bail hostels were introduced and legislation limited the courts discretion to withhold bail unless there was a danger of the accused absconding, interfering with witnesses or being a danger to the public. Even so, the remand population in many provinces is still between 20 per cent and 30 per cent of the total inmate population.

5. In Australia, the rate of remand varies interestingly between the several States but has been rising. In February 1978 remandees in all the penal institutions across Australia accounted for 9.8 per cent of the inmate population. By October 1984 it had risen to 13.2 per cent and on 1st September 1985 it was 14.3 per cent. Expressed as a proportion of the total populations of the States, remandees were 6.2 per 100,000 Australians in February 1978, 7.9 in October 1984 and 10.3 at 1st September 1985.

6. In New South Wales, in the same period, the percentage of remandees in the total prison population went from 11.6 to 21.8 - and in South Australia from 17.3 to 19.3. Actually, Australia offers an interesting contrast in the use of remands. New South Wales and Victoria are the most populous States and being next to each other have very similar problems of crime - in quantity and quality. Yet whereas in February 1978 the New South Wales remandees were 8.4 per 100,000 of the State's general population, Victorian remandees were only 2.8 per 100,000 of that State's general population. Then on 1st September the New South Wales remand rate was 15.1 and the Victorian rate 5.3. The difference is striking but, as shown, the rise in the use of remand was common. In fact the Victorian rate had almost doubled.

7. So far the evidence has been drawn from countries with a Western-type culture: but rising remands can be found in other cultures, and in countries with dissimilar criminal justice systems. It has been a notorious feature of South American prisons that persons awaiting trial or sentence account for as high as 80% of the total inmates. In India the problem is with 'undertrial prisoners', who since 1980 have constituted 60 per cent of the total prison population in the country. In Sri Lanka the rise in the numbers of persons remanded in custody in recent years has meant that they now account for 62.4 per cent (1st July 1985) or more of the total inmate population. Lest it be thought that this is due to the emergency conditions in that island, it should be explained that, even before the emergency, the remand rate was already over 50 per cent of total inmates. To cope with this, the prison authorities in Sri Lanka have established new open institutions for remandees! And in Malaysia the numbers of unconvicted persons held by the prisons went up from 450 in 1970 to 2,362 in 1981. So, new remand prisons (with semi-open conditions) have been built at Alor Star and Pengkalan Chepa. New Zealand experienced a rise in the proportion of its remands - from 3.4 per cent of the total prison population in 1966 to 7.5 per cent in 1973. The total annual remand population declined by 4.4 per cent between 1977 and 1980, but had risen to 9.6 per cent by 1st July 1985.

8. It appears that conditions are not dissimilar outside the Commonwealth. Thailand remandees represent about 23 per cent of the total prison population, and this has been the position for a decade or more; but whereas in 1971 there were 8,279 persons remanded in custody this had risen to 16,260 by 1980. Over the years, Japan has had a fairly constant 15 per cent of its prison inmates on remand, but this had risen to 17 per cent in 1985.

9. This is far from suggesting that the remand problems of different countries are comparable. Obviously, in a civil law system with a public prosecutor's power to hold people for questioning, being held without trial means something different, even if the great bulk of remandees are held in situations not too different from those in common law systems. Even within the common law system, the courts in one area may have more legitimate reasons to remand in custody than do the courts in a different area. Even the character of the crimes themselves may account in no small measure for the differences in the use of custody before or during trial. However, what is curious is that despite all these legal, regional and behavioural or cultural differences, there is a prevalent similarity of experience with the rise of remands in custody.

10. This applies, too, to the United States although it is not possible here to deal with the vast complications of that vast country. Yet it is by now very well known that the local jails in the US have been so overcrowded with remandees and short sentence prisoners that some persons detained in these conditions have obtained their release - and also substantial compensation - for being held unconstitutionally in 'cruel and unusual' circumstances.

11. The situation in Europe varies. In its Prison Information Bulletin for June 1985, the Council of Europe gives the rates of remand per 100,000 inhabitants of the countries and shows that this is rising in Cyprus, France, Portugal and the United Kingdom, but falling in nine other countries. In Italy, Malta, Spain and Switzerland it is referred to as 'fluctuating'. However, this is the rate of remands. When remands are shown as proportions of the total prison populations, the percentages range from 6.2 (Cyprus, Ireland and Iceland) through 50+ (France and Spain) to 64.1 (Italy). Turkey looks high with 34.9 per cent of its total inmates persons unconvicted and remanded in custody, but the Netherlands has 35.9 per cent and Malta 33 per cent. Belgium follows close with 30.6 per cent of its total inmates on remand. Therefore, whatever the most recent changes it seems not unlikely that remands have risen steadily in most of the large countries of Europe over the past decade. If so this would be in line with global trends. And even if increases in remands are not typical of some countries in Europe there are obviously others in which the very high proportions of remandees amongst total inmates cannot be a matter of indifference.

12. Of course the question of whether a person should be remanded in custody or released on bail is answered by the courts according to the circumstances of the individual case. Figures do not show the factors which had to be taken into account in each particular case. Does, therefore, the increase in the number of remands mean that there is greater likelihood of the accused persons absconding, interfering with witnesses, committing further offences or having to be held for his own safety? If so, it is odd that this should be occurring in so many countries at the same time. Is it possible that there is an increasing tendency for the courts to remand in custody accused persons or those found guilty but not yet sentenced - in order to teach them a lesson? Studies of trends in serious crime reaching the courts in the past two or three decades hardly suggest that the rise in remands is a simple function of the rise in the amount of crime. As shown above, there are indications that remands are increasing in length rather than in the number of persons, that there is a pile-up as the periods on remands are protracted - due perhaps to the larger number of persons being legally represented, to the protraction of trials or to the improved levels of public education making for a greater awareness of rights and more pleas of not-guilty. To ensure that justice is done the courts may have to sit for longer on cases that would previously have been disposed of quickly - and inevitably the period of remand is lengthened. Whilst this may be true in the industrialised countries it is a less plausible explanation in the developing areas for the increase in remands.

13. Unfortunately, there have been very few studies of the cases which are remanded in custody in the various countries. This study in Canada to which reference has already been made showed that 22.7 per cent of persons remanded were subsequently released - but that this group accounted for 45.5 per cent of the remand days stay. Moreover, though only 15.6 per cent of the remands were for over 30 days, these accounted for 62.6 per cent of the total days stay.

14. A 1982 survey of the remandees in the Australian State of Victoria revealed that of the 176 held on the day of the review, over one-third had been on remand for less than one month and nearly 20 per cent had been in custody for more than six months. The average time spent on remand was 2.5 months though one person had been on remand for 18 months. A later study of the outcomes of remand in custody orders by John Walker of the Australian Institute of Criminology in September 1985 showed that in the States of Queensland, Western Australia, South Australia and the Northern Territory there was a tendency to use remands in custody where a non-custodial sentence was appropriate on conviction.

15. Clearly the numbers held in prison on remand, at any one time, will be decided by intake multiplied by period on remand; and, though both of these need attention as the figures rise, it seems that the period spent on remand may well be more important than the intake.

THE CHALLENGE

16. The obvious concern for the administration of criminal justice is that the rights of individuals before conviction might be getting less than sufficient attention. If only one person is held in custody for one day longer than is necessary whilst still unconvicted, this needs serious attention. If the extended remands are a symptom of accruing delays in the criminal justice system, then the system may be in need of serious overhaul. Then, more concerned with practice than principle, there is the task imposed on prison administrators by any steady increase in remands. Already the problem of adequate segregation of the various types of inmate is serious for most prison administrators. Segregation by sex, age, health, level of violence, sexual proclivities, danger from other inmates is difficult enough in most prison administrations given the limited physical accommodation provided and the complications of dividing up a limited staff. Similar segregation has to be provided in different conditions within the remand populations. Add to this the increasing problem of providing for AIDS and its prevention and the several menus which some of the Commonwealth Prison Administrators are obliged to serve and the complexity of the burden being imposed on the administrators can well be understood. Nor should it be overlooked that the expectations of all inmates are rising so that the details of these divisions and their relative merits can become contentious and promote conflict. Whatever can be done to relieve the prison administrators of tasks which may not only be burdensome but sometimes impossible cannot be delayed if explosions in the penal institutions are to be avoided.

POLICY IMPLICATIONS

17. It is possible that, paradoxically, this increase in remands across the world could be related to both the level of legal or criminal justice sophistication - and to the lack of it. In most of the industrialised countries, the entrenched formalities of legal procedure tend to slow down the flow of cases through the courts. The trend in the last four decades

has been to eliminate discretion wherever possible from the criminal justice system - which means a greater dependence on the letter of the law and on its various possible interpretations. All of this protracts legal proceedings. Where it means that the longer time taken ensures that more justice will be done, there can be no argument. No one wants to risk injustice by accelerating procedure. The increased time taken is however less defensible when it means that professional offenders who have 'learned the ropes' are able to defer conviction and extend the period which they can serve as innocent remandees rather than as ordinary prisoners. Since the remand period is generally taken into account when a sentence is passed there is obvious value in prolonging the special remand conditions. Nor is the extended hearing so defensible when it is due to shortages in the police forces leading to more time being needed to prepare the cases - or due to the adjournments being inserted to give more time to overload counsel or to accommodate court vacations. Moreover, in the industrialised nations, the legal profession has grown so that a great many more technical points of procedure can be raised. This means not only greater certainty that the accused will be able to present his case properly but also the need to delay hearings for the cases to be prepared. On the prosecution side it usually calls for more care to be taken than might have been necessary in the past to ensure a conviction. On the defence side it offers opportunities to delay proceedings until every possible avenue of exculpation or mitigation has been explored.

18. Contrasting with this - but equally encouraging the use of remands in custody - is the situation in the developing countries where the paucity of legally trained personnel might make it necessary to defer cases for qualified legal review or necessary to proceed with extra caution. Sometimes great distances and the lack of quick effective means of communication make it necessary to keep offenders in custody simply to avoid them absconding.

19. It is no accident that in the Walker study, already cited from Australia, the States making the greatest use of remands were those with the highest proportions of Aborigines appearing before the courts. The likelihood of them 'going bush' was mentioned in the study as one possible reason for the increased tendency to use remands in custody in these States. Certainly, the problems of identification, of the lack of immediate family controls (when the offender is apart from his family) and the risks of interfering with witnesses can be great where administration is spread thinly over vast distances.

20. Yet, allowing for all these possible reasons for the increased popularity of remands in custody, the rights of an innocent and as yet, unconvicted offender demand that authorities look very closely at what is happening. Remand in custody was never intended to provide a means by which the court could give an accused a taste of incarceration. Remands in custody were never intended to provide the prosecution with extra time to prepare its case - or to subordinate the rights to freedom of the individual to the convenience of judges, lawyers or even witnesses. Except in cases where the offence was grave, the offender was likely to abscond or interfere with witnesses, a remand in custody was not the normal or even regular way of dealing with an alleged offender during an adjournment.

21. To emphasise this, some governments have already legislated to make bail a right and to expect written explanations of why, in given cases, bail could not be granted. To cut down on the time being taken by the courts to dispose of cases, the government of the United Kingdom has moved to test what time limits might be imposed in criminal proceedings under the Prosecution of Offences Act 1985. From 25 November 1985 in selected Magistrates' Courts and from January 1986 in selected Crown Courts, time limits have been set. In the Magistrates' Courts, the test limits set in custody cases are 56 days from first appearance to summary trial, or 70 days to proceedings for committal for trial in the Crown Court. In the Crown

Court, the test limit in custody cases is 112 days from committal to arraignment. The Home Secretary has commented that these time limits are really longer than the government might wish to impose but that during the test period it was necessary to avoid being too stringent. This is a valuable move to cut down the periods being spent on remand even if this was only one of the objectives. It might recommend itself to other governments facing the rise in remands. The building of special prisons for remandees, as in Sri Lanka and Malaysia might well find favour with other prison administrations finding it difficult to maintain a realistic distinction between the unconvicted and the convicted.

22. Arrangements for a periodical review of remands in custody is obviously necessary to avoid undue delays. Research is required to determine the rationale for decision making by the courts. It is significant that some of the alternative sentences to imprisonment, probation, community service orders, suspended sentences and the like have frequently been applied not to keep offenders out of prison but to extend the obligations of many who might previously have escaped with a fine or a bind over.

23. Could it be that with the ultimate aim of keeping offenders out of prison, the remand in custody is being used as a deterrent? If so, then it needs always to be short because it does not take long for a new remandee to adjust to the system. And when this happens, prison does not nearly so frighten as it once did.

24. Perhaps the numbers and lengths of remands in custody are indices of the efficiency of a criminal justice system. They will certainly indicate the level of toleration in a system and the capacity of a system to handle offenders without undue incarceration.

25. Finally, it needs to be mentioned that remands in custody are expensive. When they are necessary, this expense is more than justified. When they are not necessary, the taxpayer is carrying a greater burden than he should.

REFERENCES

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PRE-TRIAL REMANDS IN CUSTODY

Memorandum by the Government of Hong Kong

INTRODUCTION

Hong Kong has not as yet followed the lead taken by many other Commonwealth countries by codifying the law of bail, and setting out in statutory form the principles upon which bail applications should be considered. This topic is, however, being considered by the Law Reform Commission, and it is hoped that a comprehensive Bail Ordinance will be introduced in the reasonably near future. Because the police have extensive powers of arrest which they use even for comparatively minor offences, the proportion of defendants for whom the question of bail must be considered is high. Cash bail predominates.

Although these factors might lead one to expect a high level of pre-trial remands in custody, the level is in fact low. No research has been done into the reasons for this, but on the basis of the material available it is possible to speculate. Firstly, the delays in bringing matters to trial in Hong Kong are relatively short - this reduces the total number of those on remand at any time. Secondly, the proportion of defendants granted bail is high (between 82% and 93%). Thirdly there is an administrative system under which all persons granted bail but unable to meet the conditions are referred back to the magistracies for re-consideration of the terms of their bail.

PROPORTION OF PRISONERS ON REMAND

The breakdown of the prison population as at 31 December is as follows:
As at 31 December

	1978	1979	1980	1981	1982	1983	1984	1985
On remand, pending sentence or committed for trial								
(a) total	660	725	988	911	877	739	653	722
(b) percentage of all prisoners	10.2	12.2	14.9	13.1	11.01	9.4	8.3	8.9

On 1 March 1986 the breakdown of prisoners in Lai Chi Kok Reception Centre (our main adult male remand institution) was:

- (i) Total number of remand prisoners
 - (a) On remand pending hearing 177
 - (b) On remand pending sentence 195

(c)	On remand pending committal for trial	203 —
		575
(ii)	Number of prisoners remanded in custody	
(a)	for indictable offences	142
(b)	for summary offences	<u>433</u>
		575
(iii)	The number of remand prisoners who were allowed bail, but unable to meet the terms	50
(iv)	Breakdown of offence categories:	
(a)	Against lawful authority	19
(b)	Against public morality	7
(c)	Against the person	54
(d)	Against property	201
(e)	Against penal code	24
(f)	Against local laws	20
(g)	Narcotic offences	<u>250</u>
		575

RECEPTIONS

In 1984 43.07% of all prisoners received either on remand before trial, or following sentence, were remand prisoners. In 1985 the figure was 40.64%.

BAIL FROM MAGISTRATES COURTS

All defendants are initially charged in a magistrate's court, and the rate of remand on bail there will be very close to the total for prisoners remanded in all courts. No regular statistics are kept, but a survey of all files in all magistracies for the period 1/8/85 - 31/10/85 shows that of 9469 persons for whom bail was considered 8416 (88.88%) were granted bail, and 1053 (11.12%) were refused. Of those granted bail 171 (2.12%) were referred back to the courts by the prison authorities because they were unable to meet bail terms. There is no legislative basis for these reviews, but as a matter of practice all remand prisoners who are unable to take up their bail are referred back to the courts after a few days.

SPEED OF TRIAL

In the overwhelming majority of cases criminal charges move speedily to trial. This reduces both the numbers of prisoners on remand at any time, and the length of remands.

Delays caused by lengthy committal proceedings have already been reduced by allowing committals to proceed on paper with the consent of the defence. When a person, charged with an indictable offence is first brought before the magistrate a day for the continuation of the proceeding is set (the "return day"), this date may be not less than 10 and not more than 42 days away and the period may only be extended on reasonable cause being shown. Further improvements to the committal procedure are now under consideration.

In order to enable the courts to monitor the length of delays the Correctional Services Department provides a monthly return of all those remand prisoners who have been in custody for more than 60 days. The Registrar uses this information and takes action where delays become excessive. If, for example, one magistracy is encountering unusually long delays, this may indicate a need for more staff.

The figure for the year ended 31 December 1985 are as follows:

Prisoners on remand for over 60 days

Year ended 31/12/85

Mean number of days in custody (of those over 60 days)				98
Average number of persons on remand at end each month:				
over	300 days	0.9		0.7%
between	200 & 300 days	8.8		6.8%
between	150 & 200 days	16.0		12.4%
between	100 & 150 days	40.7		31.5%
between	60 & 100 days	<u>62.6</u>		<u>48.5%</u>
	Total	129.0		100.0%
Total number of cases where remand exceeded 300 days				
				7

Number of prisoners remanded over 60 days as percentage of total remand prisoners on 31/12/85: 18.3%

Waiting Period Before Trial

In 1984 the average delay between charging and trial in the High Court was 160 days. In 1985, the average delay was 151 days.

Number of Courts

Hong Kong has the advantage of being a small, compact jurisdiction. There are only 8 magistracies, 3 District Courts, and the High Court. There are 4 remand institutions - one each for adult males and females, and one each for juvenile males and females.

TAKING ACCOUNT OF TIME SPENT IN CUSTODY

All sentences are treated as reduced by the amount of time a person has spent in custody on remand prior to his trial or sentence (see s.67A Criminal Procedure Ordinance Cap. 221 - Appendix 1)

<u>Number of prisoners remanded over 60 days as percentage of total remand prisoners on 31/12/85:</u>	<u>18.3%</u>

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PRE-TRIAL REMANDS IN CUSTODY

A memorandum by the Government of GHANA

With the phenomenal increase in crime especially white collar crime, there is a corresponding rise in the prison population. The prison population is made up of convicted offenders serving custodial sentences and also remandees awaiting trial. In Ghana the remandees amount to about 20% of the population and this has given cause for concern. The prisons are over crowded and contain more inmates than they can conveniently contain. The question is how to decongest the prisons?

2. In the case of convicted prisoners, alternative methods of punishment must be found. In Ghana today discussion is going on to find such alternative methods of punishments as fines, probation, community service orders, confiscation of assets, payment of compensation to victims etc. And some of these methods are already being employed by the Tribunals under section 16 of public Tribunals Law 1984 PNDCL 78. The case of the remand prisoners is more complex to solve. The presence of pre-trial remandees in prison poses a number problems for the prison authorities, for example the overcrowding in prisons, rise in feeding costs, idleness of the remandees as they have not yet been convicted, and subsequent bitterness generated thereby, coupled with extra strain on prison staff due to a large number of prison inmates.

3. Why do we have pre-trial remands? Section 15 of Ghana's Criminal Procedure Code, 1960 provides that when a person is arrested he must, unless he is granted bail by the police, be brought before an appropriate court within 24 hours after the arrest. This provision was repeated in Article 21(3) of the 1979 constitution. Section 96 Act 30 deals with bail. When a person is brought before a court the court will, in appropriate cases, grant bail pending the hearing, or remand the accused in custody for a special period, usually 7 days. Thereafter the detention becomes subject to periodic review.

4. Section 96 of the Criminal Procedure Code, 1960 Act 30 provides:

- '(1) Subject to the provisions of this section, a court may grant bail to any person who appears or is brought before it on any process or after being arrested without warrant, and who
 - (a) is prepared at any time or at any stage of the proceedings or after conviction pending an appeal to give bail, and
 - (b) enters into a bond in the manner hereinafter provided, with or without a surety or sureties, conditioned for his appearance before that court or some other court at a time and place mentioned in the bond.
- (2) Notwithstanding anything in subsection (1) of this section or 15, but subject to the following provisions of this section the High Court or a Circuit Court may in any case direct that any person be admitted to bail or that the bail required by a District Court or police officer be reduced.

- (3) The amount and conditions of bail shall be fixed with due regards to the circumstances of the case and shall not be excessive or harsh.
- (4) A court shall not withhold or withdraw bail merely as a punishment.
- (5) A court shall refuse to grant bail if it is satisfied that the defendant -
 - (a) may not appear to stand trial; or
 - (b) may interfere with any witness or evidence, or in any way hamper police investigations; or
 - (c) may commit a further offence when on bail; or
 - (d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while he was on bail.
- (6) In considering whether it is likely that the defendant may not appear to stand trial the court shall take into account the following consideration:-
 - (a) the nature of the accusation;
 - (b) the nature of the evidence in support of the accusation;
 - (c) the severity of the punishment which conviction will entail;
 - (d) whether the defendant, having been released on bail on any previous occasion, has wilfully failed to comply with the conditions of any recognisance entered into by him on that occasion;
 - (e) whether or not the defendant has a fixed place of abode in Ghana, and is gainfully employed;
 - (f) whether the sureties are independent, of good character, and of sufficient means.
- (7) A court shall refuse to grant bail -
 - (a) in a case of treason, subversion, murder, robbery, hijacking, piracy or escape from lawful custody, or
 - (b) where a person is being held for extradition to a foreign country.'

When bail is granted the matter is subject to review every two weeks. In all other cases except those referred to above, unless the court finds that there is the likelihood of the accused leaving the jurisdiction, bail is invariably granted. The problem is that the accused persons are usually men of straw and unable to provide persons to stand as sureties for them. A great number of pre-trial remandee prisoners fall into this category. These form a great majority of the ones which clog the prisons until their cases are heard and determined.

5. The only way of solving the problem posed by those unable to provide bail for themselves is to try such offenders speedily. But then with the already long list of pending criminal cases would it be fair to deal with recent cases over and above long pending ones merely because such accused persons are unable to secure bail? Should other offenders who have been able to provide sureties for bail, being sometimes first offenders, suffer delay in the trial of their cases for the benefit of remandees most of whom are frequent offenders? The answer to the question is not easy and straight-forward, but a solution should be found for this problem. If the trial of remandees is to take precedence over other long standing cases, probably the prisons should be decongested and government would save feeding costs, but it would mean that other criminal cases might never be heard because impecunious criminals repeat offences as soon as their cases have been dealt with, and they have either paid their fines or been released from short term custodial sentences. To those offenders on bail therefore it would mean a long delay in disposing of their cases with resultant mental agony. What then is the solution? The easy answer that comes to mind is the provision of more judges to handle cases, but this simplistic answer would evoke wider implications like the provision of funds. Lack of funds for expanding the judiciary is already a problem just as lack of funds to expand prisons and feed prisoners. Such suggested solutions to this problem of pre-trial remandees are:-

- (a) to further reduce bail bonds by judges;
- (b) to try cases as speedily as possible and in this exercise the co-operation of defence lawyers, prosecutors, police and judges would be required;
- (c) reducing custodial sentences and imposing other modes of punishment involved so as to decongest the prisons, e.g. imposition of fines and community service orders;
- (d) if custodial sentences are drastically reduced in preference to other non custodial sentences persons granted bail would be less likely to jump bail and would appear to face their trials. It is often the fear of inevitable prison sentences being imposed upon conviction which deters persons on bail from failing to appear to stand trial;
- (e) the time already spent in custody pending trial should also be taken into account in awarding punishment. In Ghana we already have provision for this in our laws.

6. The search for a solution to minimise pre-trial detentions should not overlook the interest of society which must be protected from criminals. A person who is not likely to appear to face his trial or who is a violent offender with a propensity to commit repeated offences whilst on bail should in all cases be refused bail whether he can provide sureties for bail or not. The interest of the criminal should not outweigh that of society.

7. In Ghana at present a committee has been set up comprising officials from the Ministry of Interior, Prisons, Attorney-General's Office, Welfare Department, etc, to look into this problem and it is yet to submit its report. Some suggestions advocated are:-

- (a) To appoint one Judge to take up the trials of all the cases of the remandees as and when their numbers increase unusually.
- (b) To review periodically cases of remandees by providing them with legal aid to enable them to go to court for a review of their cases.

They could then be granted reduced bail with the condition to report daily to the police in deserving cases. The suggestion by some to impose deadlines on prosecutions could also be considered but this requires careful study in view of the many difficulties that could impede early hearing of cases.

ASPECTS OF PRE-TRIAL CRIMINAL PROCESS IN ZAMBIA

A memorandum by the Government of Zambia

Introduction

This paper discusses the pre-trial criminal process in Zambia. It is divided into two parts. The first part deals briefly with the procedure of bringing into motion the criminal process. The second looks at the problem of securing the individual's liberty once the criminal machinery is set into motion i.e. the issue of bail in pre-trial matters.

The provisions of the law in Zambia regarding pre-trial criminal procedure, under the existing circumstances in the country are largely satisfactory. The processes here can be divided into three, viz

- (1) Arrest
- (2) Laying of charges: and
- (3) Trial (hearing conviction/acquittal and sentencing)

(1) Arrest

The presence of an accused at his trial is secured by summons or warrant of arrest. The accused may also be arrested without a warrant in a number of instances. The law also provides for the non-attendance of the accused in the cases of charges punishable by fine or imprisonment not exceeding 3 months.

(2) Summons

Summons issued by court directed to the person requiring him to appear before the court at a place and time appointed is normally served on the person against whom a charge is laid. Where he is not available this can be left with a member of his family, a servant or where this is not possible the summons can be affixed to a conspicuous part of his house.

The system in Zambia of the issue of summons, the service thereof on the person required to attend trial still works. This is a method more preferable to that of arrest for it ensures the liberty of the individual as laid down in the country's Constitution. Where the offence is not of a serious nature, and the accused and his interests are known and it appears that the accused is not likely to abscond, the issue of a summons is preferable.

(3) Warrant

In cases where a person summoned may abscond or is likely to take steps that may defeat the ends of justice, or where an offence is committed in circumstances where the attendance of the accused person can only conveniently be secured by an arrest, a warrant of arrest is resorted to. In Zambia no arrest can be effected unless a complaint or charge has been made on oath. A warrant of arrest is only issued by a judge or a magistrate upon allegations of facts which prima facie show that a punishable offence has been committed and

that there is reasonable ground of suspecting the person named in it. A warrant of arrest states the offence and names the person against whom it is issued and orders that such person be brought before the court to answer the offence charged. The Zambian judicial system recognises that the issue of a warrant of arrest is a serious judicial act and as such normally resort to such in circumstances of necessity. And in recognition of the liberty of the individual the law provides that any court issuing such a warrant may direct that the officer executing the warrant do release the person arrested if such a person executes a bond with sufficient sureties. Perhaps the only recommendation that could be made here is that such a release on bond should be upon the person's own recognisance.

In the case of an arrest effected by a person other than a police officer, such a person hand over the arrested person to the nearest police officer who, in turn, is required by law to bring him before a magistrate without delay. This provision again ensures that a person is not unnecessarily restrained or badly treated. In cases where a person may have been unduly held up in custody, the criminal procedure code empowers a court to issue an order directed to officer in charge of the place where the person in question is being held before such court. The court then takes the necessary steps to see that the case is disposed of expeditiously. This ensures that the ends of justice are met and not defeated.

(4) Arrest without warrant

This is the most common form of arrest in most developing countries including Zambia, perhaps because the offences for which the arrests are made are of a common nature. Among other offences a person could be arrested without warrant if he is suspected of having committed a cognisable offence or breach of the peace. Other instances include the obstruction of the police, being found in possession of stolen property or where one deserts from the defence forces, etc.

However, in any of these instances an arrested person is required to be present before the court without delay. What constitutes unnecessary delay is a question of fact. But if it appears that such a person cannot be taken to court within twenty-four hours the police officer is empowered by the Criminal Procedure Code to release him on bond unless the offence in question carries capital punishment. Police Officers are required to report all cases of persons arrested without warrant within the limits of their jurisdictions.

(5) Prosecution

The law recognised that arresting a person and merely handing him to the court is not a full discharge of justice. Accordingly, it imposes a duty on the court to ensure that once a person is brought before it his case is disposed of as quickly as possible, hence the legal maxim "Justice must not only be done but it must be seen to be done". The judicial process of preparing the case for trial is thus set in motion. If a charge is not yet framed up this is done either by a public prosecutor or at the instance of the office of the Director of Public Prosecutions, or by the court itself.

Our law permits both private and public prosecutions. Private prosecutions are only conducted with permission from the court. This is to ensure that the individual's rights are not jeopardised and that the case trial is meritorious and not frivolous and vexatious. The law subjects the private prosecutor to the same rules and limitations as the public prosecutor and where necessary it permits the Director of Public Prosecutions to take over the prosecution. The permission of private prosecution under our law is a recognition of the fact that under certain conditions some cases are more effectively handled privately than publicly and such privileges given to the private prosecutor have hardly been abused.

(6) Public Prosecutor

The power to institute or discontinue public prosecution on behalf of the State is vested in the Director of Public Prosecutions. However, he has the authority to delegate some of the powers under him and to appoint public prosecutors.

The entrusting of prosecution to the office of the Director of Public Prosecutions is consonant with the fact that a crime is an offence against the State. Centering the process of prosecution to the office of the Director of Public Prosecutions is a way of ensuring law and order to the whole society. This is a further recognition of the fact that executing the judicial machinery of trial commencing with enquiry, charge and the crowning of trial with conviction and sentence is an enormous task. In the interest of the State this function given to the Director of Public Prosecutions must be effectively and speedily executed. For on the other side lies the interest of the accused that is seeking freedom. Only a speedy trial will save him a lot of difficulty.

The law empowers the Director of Public Prosecutions to avoid unnecessary delays of trial and to ensure the liberty and freedom of the individual. Either due to insufficiency of evidence or due to any other sufficient cause he is empowered to enter a nolle prosequi at any stage of the trial, in which case the accused stands discharged. Still for any other sufficient cause he is empowered to withdraw any case before a subordinate court in which case the accused may be discharged or acquitted depending on the stage the trial had reached. Any unnecessary delays that may crop up from the office of the Director of Public Prosecutions, either due to insufficiency of evidence or any other causes as seen above, are taken care of. As a result up to this stage the processes under our law regarding pre-trial criminal procedure still appear satisfactory.

(7) Trial

Preliminary Inquiry still appears in the Criminal Procedure Code, but has attracted criticisms. The main criticism against this process is long delay in the disposal of cases and the fact that it creates a wrong impression to witnesses that the trial has already been disposed of. By the trial they mean the preliminary inquiry.

In inquiries the law limits accused's remand period at any one time to only fifteen days.

As for trial, there is no statutory provision in Zambia fixing the time when an accused person should be brought before the court to stand his trial.

However, the time within which prosecution should commence a summary trial is limited to 12 months. In practice, arrangements for trial are made between the court, the office of the Director of Public Prosecutions or Public Prosecutor and the defence in cases which are defended.

The present laws in Zambia on pre-trial criminal procedure are set to ensure a fair and expeditious trial without infringement upon the rights of the citizen. They also provide effective penal system for those found guilty.

The process commences with preparation of a case and reaches the peak with the trial itself. However, not all cases commenced reach trial for a registered case may be withdrawn for a number of reasons such as a reconciliation. The Zambian Government is now considering instituting legislation under which the police will be given more powers to settle some cases outside court. This will save the courts from undue congestion and enable them to handle more contentious matters.

The general rule is that only contentious cases must reach trial stage. Hence the encouragement of compromise, reconciliation or settlement of disputes out of court i.e. before police officers or judicial officers. An accused who has no defence is encouraged to admit the charge. This is without prejudice to his right to trial. Admission of the charge without the rigour of a trial which may subsequently end up in a conviction actually saves both the accused and the court a lot of trouble, costs and time.

The procedure ensures that unnecessary delays are avoided under a number of instances as seen above. The law only permits necessary adjournments and discards as far as possible unnecessary delays. Both the legal and judicial machinery in Zambia adequately takes care of the legal maxim "Justice delayed is justice denied," and the principle of fair trial. Accordingly the machinery of justice in Zambia is geared to the fulfilment of these goals.

Bail in Zambia

Bail as a device in pre-trial criminal procedure rose out of the need to free untried prisoners. Its theoretical base is the legal doctrine that an accused person is presumed innocent until proven guilty. Putting an accused person in goal before he is tried, convicted and sentenced would in essence be a violation of this legal doctrine and a violation of constitutional rights.

However, on the other side lies State interest to ensure the presence of the accused at his trial.

In Zambia there is no automatic right to bail for any accused person. Where bail may be granted it is granted to a person other than a person accused of murder, treason or espionage. This is done either on the accused person's own promise that he will be present at his trial or on the promise of a suitable surety or sureties acceptable to the court or a police officer. However, in most cases the release or non-release of an accused person on bail is a matter of the court's discretion. A right of appeal exists.

Before a person is admitted to bail, the court considers a number of factors which basically hinge on whether or not the accused will appear and stand his trial. These factors are:

- (i) the gravity of the offence charged;
- (ii) severity of punishment on conviction;
- (iii) possibility of interfering with witnesses; and
- (iv) independent sureties. (see 1964, 61 Law Society's Gazette likelihood)

In some cases bail may be refused to an accused if there is a likelihood of repetition of the offence. In other cases bail is denied because of lack of acceptable sureties. In yet others the bail sum may be excessive for there is no objective criteria for assessing bail in relation to the means of the accused, the law merely provides that:

"The amount of bail shall in every case be fixed with due regard to the circumstances of the case, but shall not be excessive."

These considerations may deviate from the very objective for which bail was conceived - namely that of ensuring that an apparently innocent person does not remain in custody before his trial. Being in custody for the want of raising the necessary bail money

is inconsistent with the presumption of innocence of the accused. In most cases, this works more unfairly to the poor and may not augur well for those acquitted trial.

There is, however, a provision for the High Court to order that the bail or deposit required by a subordinate court or by a police officer be reduced or varied. Needless to add, an illiterate person may be left unaware of such a provision.

Other jurisdictions have voiced strong sentiments against pre-trial detention. The court in one case noted thus:

"Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that on..... who is retried after obtaining past conviction relief. In both instances the power of the State has been utilised to punish the complainant."

One may well argue that to detain a person before trial is to punish him and to deny him protection under the Bill of Rights which decrees freedom and justice to all citizens. Perhaps it is safer to suggest that, since pre-trial detention is there basically for making certain the reappearance of a person at his trial, then those for whom bail cannot be granted should be the exception in the law.

Conclusion

It is clear from the foregoing that the grant of bail in pre-trial criminal procedure is a privilege rather than a right. Perhaps one could suggest a position which recognises that the main factor which induces an accused person to appear for his trial is not the forfeiture of his money or property but his reliability as a person. And his reliability or non-reliability can be established by investigation. The investigation could be directed to establish a number of things such as:

- (i) the character of the accused;
- (ii) his background;
- (iii) his occupation;
- (iv) his hobbies;
- (v) his close relatives or friends and their addresses;
- (vi) his criminal records, etc.

Where the investigation proves satisfactory the accused should be released on his own recognisance without having to buy his freedom.

As argued above, it is obvious that a delicate balance between the interest of the State and those of an individual need to be established. The State has enormous resources which an individual does not have.

It is obvious, therefore, that legal rights historically achieved by the people should have a socio-economic basis for their enforcement. In more cases than not congestions at both courts and prisons seriously jeopardise the individual's freedoms and rights.

One would have appealed for a statutory provision creating a limit on the time for prosecuting a matter. But, attractive as this might be, it would in reality, be illusory, given both the material and financial limits of Government.

What should be forcibly pleaded for is a system that is more objective than subjective in application. Indeed every defence lawyer has been confronted with a situation whereby Magistrate A grants an individual bail, whereas B refuses bail when the operative circumstances are the same.

Granted the acumen of the adversary system, it may be that in one instance the prosecution was agreeable to bail, whereas in the other serious objections were entertained.

Given a heterogeneous society caught up in a vortex of rural-urban migration, it is hard not to sympathise with the prosecutor's objection for admitting to bail a "person of unfixed abode just come from the village." For all purposes and intents sureties may not be forthcoming. The mentality of a good number of rural people who have not yet articulated legal consciousness is to equate an accused with a convict.

They are frightened of the legal apparatus embodied in the police, courts and prisons. As such, many illiterate persons who cannot afford a legal counsel, and may not be aware of the legal aid schemes, may languish in prison for a considerable period of time pending the clearance of overloads at the court. Moreover, when the matter does eventually come before the courts it will be a prologue to further adjournments. The accused is perplexed by such terms as "mention", "adjournment", "trial", etc.

In all fairness it may be stated that the Zambian bench has been very aggressive in protecting individual freedoms. Mbandangoma v the Attorney General 1979 ZLR 45 was an instance where the court showed dissatisfaction at an arrangement whereby an arrested person who was released on police bond was subsequently made to report himself to the police station in relation to the same offence. The court stated clearly that the police can only arrest persons for offences and have no power to arrest anyone in order to make enquiries about him, and further that it was improper for the police to detain persons pending further investigations without bringing them before court as soon as practicable.

Provided the applicant is a person of social integrity, the court is likely to be more sympathetic. That is why an exploratory exercise on the person's social standing is often carried out. In Shamalambe v The People (1985) (unreported), Commissioner Kabamba went on at length to explain that:

"There can be no other purpose for seeking to know all about the accused when considering bail applications than to answer the silent question concerning his personal integrity. The value he attaches to his name stands at the centre of inquiry. A man who values his name highly is more likely to stand his ground and defend it without the fear of suffering physical pain that a custodial sentence threatens. On the other hand, a man who cares less about what value his name may have so long as he enjoys himself is less likely to stand his ground to defend it".

The practice of the courts has been largely influenced by the reaction of the State to a bail application. In the same judgement Commissioner Kabamba stated:

"that the State's non-opposition to a bail application presumes that it has favourable information concerning the reliability of the applicant."

PRE-TRIAL REMANDS IN CUSTODY — UGANDA'S EXPERIENCE

A memorandum by the Government of Uganda

The problem of persons held in custody in our prisons awaiting trial can be attributed to a variety of factors. These include the shortage of well-trained and experienced man-power in the Judiciary, the Department of Public Prosecutions as well as in the Criminal Investigations Department of the Police Force. The relatively slow process of criminal trials occasioned by technical procedural requirements for the reception of evidence, coupled with the need to respect and observe the rights of the parties, such as the right to bail and adjournment, are also instrumental in bringing about this problem. An examination of some of these factors may help to illustrate how the problem has come about in Uganda.

Grant of Bail

In Uganda, a person accused of an offence under our criminal law has a constitutional right to bail. This means, therefore, that bail may be granted in respect of any offence under our legal system. However, there are some limitations to this right, depending on the gravity of the offence and the jurisdiction of the court dealing with the case.

Ordinarily, the power to grant or refuse bail in cases triable by Magistrates' Courts is discretionary and according to the provisions of Section 75 of the Magistrates Courts Act, the accused must be informed of his right to apply for bail. Except for certain specified offences, including those which are only triable by the High Court, a Magistrate's Court may at any stage in the proceedings release on bail any person accused of a non-capital offence upon taking from him a recognisance consisting of a bond with or without sureties for such amount as is reasonable in the circumstances. If bail is refused by a lower Court, a Chief Magistrate has power to grant it. Similarly, the High Court has power in any case to direct that a person be released on bail or that the amount required for bail be varied by reducing it to enable the applicant to afford it. Conversely, however, the High Court has power, if it is of the opinion that the amount of cash bail ought to be increased, to issue a warrant for the arrest of the accused to execute a new bond for the increased amount and may commit him to prison for failure to do so.

Consideration for granting or refusing bail in a Magistrate's Court

In deciding whether bail should be granted or refused, Magistrates' Courts are guided by the statutory provisions and must have regard to the following matters:-

- (a) the nature of the accusation - is it of a nature that if given a second thought by the investigator it could amount to merely a civil dispute;
- (b) the gravity of the offence charged and the severity of the punishment which conviction might entail;
- (c) the antecedents of the applicant so far as they are known;

- (d) whether the applicant has a fixed abode within the area of the court's jurisdiction;
- (e) whether the applicant is likely to interfere with any of the witnesses for the prosecution or any of the evidence to be tendered in support of the charge. Essentially, the first four matters the court is required to take into consideration when dealing with a bail application are concerned with the vital question whether the accused will ultimately answer his bail or is likely to abscond.

Experience has shown that our magistrates have been very liberal in granting bail to accused persons although in most cases cash deposits have been insisted upon. Where cash deposits have been made an additional condition, the amounts have always depended on the gravity of the offence and severity of the sentence in the event of a conviction. This liberal approach by Magistrates' Courts is understandable otherwise our prisons would be flooded with inmates as it is in these courts that the greatest number of accused persons are dealt with. Furthermore, in view of the substantial delays in concluding investigations and trials, such liberal approach minimises cases of people overstaying in remand before their guilt or innocence is determined.

Consideration for granting or refusing bail in the High Court

Unlike in the Magistrates' Courts, the right to bail in the High Court appears to be severely restricted. This is so in view of the fact that the type of cases which come for bail in the High Court are mainly those where Magistrates' Courts have no jurisdiction to try and where the offences carry long prison sentences or the death penalty.

Accordingly, a person will be released on bail only under stringent conditions. First of all, he will have to prove to the satisfaction of the Court that exceptional circumstances exist justifying his release on bail. Secondly, he must also prove that he will not abscond when released on bail. Clearly, because of the nature of the offences involved the law casts the burden of proving these matters on the accused. The exceptional circumstances which he must prove are spelt out as:-

- (a) Grave illness as certified by a Medical Board, signifying that it will be impossible for the accused to receive adequate medical treatment while in custody; or
- (b) Evidence that he has been remanded in custody for a period of 15 months or more without having been committed to the High Court for trial; or
- (c) A certificate evidencing that the Director of Public Prosecutions has no objection to the accused being released on bail; or
- (d) Evidence that the accused is an infant or a person of advanced age.

Factors which still lead to large numbers of remands

Despite the right to bail, many people still continue to languish in our remand prisons, especially in cases triable by the High Court. This is because few can satisfy the bail conditions stipulated in the law. Secondly, in the case of those who wish to rely on ill health as a ground for applying for bail, they still experience problems of getting the

appropriate certificate from the Medical Board established to deal with such matters. Thirdly, although the Courts are required by law to explain to the accused persons their rights as to bail, there are still some, especially those unrepresented by Counsel, who are not conversant with the modalities of applying for bail, while others do not simply bother until life in prison begins to bite. All these factors have had their effect on congestion in our remand prisons. Thus, the problem of persons held in custody awaiting trial is real in Uganda. By way of illustration, recent statistics show that in Masaka District of Western Uganda alone, there were 154 remand prisoners awaiting trial as compared to 85 who were waiting trial in what was classified as petty cases, while the total number of those in remand exceeded those serving prison terms after conviction.

Pre-Trial Criminal Procedure

As a feature of our criminal justice, preliminary proceedings are to be found in cases to be tried by the High Court only. According to the provisions of Section 1 of the Trial on Indictments Decree No. 26 of 1971,

"no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the provisions of Part XV of the Magistrates' Courts Act, 1970."

Part XV of the Act deals with preliminary proceedings in cases to be tried by the High Court. Under Section 173 of the Act, if a person is charged with an offence to be tried by the High Court, the Director of Public Prosecutions is required to draw up and file an indictment together with a summary of evidence with the Magistrate's Court exercising jurisdiction. The summary of evidence must contain the substance of the evidence which each witness is expected to give at the trial and also a reference to any exhibits which the prosecution intends to produce at the trial. When the accused person appears before the Committing Magistrate, the indictment is read out and explained to him. He is told not to plead to the indictment but is informed that he will be tried in the High Court where he will be able to defend himself and call witnesses on his behalf. The summary of evidence shall then be read out to him and, where necessary, translated into a language he understands.

The Magistrate should take care to ensure that the details of any witness the accused intends to call at his trial must be noted for the purpose of summoning them. When these and other minor requirements, not mentioned here, are complied with the Magistrate shall commit the accused for trial to the next convenient sessions of the High Court, and in the meantime, "remand the accused person in custody".

The basis for this procedural requirement is to afford the accused person an opportunity to know the case against him and prepare his defence. It also gives an equal opportunity for the prosecution to prepare its case well in time. Similarly, by reading the summary of evidence beforehand, the trial judge will have the opportunity of acquainting himself with some of the problems which are likely to arise at the trial.

In trials by the High Court there is what is known as preliminary hearing which precedes the testimony of witnesses from the witness box. At the preliminary hearing, both the prosecution and the defence are required to agree on such matters as are not in dispute so as to promote a fair and expeditious trial. Upon such agreement, the trial judge is required to prepare a memorandum setting out such matters as are agreed upon, which memorandum must be signed by both parties.

Our experience is that both preliminary proceedings and preliminary hearing procedures are cheap and expeditious, and were intended to give the accused persons a speedy trial and thereby reduce over-crowding in our remand prisons.

Adjournments

A Magistrate's Court has discretion to adjourn the hearing of a case upon an application made in open court but only if sufficient cause has been shown by the party applying for the adjournment. Similarly, the High Court may grant an adjournment in course of criminal proceedings due to absence of witnesses or other reasonable cause to the recorded in the court file. In the meantime, the court may either remand the accused in custody or release him on bail.

Therefore, although the decision to grant or refuse adjournment is discretionary, the discretion must be exercised judicially. In other words, good cause must be shown to the satisfaction of the court by the applicant. For example, in Uganda V. Badrudin Adatia, (High Court Monthly Bulletin No.128 of 1971) where the prosecutor applied for an adjournment sine die on the ground that the principal witness had gone to India for a specialised treatment and that the date of his return was unknown, the High Court rejected the application on the ground that it would be monstrous to hold a charge over the accused person's head indefinitely. Even where the accused is the applicant, the same principle will still apply. In another case Y. Gitta V. R. (High Court Monthly Bulletin No.20 of 1959) the accused was released on bail and the hearing of the case fixed a month later. On the due date, he applied for an adjournment on the ground that his advocate was not available. In support of his application he produced a letter from the advocate saying that he (the advocate) was unable to appear as he was engaged in another court on the same date. In fact, the accused had not instructed the advocate until the eve of the trial. The trial magistrate refused adjournment as all the prosecution witnesses were present and the prosecution was ready to proceed with their case. On appeal it was argued on behalf of the accused that the refusal of the magistrate to adjourn the hearing so as to enable the appellant to be legally represented occasioned a miscarriage of justice. It was held that in refusing adjournment the magistrate exercised his discretion correctly. That the appellant had plenty of time to instruct an advocate long before the hearing date of the case but instead he waited and did so on the eve of the trial. In those circumstances, the court observed, it could not be said that the appellant was deprived of the right to be represented by counsel through no fault of his own.

It is clear, therefore, that normally the courts are not prepared to adjourn a case unless good cause is shown. Needless to say, a protracted trial, punctuated with unnecessary adjournment not only contributes to over-crowding in prisons, but may also lead to injustice to the accused. In spite of this, the courts continue to experience practical problems. Frequently, a prosecutor may find himself unable to proceed with a case because of the absence of witnesses. Similarly, Counsel for the defence might find it necessary to ask for an adjournment because of other court engagements. Even the court itself might be unable to proceed with a case due to the work load before it. All these factors inevitably contribute to overcrowding in remand prisons.

Time spent in custody and the sentencing process

It is common knowledge that after conviction it is the duty of the court to pass sentence upon the accused according to law. Except where the sentence is fixed by law, assessing the proper sentence in any given case has no mathematical formula, and is often the most difficult task of the court. In this connection, therefore, our law provides that before passing sentence, the court is required to make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed, and may inquire into the antecedents of the accused and take them in consideration. One of the matters to be taken into account in favour of the accused is the period he has spent in remand awaiting trial.

The Establishment of Magistrates Courts:

The courts of Uganda consist of six hierarchical tiers. The lowest four tiers comprise the Magistrates' Courts. These are the courts of the Chief Magistrate below which there are those of Grade I, Grade II and Grade III Magistrates. They are subordinate courts of record whose decisions are subject to review by superior courts. Generally, the jurisdiction of Uganda Courts is confined within its territorial boundaries. However, where offences of Treason; those arising out of acts intended to alarm, annoy or ridicule the President; concealment of treason; terrorism; and those acts intended to levy war against a lawful authority are committed outside Uganda, the same may be tried by Uganda courts, if they are committed by Uganda citizens or persons ordinarily residing in Uganda.

Whereas the High Court has unlimited territorial jurisdiction within Uganda, Magistrates' Courts have theirs confined to the local limits of their magisterial areas. As a general rule, therefore, every offence committed in Uganda must be inquired into or tried by a court within the local limits in whose jurisdiction it was committed. The reason for this is obvious. Evidence is more likely to be available in the area where the offence is alleged to have been committed. Also both the prosecutor and the defence are likely to find it more convenient to secure their witnesses and organize better their respective cases.

Presently, there are magisterial courts in every District Administrative Headquarters throughout the country, as well as in all urban and heavily populated areas. On the average there is a Grade II Magistrate's Court for every sub-county Division. To a large extent, because of the wide-spread number of magisterial courts, the problem of over-population in our prisons caused by persons in remand awaiting trial has been considerably minimized. But more could be done to improve the situation, depending on our resource capability in terms of the necessary funds to rehabilitate the war-damaged court buildings and put up new ones and increasing, particularly, the prosecution personnel.

The Training of Police Officers

Expeditious disposal of criminal cases by the courts depends largely on the quality of investigations by the Criminal Investigation Department of our Police Force. The mounting of prosecutions is often delayed because of poor investigation. Consequently, the Uganda Government has continued to lay emphasis on the training of police personnel and, particularly, those involved in criminal investigation. The introduction of the Certificate of Law Course at the Law Development Centre at Makerere is designed to equip police officers, not only with the basics of the law and how to apply them, but also to improve on the techniques of crime detection and investigation. These efforts have so far yielded dividends, and generally other problems such as transport apart, there has been a remarkable improvement in the quality of criminal investigations in our country. Without a properly trained manpower in criminal investigation, there will always be delays in prosecuting cases and therefore over-population in our prisons.

Transfer of Prisoners on Remand

The transfer of prisoners from one remand prison to another is one of the ways of minimizing congestion in our prisons. This happens to a limited extent due to lack of better facilities in most of our prisons. Secondly, the prison authorities are usually apprehensive about transfers as experience has shown that it is during such transfers that prisoners tend to escape.

Manpower Improvement in the Department of Public Prosecutions and the Magisterial Courts

Within the limited resources of our country the Government has tried to ensure that justice is not denied to the people of Uganda through unnecessary delays. The increase in the intake of students to Makerere University's Law Faculty, and to the Law Development Centre which offers a Post Graduate Bar Course, is purposely to improve on our manpower development in this area, both in terms of numbers and quality. The result has been a gradual but steady turn-over of young lawyers most of whom are appointed State Attorneys in the Department of Public Prosecutions, while others are appointed and posted as Magistrates up-country. The DPP's Department has also been further strengthened by the posting of regional State Attorneys to expedite the process of prosecuting criminal cases up-country. From Uganda's experience, therefore, there is no doubt that these efforts have helped to reduce considerably the volume of cases pending before the courts and thereby cutting down on the number of remand prisoners awaiting trial.

Conclusion

In conclusion, it must be stated that the law enforcing agencies in particular and the Government of Uganda in general, are committed to seeing that everything possible is done to minimise, if not eliminate altogether, the problem of persons held in custody awaiting trial, without denying the accused person the rights that he may have under the law during his trial. In so doing, the Government of Uganda will, obviously, need and welcome any assistance from any Commonwealth member state, particularly in the areas of rehabilitating the courts and the training of our police force.

PRE-TRIAL REMANDS IN CUSTODY

A memorandum by the Government of Canada

Issue

What efforts have been made in Canada to restrict the number of persons deprived of their liberty while awaiting trial ?

As suggested at the previous Commonwealth Law Ministers' meeting, these efforts might take the form of (a) increasing the availability of bail, (b) streamlining pre-trial criminal procedures, (c) imposing deadlines on the prosecution, and (d) taking into account time spent in custody in fixing any subsequent sentence.

Background

The Canadian Government has addressed the issue of pre-trial remands in custody through legislation based on at least two fundamental rights:

(1) Right to Judicial Interim Release or Bail

Even though the right to interim release has traditionally been at the foundation of the common law legal system inherited largely from England, this right is now enshrined in the Canadian Charter of Rights and Freedoms, being Part 1 of the Constitution Act 1982. Current provisions for interim release are set out in Sections 448 to 459 of the Criminal Code of Canada as amended by the Bail Reform Act of 1971. These provisions stem from recommendations made by the Canadian Committee on Corrections (Quimet Commission) in 1969 and serve to increase the onus on the arresting police officer to provide reasons at a show cause or bail hearing as to why a suspect should be remanded in custody, thus increasing the likelihood that the suspect will be released on bail. Under these provisions, the court may only remand an accused in custody:

- "On the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; or
- On the second ground, that his detention is necessary to the public interest or for the protection or safety of the public having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice."

(2) Right to Trial Within a Reasonable Time

Under section 11 of the Canadian Charter of Rights and Freedoms, 1982, any person charged with an offence "has the right....to be tried within a reasonable time". This right

was incorporated into the Criminal Code through the Criminal Law Amendment Act of 1985. Some of the factors which the courts have been prepared to consider are the length of delay, the reason for the delay, the accused's assertion of his right to a speedy trial and the prejudice to the accused occasioned by the delay.

At the present time, a Correctional Law Review is being conducted as part of an overall review of the criminal law in Canada. It is expected that the report, due in 1987, will rationalize further the sentence calculation process by ensuring that it will include a consideration of the time a person spends in pre-trial custody. For example, the issue will be examined as to whether a person in pre-trial custody could be eligible for a Temporary Absence and, as well, be allowed to earn remission for good behaviour.

Status

An overview of the use of pre-trial custodial remands for adults (aged 18 years and over) in Canada is provided by recent statistics on adult correctional services from the Canadian Centre for Justice Statistics (Statistics Canada):

- During the fiscal year 1984-85, an approximate total of 900,000 persons were charged with an offence but only 61,000 (6.7%) or 1 out of every 15 persons charged was remanded in custody. Conversely, nearly 93% of accused persons remained in the community or were granted interim release, pending further court proceedings.
- During this same period (1984-85), approximately 189,000 of the total persons charged were admitted to provincial, territorial, or federal adult correctional institutions but the 61,000 remands represent only 32% of these admissions and account for 12% of the average daily inmate count.

The Canadian figures may be placed in the context of comparable ones contained in the conference papers of other Commonwealth countries (LMM(86)9 #9, #28 and #34):

<u>Country:</u>	<u>Time Period:</u>	<u>Percent of Prison Population:</u>
Canada	1984-85 fiscal	12.0% of average daily count
Australia	Sept.1, 1985	14.3%
New Zealand	July 1, 1985	9.6%
Hong Kong	Dec. 1, 1985	8.9%
Ghana	a recent year	20% "approx."

A recent (1986) Canadian Centre for Justice Statistics study (Custodial Remand in Canada - A national Survey) conducted a three month "snapshot" during April-June, 1985 of "pure remand" (i.e. persons in custody for remand only under a Warrant of Remand or a Warrant for Committal, and without the "dual status" of serving at the same time a sentence for another offence). While there were some limitations on the study (e.g. Quebec observes different reporting practices for remand), it nevertheless produced valuable information, including the following description of remand inmate characteristics:

- the vast majority were males (92%), non-Native (88%), less than 30 years old (67%) including 46% aged between 18 and 25 years, single (72%), unemployed (55%) and with between 9 and 12 years of education (75%).
- 70% of remand inmates had served a jail or prison sentence previously and some were known to be on probation at the time of admission;

-with regard to the most serious offence, some 27% of the remand inmates were charged with offences "against the person" while, using another method of classifying the most serious offence, nearly one half of these inmates were charged with either "serious violent" (11%) or "serious" (38%) offences.

In the same study it was found that custodial remand status was routinely terminated within one week or less in 64% of the cases. In addition, the modal (i.e. most common) length of stay was 1 day, the median (mid-point) length was 4.6 days and the mean (average) length of stay in remand was 11.1 days. However, it was also found that the group representing 64% of the cases utilized only about 12% of the "bed space" available for remand inmates in correctional institutions while the remand inmates who were detained for one month or more comprised only 14% of the cases but used 65% of the remand "bed space" during the year.

Reasons given in this study for terminating a custodial remand status were: 45% were "released at court" and 32% were moved directly from remand status to "sentenced" (i.e. serving a jail or prison sentence).

Canadian Perspective

The issue of a large number or proportion of persons deprived of their liberty while awaiting trial is now considered to be a relatively minor one in Canada. This position is taken because legislative initiatives in recent years that articulate fundamental rights in Canadian society have addressed this issue sufficiently to ameliorate most of the problem that existed in the past.

Rather than intrude on judicial powers or impose deadlines directly on the prosecution, the Canadian approach to the issue is to allow the courts to interpret independently those fundamental rights under the Charter which contribute towards the likelihood of persons being released from custody. As indicated above, these include the right to release from custody unless sound reasons are provided to show otherwise and the right to a speedy trial. Consequently, it is not considered necessary, for the objective of pre-trial remand, to streamline further the pre-trial criminal procedures or to impose deadlines on the prosecution. Nonetheless, time spent in pre-trial custody is currently being re-examined to ensure it is a consideration for any subsequent sentence.

In addition, the Department of Justice Canada is embarking on a national study of the disposition of criminal cases of which one area is the granting of judicial interim release and bail and the placing of persons charged in pre-trial custodial remand.

In contrast to the Canadian perspective, other countries have addressed the problem more directly. In Hong Kong (see paper LMM(86)28), where the problem is currently being examined by the Law Reform Commission, it is likely that bail will become more widely available. In addition to making bail more easily obtained, solutions suggested in the Ghana paper (LMM(86)34) are to try cases more speedily and to reduce the use of custodial sentences. Another approach, which is now being examined in the United Kingdom (see LMM(86)9), is to set limits in custody cases on the time spent in prison between first appearance and trial.

Finally, the analysis by Mr W Clifford (LMM(86)9), indicating a trend in a number of countries towards an increasing use of pre-trial remand, suggests this may be attributed to the growth of widespread discretion and accountability throughout the criminal justice process. However the Canadian approach appears to provide a balance to these trends.

The International Tracing, Freezing and Forfeiture of Criminal Profits

THE INTERNATIONAL TRACING, FREEZING AND FORFEITURE OF CRIMINAL PROFITS

A memorandum by the Government of Ghana

There is no doubt that big profits are often derived from illicit drug dealings and other frauds especially Commercial Crimes which transcend International boundaries. It is for this reason that there should be international cooperation in finding solutions for tracing and forfeiture of criminal profits.

2. In Ghana under our Criminal Law the aim is not only to punish Criminal offences but to order restitution to any person harmed by such crime, namely making restitution orders, compensation orders and confiscation of property acquired through criminal activity. Under Section 145 of the Criminal Procedure Code where upon the apprehension of the person charged with an offence any property is taken part thereof be restored to the person who appears to the court to be entitled thereto, and if he is the person charged that it be restored either to him or to such other person as the court may direct or that it be applied to the payment of any costs or compensation directed to be paid by the person charged. Section 146 also provides that where a person is convicted of having obtained property by fraud, or stealing or by false pretences the Court may order the property involved to be restored to the person who appears to be entitled to it.

Section 147 provides:

"Where any money or other property in respect of which any person has been charged before a court with an offence involving dishonesty is in the custody or possession of a person other than the accused, the trial court of its motion or on the application of the prosecutor or the alleged victim of the offence, may order that the person in whose custody or possession the money or property is shall not part with or dispose of the money or property until otherwise directed by the court".

Section 137 provides:

(i) Where a person convicted of an offence involving dishonesty has, since the commission of the offence, made payments of money or transferred any property to any person, such payments or transfers shall be deemed to have been made out of the proceeds of the offence and accordingly any court may, on the application of the prosecutor or the victim of the offence, order the person to whom the payments or transfers have been made to return the money or property to such person as may be specified by the court unless it is shown to the satisfaction of the court by the person in respect of whom the order has been made -

- (a) that he gave valuable consideration commensurate to the payments of money or transfer of property made to him; or
- (b) that he is a dependant of the person convicted and that the payments of money were his reasonable living expenses made to him as such dependant.

(ii) An order under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the person in whose favour the order has been made as plaintiff and the person against whom the order has been made as

defendant and shall be enforceable in the same manner and be subject to the like appeal as are orders for the return of money.

(iii) The court shall have jurisdiction under this section notwithstanding that the value of the money or property exceeds the limits of the civil jurisdiction of the court."

Section 147B provides:

" (i) Where the sentence is imposed for an offence involving dishonesty and any property including money is not recovered, the court on sentencing the offender, on its own motion or on the application of the prosecutor or the victim of the offence, may make an order for the return by the offender to victim of the offence of the property not recovered and for payment, in default, of the value of any property not returned.

(ii) An order under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and offender as defendant and shall be enforceable in the manner and be subject to the like appeal as are orders for the return of chattels or of money.

(iii) In case of dispute as to the value of the property the issue shall be tried by the court in the same manner as in a civil action.

(iv) The Court shall have jurisdiction under this section notwithstanding that the value of the property involved exceeds the limits of the civil jurisdiction of the court.

(v) An order under this section may be enforced either during the term of the sentence imposed, or at any time within ten years after the expiry thereof".

Section 148 provides:

" (i) Any person who is convicted of felony or misdemeanour may be ordered by the Court to make compensation to any person injured by his offence.

(ii) Any person who is convicted of an offence on summary conviction may be ordered by the Court to make compensation, not exceeding twenty-five pounds, to any person injured by his offence.

(iii) Any such compensation may be either in addition to or in substitution for any other punishment".

3. There is one criticism however of the provision that any order for refund of property acquired as a result of the offence, be deemed to be a civil judgement and those in whose favour the order was made have to enforce them in accordance with the civil procedure. This is a tedious procedure and has not proved effective because the victim of the crime has not always been able to identify the property of the convicted person to the Civil Court. There is therefore need to change the law to make forfeiture of the convicted persons property automatic without going to the Civil Court again.

However section 16(6) of the Public Tribunals Law 1984 PNDCL 78 provides that "any person found by a Public Tribunal under this Law of having illegally or dishonestly acquired any property shall be liable on conviction to forfeit the property to the State". This provision has enabled the State to recover monies stolen from public coffers and also private persons who have lost property through crime.

4. There is an increasing interest among nations in enacting laws and providing effective measures to ensure that illegal proceeds of an convicted offender are not enjoyed by himself or his family and friends. Unless this is done the deterrent effect of punishment would be lost and such persons can after paying any fines or their crimes and in some case even serving terms of imprisonment enjoy afterwards the fruits of their crimes and in some case even become millionaires. The issue demands seizure and confiscation of property and effective enforcement of powers. How to trace ill gotten assets is a big problems however.

5. The problem can be solved by confiscating any property of a convicted person to the value of the amount stolen etc. without necessarily tracing such monies. This is what is done in Ghana under Section 16(6) of PNDCL 78. Part of such monies could be used partly to pay fines, costs, compensations etc. and in the end the offender would be left with nothing, and would not have benefitted in any way from his crime.

6. The procedure also adopted in Ghana is by freezing the assets and bank accounts of a person suspected of having committed frauds, stealing etc. This is done by Government even before investigation or prosecution and it is an effective way of preserving property acquired by crime. If after investigation the person suspected is cleared then his assets are at once defrozen by Legislative Instrument. This compares with the case in Civil Law where a plaintiff could get an order of interim injunction or preservation of property the subject matter of a dispute before the trial of the case.

7. Unless the assets of a suspected criminal is frozen he may tamper with and dissipate property acquired as a result of the offence before any order of forfeiture could be made against him after his trial. He would thereby have been able to enjoy the proceeds of his crime.

8. It means in effect that in Ghana freezing of assets and Bank accounts takes care of tracing of assets and makes tracing merely complementary. Once the account belongs to the offender it can be frozen so that even if the actual proceeds of the particular crime has already been squandered his other monies could be forfeited. To adopt only the procedure of tracing actual proceeds of crime would be difficult and even impossible. Freezing of assets and automatic confiscation and seizure is an easier way of dealing with this matter (See Appendix 1 of proposed draft clause for inclusion in Draft Scheme for Mutual Assistance).

9. Assets of a person charged with Drug trafficking should be dealt in the same way as other crimes because there is really no reason why the proceeds of Drug Trafficking should be treated in any different way, it being also a criminal offence.

10. There should be international cooperation in the effort for the recovery of unlawful criminal gains. Member States may wish to agree to pass laws freezing assets of criminals found in their countries when the request is made by a member country to this effect pending further action, e.g. extradition or return of such stolen property to the country from where it was stolen. There should be provided power by states to order the preservation of property pending the outcome of a foreign prosecution and also power to transfer the preserved property to the state entitled, but this should be based on reciprocity. Unless there is international cooperation in these matters the criminal is at liberty to transfer property and assets of crime out of one jurisdiction to another with impunity and succeed in avoiding laws of member countries dealing with forfeiture matters.

PROPOSED CLAUSE BY GHANA ON INTERNATIONAL TRACING, FREEZING
AND FORFEITURE OF CRIMINAL PROFITS

To be included in the Draft scheme for Mutual Assistance in Criminal matters.

1. (a) A court before which a person is accused of any crime may order the freezing of the Assets and Bank accounts of the offender pending the trial and final determination of the case.
- (b) If after the trial the accused is found guilty of the offence charged then such frozen assets could be used to settle any order for forfeiture or confiscation of property, fine order of costs or compensation which would be made against the convicted person.
- (c) The court can also make an order for freezing the assets and Bank accounts of any person suspected or accused of crime in any member country when the request is made by the property authorities.
- (d) An order of transfer of such assets could also be made to a member Country when a proper order of Court of such requesting country is produced in court directing transfer after trial and conviction of the offender against whom a restitution order is made.
2. Any person who invests directly or indirectly any income or proceeds derived from any crime wheresoever committed shall be guilty of an offence and punishable by a fine..... and such business or income shall be liable to be forfeited to the State.

COMBATING ORGANISED CRIME

Memorandum by the Commonwealth Secretariat

Background

1. Confiscating and forfeiting property directly associated with serious crime is not a new concept. Very early and relatively unsophisticated systems of law provided for the seizure of property which was directly involved in the commission of a crime, and property which belonged to those placed outside the legal order. Indeed, 'outlaws' under many systems of law were deprived of their property not only to punish and deter, but also to deprive them of their status in society and ability to perpetrate anti-social acts in the future. It is well documented that under the early common law, the prospect of forfeiture of property on a felony conviction, was viewed as a significant disincentive to those possessed of power and influence to offend the law. Thus, history clearly indicates that the attachment of property has been used in the past not only to punish and deter criminal acts, but also reduce the ability of powerful individuals and indeed, organisations to perpetrate their disruptive and anti-social actions.

2. In more modern times the attachment of property has generally become, more-or-less, confined to the instruments and conveyances of crime and contraband. There are few provisions in most developed legal systems which permit the forfeiture of property which is directly, let alone indirectly related to the proceeds of crime. In recent years, however, there has been a growing awareness of the importance of combating syndicated and organised criminal activity, especially where the primary motivation of such is financial gain, through the forfeiture and confiscation of the proceeds. Historically the debate has centred on the illicit trade in drugs, and, indeed, considerable developments have taken place within the international community in refining at both national and international levels devices for depriving drug traffickers of their profits. However, more recently the parameters of the debate have widened, and now, it is recognised that the same mechanisms can be usefully employed against other types of criminal activity.

Organised Crime

3. Organised crime, almost without exception, exists and perpetuates itself for the purpose of making money. The concept of greed, and the power that money - in vast quantities - assures, is integral to most manifestations of serious organised crime. Indeed, most criminological definitions of organised crime fasten on this particular facet. Organised crime is in the business to make money, and thus, where a particular business activity is rendered unattractive, in economic terms, it will move into something else. Organised crime produces enormous amounts of money not for the sake of producing wealth in itself. This wealth is only relevant when it can be utilised and given a utility value. The product of such crime is used to acquire possession, social standing and respectability, immunity and other investment opportunities. Most criminals are concerned sooner or later to acquire legitimacy and thus convert their wealth, through a process of obscuring its origins, into indicia of standing and respect.

4. Today organised crime has moved far away from the almost romantic picture of the relatively amiable but not too competent gangsters in wide lapelled striped suits. Today the modern crime syndicates have adopted the same structures and modus operandi as

legitimate business. They have spread their investments and, thus, their risks. They operate internationally, they have diversified their activities - ensuring that disruption of one activity, will not unduly bring into question the viability of the whole. They operate within a management hierarchy and appear as financiers and businessmen rather than as stereotype gangsters.

Higher risk and more overt activities, such as trafficking and distribution of narcotics can be 'delegated' or even 'franchised' to relatively expendable other groups and individuals. Consequently, given their structure and their ability to function at a level beyond the reach of traditional law enforcement, in terms of hierarchy and territoriality, they exist and function beyond the perception of most law enforcement agencies. It is only recently and then 'as through a glass darkly' that Commonwealth countries are beginning to realise the extent of this problem.

5. Not only is organised crime able to structure its activities so as to avoid exposing itself to high risks, but it is also able to take full advantage of developments in communications technology and mobility of capital. It can operate on a broad international base, ensuring that even illicit activities that it must become directly involved in, are constituted in such a manner as to take full advantage of the constraints of territorial jurisdiction, limited investigatory resources, restrictive rules of evidence and little practical cooperation between police agencies. They can utilise their vast earnings to ensure a degree of protection through corruption and penetration. Organised crime has on a number of occasions dramatically illustrated its ability to corrupt and extort at all levels. Those who cannot be bought can be blackmailed or conned. Indeed, there have been instances where organised crime has adopted even more sinister tactics, where it has actually sought to penetrate organisations and governments to ensure cooperation, and thus, substantial immunity. There are cases where the vast proceeds of organised crime have been used virtually to buy up territories. In such cases the concept of state sovereignty and the very notion of mutual self-respect are brought into question.

6. Of course, the profits of organised crime are not only used to achieve legitimisation and immunity. They are invested to create even larger profits. Organised crime is able to find and finance other criminal enterprises and re-invest in its own operations. There is a pipeline in criminal funds. Money produced from one type of criminal activity will be invested in another. Money will also be invested in activities which are attractive for commercial, or other reasons, which may not necessarily be themselves illicit. The problem of penetration is an insidious one, and a serious threat both directly and indirectly to the stability of societies, where organised crime is able to buy into a legitimate business and subvert its activities the harm to society is obvious. However, even where there is no direct subversion to an illicit or improper purpose, the ability of criminals to fund their businesses from essentially unaccountable sources, at rates and levels beyond the reach of legitimate business, is not only unfair and thus destabilising, but likely to result in alienation or corruption of the legitimate business world. Businesses must compete to survive and there will be a proportion of businessmen who in order to survive will compromise their ethics, albeit "under protest". Of course, even where the investment is made with relatively unobjectionable aspirations, such as to acquire respectability and, thus, bring back the funds into the lawful economy, there is always the danger that those who have made their money peddling death and addiction will not be particularly scrupulous about adhering to the traditional constraints and restraints of the business world.

Money Laundering

7. Organised crime's ability to perpetrate and expand its activities will increasingly depend upon its ability to obscure the illicit origin of these funds. The ability to hide the origins of money and move it without leaving a clear trace has been developed and refined over the centuries by many groups, some for lawful and wholly proper purposes, others for far less honourable motives. Certain ethnic and religious groups have been forced, because of persecution or ostracism to develop procedures for the movement and maintenance of funds outside the traditional banking system. For example, the underground banking system developed by the Jewish Communities during the middle-ages and the system today operated by the overseas Chinese, both depending largely on gold and silver shops, representing examples of underground bankings systems. Devices for evading fiscal, exchange control regulation and taxation have been perfected and refined from what might well have started out as relatively unobjectionable financial procedures for the lawful minimisation of taxation. Organised crime have over the last three decades, in particular (and especially since the USA has developed and refined laws and procedures for the seizure and forfeiture of property associated with serious criminal activity) established highly sophisticated money laundering procedures. The devices employed today are truly legion, but all have certain elements in common. There is invariably a facility within the jurisdiction generating the illicit income, to consolidate and possibly convert it into a form of wealth that is easily transferred or smuggled. Then, this wealth will be moved out of the jurisdiction, and probably through other jurisdictions, often specially selected on the basis that their laws or administrations are such that no real co-operation can or will be given to those from outside. Once the money has been 'washed' through these jurisdictions, often using the expedient of spurious commercial and fiscal transactions, the money will either be deposited in a safe haven, such as the traditional end deposit countries, or repatriated through artificial transactions which resemble lawful business dealings to the original jurisdiction. There are, of course, many variations on the theme and almost by definition no two operations are the same. Lawyers who are prepared to facilitate the establishment of institutions and business organisations which can constitute links in the chain and territories, which are prepared to countenance such lax regimes of control and supervision in the knowledge that this will attract such business, must bear a considerable responsibility. To condone the laundering of funds produced from illicit trafficking in drugs is essentially to condone the illicit activity which has generated the profit.

8. Because of the expertise that organised crime has built up in recent years in laundering its own profits, it has provided a service for both terrorist and subversive organisations. There are also instances where essentially organised crime facilities have been employed to launder the money of alienated minority groups in countries operating strict exchange control regimes. The dangers that this represents for political and social stability are obvious.

9. It is sometimes argued that the legal economy depends on the illicit or 'black' economy and the 'black' economy by definition is, if not a product of, essentially a manifestation or reflection of the legal economy. Thus, the recycling of money from one side to the other, is not only inevitable, but in economic terms necessary. The problem with such essentially economic theories is that they, by definition, ignore the wider considerations of social and political policy. It is probably true that certain organised crime businesses could be bankrupted by the temporary legalisation of narcotics trafficking - as this would undercut the illicit market. However, this pays no regard to other social and political considerations. As countries such as Switzerland and some of the offshore financial centres in the Caribbean have recognised, the long-term implications of acquiring a reputation for providing a facility for 'hot' or 'dirty' money are detrimental. Not only is the standing of the commercial and business community undermined, and thus its ability to service the economy, but also there are the ever

present risks of corruption and alienation within society, and the infection of other areas of the community. This form of criminality is a cancer which taints everything it touches.

Commercial Crime

10. Organised crime has become increasingly involved in various forms of commercial crime since the Second World War. Commercial crime provides a relatively attractive source of revenue, in that the rewards can be high and the risks are low. Furthermore, as organised crime groups have progressed to a greater level of sophistication in both their process to legitimisation and structure they have found themselves ideally placed to commit and sponsor certain types of economic crime. Commercial crime and abuse also provide a useful means of protecting investments, improving the return on investment and in facilitating related forms of criminality. Although it is only in a few jurisdictions that the laundering of money is a specific criminal offence, the process of washing money will often involve the commission of a technical or fiscal offence. In some instances commercial crime is resorted to as an element within the laundering process. Certainly, the skills acquired in committing many forms of commercial crime and in laundering money are virtually inter-changeable.

11. Since the Commercial Crime Unit of the Commonwealth Secretariat became operational in 1981 a number of cases have been referred to it, which illustrate not only the involvement of organised crime in the general field of commercial crime, but the utilisation of expertise developed in laundering money in the context of commercial and non-commercial serious crime. It would be inappropriate to refer to specific cases, but for the sake of illustration the following examples may be relevant.

- (a) The Unit received a request for assistance from a regulatory agency in a non-Commonwealth country for assistance in tracing certain telephone calls made from a Commonwealth country and in identifying certain individuals who have visited that country. With the assistance of the police in the Commonwealth jurisdiction it was possible for this regulatory agency to establish that price sensitive information obtained in breach of confidence by professional advisers to companies was communicated, on several occasions, to persons in this other country, and then relayed back to others in its own jurisdiction, where it was illegally used for dealing on the securities market. This information was payment for cocaine. Therefore, organised criminals were paid for narcotics with 'inside information'. The Unit has come across similar cases where organised crime groups have extorted and blackmailed corporate officials into disclosing valuable information in similar circumstances.
- (b) A Commonwealth country was approached by a 'money broker' who offered to facilitate for this country substantial investment funds, at a very attractive rate. The Unit was able to establish that the money that was provided had been derived from inter alia, illicit trafficking in drugs. The criminals were thus seeking an excellent investment which would provide interest, security and suitably wash the principal sum.
- (c) A request was received from a Commonwealth country in regard to a series of investigations into gem smuggling. It was discovered that this was directly connected with trafficking in mandrax. Certain groups within the country wished to acquire gems for the purpose of smuggling their wealth out of the country and mandrax was a commodity that they could acquire relatively easily and trade for gems within the country.

- (d) A Commonwealth country under its exchange control laws blocked transfers of shares held by residents in foreign issuers. These securities could be released on deposit of 'equivalent' securities. Certain individuals within the jurisdiction sought the assistance of lawyers, associated with organised crime, to set up shell companies, the securities of which were apparently traded through recognised securities markets and then deposited with the relevant central banks. The shares were released in return for worthless securities. The individuals who had taken advantage of this device were subsequently blackmailed by the lawyers.
- (e) A major money laundering operation was established to wash monies obtained from narcotics trafficking in the USA. This process involved a central bank of a non-Commonwealth country and several companies in Commonwealth jurisdictions. Once the money was received in another Commonwealth jurisdiction it was employed to fund a series of promotional companies which were placed on the securities market and were then used to engage in market manipulation and cheque frauds.

There have been innumerable cases where proceeds from various economic crimes - ranging from bond washing to insurance frauds have been laundered and disposed off, through money laundering chains established for handling monies obtained from illicit trafficking in drugs. Indeed, the vast majority of the 1,000 or so cases referred to the Unit, since its inception, have at some stage involved a degree of money laundering or similar techniques.

12. The modus operandi adopted by money launderers in creating a highly complex network of financial and other institutions which mutually support each other in clothing shell and phantom operations with a semblance of credibility, is adopted by the advance fee fraudster, and those who peddle worthless securities and false letters of credit and deposit. Indeed, there have been a great many cases where the same individuals have been involved, at the same time, in classic advance fee frauds as well as money laundering operations. In some cases the money laundering element has been used to supply credibility to the fraudulent scheme. Victim governments have been discouraged from asking questions about the origins of money that is apparently being offered to them (on the basis that the source might dry up) and thus vital checks which would show the operation to be merely a sham or advance fee fraud, may be bypassed. Some lawyers, accountants and registrars, especially in so called 'tax haven' jurisdictions, and those offering offshore financial services are sadly as willing to prostitute their professions and disregard their social responsibility by servicing money launderers.

Commonwealth Concern

13. Commonwealth governments have not been slow to recognise the importance of combating organised crime through attacking its life blood - its money. Until relatively recently, it was in the USA that most work had been done in fashioning devices to enable not only the tracing and identification of such funds, but also their seizure pending trial and then their eventual forfeiture. The US legal system has showed itself able to adapt its devices, whether civil, criminal or administrative, to achieve its goals. Although there have been considerable procedural, definitional and jurisdictional problems, the US law, both at federal and state levels, has developed effective mechanisms for achieving this form of enforcement. Whilst it would be wholly misconceived to consider the US law and approach, as some sort of panacea, or model, it does provide a most useful and practical indication of what can be done. Commonwealth countries have recognised this; and now many have extended their traditional provisions (which allow for the forfeiture of contraband and the instrumentalities of serious crime) to include the proceeds of illicit trafficking in narcotics, and in some instances certain other serious

crimes. Other countries which have not yet been able to enact or prepare legislation are actively considering adopting such an approach. Indeed, it is perhaps important to underline that whilst this is an effective approach, conceptually and almost certainly practically, it is only one of many weapons that must be fashioned and then adequately and competently deployed to combat the modern criminal.

14. In the context of the Commonwealth, papers have been presented by member governments and consultants at the last two Commonwealth Law Ministers' Meetings, on the forfeiture of assets associated with criminal activities, and at the last three meetings, on the need for greater cooperation in tracing and the identification of such funds. Commonwealth Ministers of Finance have noted, at their last two meetings, the impact that organised crime and commercial crime can, and does have in some cases, on the economic stability of Commonwealth states. Other meetings and fora, such as the CHOGRM Working Group on Illicit Trafficking in Drugs, the first and second meetings of Law Officers of Small Commonwealth Jurisdictions (Isle of Man 1983; Vanuatu 1985), the Pacific Island Law Officers Meeting on the Seventh Commonwealth Law Conference, have all emphasized the importance of combating organised crime through action against financial assets, and the need for action at both national and international levels.

15. This concern has, naturally been mirrored in other international and regional organisations. The United Nations, ICPD-Interpol, the Council of Europe, the Association of South East Asian National and the Customs Cooperation Council, have also initiated programmes designed to facilitate action against organised crime through attacking its assets.

16. It is not necessary here to do more than record the extent of international concern and the political imperative that this subject has, at both national and international levels. What is especially significant to underline, is recognition that this type of initiative should not be confined to combating illicit trafficking in drugs. The Resolution of Seventh United Nations Congress on the Prevention of Crime and the treatment of Offenders (Appendix I) is particularly clear on this. At the Commonwealth Law Ministers Meeting in Sri Lanka in 1983, Ministers had already recognised this, and their request that the Commonwealth should further study cooperation in this context was not limited to narcotics offences, although it was recognised that it was 'particularly appropriate in such crimes as drug trafficking and fraud' (Appendix II). It will be seen that the proposed Scheme Relating to Mutual Assistance in Criminal Matters is not limited to narcotics offences in regard to requests for tracing of such assets and forfeiture (see LMM(86)13).

17. The significance of this approach in combating serious criminal activity has been given considerable impetus by the importance attached to it by Commonwealth Heads of Government at their Meeting in Nassau, Bahamas, in October 1985. Commonwealth Heads of Government emphasised the profound danger to the stability and security in particular to developing and smaller jurisdictions presented by organised crime and its vast funds (Appendix III). It was recognised that the effective action must be taken on an international level against the proceeds of such criminals. Heads of Government called upon the Commonwealth Law Ministers meeting in Harare, in July 1986 to consider this and refine procedures for greater cooperation.

18. As in the case of ordinary commercial crime, it must be recognised that no matter how sophisticated and well conceived both the law and its enforcement is at a domestic level, international cooperation is of critical importance. It will be necessary for governments to explore not only enhanced cooperation within and beyond the Commonwealth through bi-lateral and multi-lateral conventions and schemes, but also through modification of traditional concepts of jurisdiction, rules relating to the admissibility of evidence and judicial procedures. In the context of commercial crime and economic

destabilisation, Commonwealth Governments have long recognised that there is a need for an initiative, at least within the Commonwealth, which goes somewhat further than that which can be envisaged through traditional channels of cooperation. Commonwealth Law Ministers at their last three meetings have recognised the importance of establishing and supporting an initiative against commercial crime which is unique and beyond traditional police to police force cooperation. Traditional police cooperation was specifically recognised as not being sufficiently comprehensive, flexible, timely and sophisticated to provide on its own a satisfactory protection. It is suggested that this initiative (which has as its focal point the Commercial Crime Unit within the Legal Division has proved a success, as Law Ministers recognised in Sri Lanka.

19. As has already been indicated, the Commercial Crime Unit has since its inception been concerned directly with organised crime through its exposure and involvement in the field of commercial and economic activity. Consequently the Unit has been able to build up a special competence at an international level to co-ordinate inquiries and develop intelligence in regard to the flow of illicit funds and the investigation of money laundering operations. This was recognised by Law officers of Small Commonwealth Jurisdictions at their meeting in Vanuatu in 1985 who invited the Secretariat to consider strengthening this facility especially in the context of offshore and shell banking operations (Appendix IV).

20. The General Secretariat of ICPO-Interpol has had resort to the Unit's expertise in the development of its own training programme for financial asset investigators and the Unit has, at the request of Commonwealth governments, organised and run training courses on money laundering in Zimbabwe, Malaysia, Singapore, India and Hong Kong. It has also participated in other training courses in Britain, Australia, the USA and Portugal.

21. Consequently, already within the context of the initiative against commercial crime, the Commonwealth is able, in some measure, to facilitate the fight against organised crime and illicit trafficking in narcotics. Of course, given the limited resources available to the Secretariat and the number and nature of requests for assistance there are clear limits as to how far this particular aspect of its mandate can be carried.

22. Nonetheless, there would appear to be a facility in existence for the co-ordination of references in regard to money laundering inquiries, and the ability to support this co-ordination through the utilisation of intelligence and data that has already been developed on an ad hoc basis, and access to information that can be obtained through the special network that has been created in the context of commercial crime cases. Furthermore, the expertise that has been established may be utilised not only for co-ordination and training but also technical assistance. The Unit has already been able to initiate research projects on certain aspects of money laundering and in particular underground banking systems. It has developed a training package which is currently being used by several national law enforcement agencies. Furthermore, the Unit has been able to participate in deliberations of various other organisations, such as the Expert Working Group convened by the United Nations Division on Narcotic Drugs on the forfeiture of property associated with illicit trafficking.

OTHER RESOLUTIONS AND DECISIONS ADOPTED BY THE CONGRESS

RESOLUTION I

Organised CrimeThe Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders

Seriously concerned by the abundant evidence of the escalation of organized crime, including illicit drug trafficking, in many countries and its enormous social and economic costs.

Aware that organized crime increasingly crosses national boundaries, is often camouflaged under apparently legitimate business activity and is extremely difficult to combat.

Recalling resolution 7 adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Caracas from 25 August to 5 September 1980, relating to the prevention of the abuse of power, in which it was recommended that co-operative efforts should be intensified among Member States to prevent, prosecute and control this form of activity and that such efforts, including mutual legal assistance treaties or conventions, should make provision for the establishment of procedures for the gathering of evidence and the extradition of persons.

Noting the provisions of the "Guiding principles for crime prevention and criminal justice in the context of development and a new international economic order" submitted for the consideration of the Seventh United Nations Congress, which state that ways and means of international cooperation in penal matters, such as extradition and various forms of investigative and judicial assistance, should be made less cumbersome and more effective, and that the United Nations should develop appropriate model instruments for use by interested countries to promote further the use of such mechanisms and to maximize the effectiveness of international co-operation in the struggle against crime.

Noting also the conventions and draft conventions adopted, or under consideration, by a number of regional organisations of the subject of mutual legal assistance.

Recalling General Assembly resolution 39/112 of 14 December 1984, in which, inter alia, the Assembly invited the Seventh Congress to pay particular attention to the question of illicit drug trafficking, and Assembly resolutions 39/141, 39/142 and 39/143 of 14 December 1984 dealing with the Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, the Declaration on the Control of Drug Trafficking and Drug Abuse, and the international campaign against traffic in drugs, respectively.

Deeply concerned at the upward trend, as reported by the regional preparatory meetings for the Seventh Congress and the International Youth Year, in the involvement of young people in drug offences, leading to their physical and mental deterioration, the commission of crime, particularly in order to finance expensive drug habits, and even to suicide.

1. Calls upon Member states to intensify their efforts to combat more effectively organised crime at the national level, including consideration, if thought necessary in their respective systems, of the following measures, subject to safeguards and the maintenance of basic rights under ordinary legal procedures and in conformity with international human right standards:

- (a) The modernising of national criminal laws and procedures, including measures to:
 - (i) Introduce new offences directed to novel and sophisticated forms of criminal activity.
 - (ii) Provide for the forfeiture of illegally acquired assets.
 - (iii) Facilitate the obtaining of evidence abroad for use in criminal proceedings in national courts.
 - (iv) Modernize national laws relating to extradition.
- (b) The conduct of national campaigns against drug abuse to develop measures on treatment, rehabilitation, law enforcement and educational processes to deal with drug abuse.
- (c) The strengthening of law enforcement authorities and the provision to those authorities of increased powers.
- (d) The establishment of national institutions, such as national crime authorities or commissions, with appropriate powers, to investigate and obtain evidence for the prosecution of those centrally involved in organized criminal activity.
- (e) The review or adoption of laws relating to taxation, the abuse of bank secrecy and gaming houses, in order to ensure that they are adequate to assist in the fight against organised crime and, in particular, the transfer of funds for or the proceeds of such crime across national boundaries.

2. Urges Member States to increase their activity at the international level in order to combat organised crime, including, as appropriate, becoming parties to relevant multi-lateral treaties and entering into bi-lateral treaties on extradition and mutual legal assistance.

3. Recommends that the Committee on Crime Prevention and Control should be requested to:

- (a) Develop a comprehensive framework of guidelines and standards that would assist Governments in the development of measures to deal with organised crime at the national, regional and international levels.
- (b) Develop model treaties dealing with extradition and mutual legal assistance, having regard to the efforts already undertaken by several States and regional organisations.
- (c) Urges the Commission on Narcotic Drugs to continue to arrange for the regular dissemination of information on treatment, rehabilitation and educational programmes to deal with drug abuse, particularly as it affects young people.

4. Recommends that Member States should accord the highest priority to measures to combat organised crime and in particular, should give urgent attention to the development of extradition treaties and mutual legal assistance and cooperation arrangements, under ordinary legal procedures and in conformity with international human rights standards.

APPENDIX II

EXTRACT FROM COMMUNIQUE OF COMMONWEALTH LAW MINISTERS MEETING HELD IN COLOMBO, SRI LANKA, 14-18 FEBRUARY 1983

Forfeiture of Assets

There was compelling evidence that one of the most effective methods of attacking serious crime was through the seizure of profits derived from crime. Judicial forfeiture and confiscation were particularly appropriate in such crimes as drug trafficking and fraud. However, such orders could give rise to constitutional questions stemming from protected rights to property and where the proceeds had been removed from the jurisdiction in which the offence had been committed. Mechanisms for tracing assets which depended on cooperation by the offender had been found wanting by those who had introduced them. Alternative mechanisms would need to be cost effective. Ministers endorsed the suggestion that the matter be examined by a small group of experts for future consideration.

EXTRACT FROM COMMUNIQUE OF COMMONWEALTH HEADS OF GOVERNMENT
MEETING HELD IN NASSAU, THE BAHAMAS, IN OCTOBER 1985

Drug Abuse and Illicit Trafficking

Heads of Government were deeply concerned at the rising incidence of drug abuse and illicit drug trafficking that was seriously threatening the social fabric and security of many countries. They recognised that it called for a wide range of responses, including urgent attention to problems affecting young persons and to the rehabilitation of its victims. They agreed that governments should cooperate, both to counter the international traffic in illicit drugs and to deny to those convicted of drug trafficking the proceeds of their crime, and looked to the early implementation of a scheme for enhanced cooperation between Commonwealth countries in this regard.

Heads of Government were also disturbed by the extent to which the profits made by drug traffickers were used in criminal and subversive activities often across international borders. They invited Commonwealth Law Ministers to explore measures to counter this trend. While supporting the work of existing international organisations in the field of narcotics control, Heads of Government welcomed the proposal of the United Nations Secretary-General for the convening of an international conference at a high political level in 1987 to deal with all aspects of drug abuse and trafficking and expressed the hope that action would be expedited on the related proposed new Convention.

APPENDIX IV

EXTRACT FROM COMMUNIQUE OF SECOND MEETING OF
LAW OFFICERS OF SMALL COMMONWEALTH JURISDICTIONS
HELD IN PORT VILA, VANUATU IN AUGUST 1985

The Law Officers recognised the serious danger that confronts many small jurisdictions arising from the activities of organised crime, illicit narcotics trafficking, and the perpetration of crimes and other abuses which tend to undermine the integrity of their economies and thus their political and social stability. Consequently, Law officers firmly endorsed the work of the Commonwealth Secretariat's Commercial Crime Unit in protecting the economies of Commonwealth jurisdictions and called upon Commonwealth countries to cooperate with the Commonwealth Secretariat in further strengthening and developing this service.

The Law Officers recognised the important role played by the Commercial Crime Unit in loss prevention and noted the dependence of effective loss prevention mechanisms on the development and deployment of timely intelligence. The Law Officers repeated their request to the Commonwealth Secretariat, made at their first meeting, to develop an intelligence facility, within the Unit to assist Commonwealth agencies in ensuring the prevention of abuse in the development of offshore and other financial centres within the Commonwealth. Law offices considered that this was a matter of urgency, and if necessary the participation of other appropriate agencies in the creation of such a facility should be contemplated.

Recent Developments in Combating Drugs Trafficking

DRUG ABUSE AND ILLICIT TRAFFICKING — A COMMONWEALTH INITIATIVE

A memorandum by the Commonwealth Secretariat and a paper by
Dr S K Chatterjee of The City of London Polytechnic

The attached paper consists of a brief discussion of the main issues in combating illicit trafficking in drugs. Dr Chatterjee then makes certain proposals for a Commonwealth initiative against the assets of such criminals. At their 1983 Meeting, Commonwealth Law Ministers stated in their communique that:

"19. There was compelling evidence that one of the most effective methods of attacking serious crime was through the seizure of profits derived from crime. Judicial forfeiture and confiscation were particularly appropriate in such crimes as drugs trafficking and fraud. However, such orders could give rise to constitutional questions stemming from protected rights to property and where the proceeds had been removed from the jurisdictions in which the offence had been committed. Mechanisms for tracing assets which depended on co-operation by the offender had been found wanting by those who had introduced them. Alternative mechanisms would need to be cost effective."

Commonwealth Heads of Government meeting in Nassau in October 1985 stated in their communique that:

"66. Heads of Government were deeply concerned at the rising incidence of drug abuse and illicit drug trafficking that was seriously threatening the social fabric and security of many countries. They recognised that it called for a wide range of responses, including urgent attention to problems affecting young persons and to the rehabilitation of its victims. They agreed that governments should co-operate, both to counter the international traffic in illicit drugs and to deny to those convicted of drug trafficking the proceeds of their crime, and looked to the early implementation of a scheme for enhanced co-operation between Commonwealth countries in this regard.

"67. Heads of Government were also disturbed by the extent to which the profits made by drug traffickers were used in criminal and subversive activities often across international borders. They invited Commonwealth Law Ministers to explore measures to counter this trend. While supporting the work of existing international organisations in the field of narcotic control, Heads of Government welcomed the proposal of the United Nations Secretary-General for the convening of an international conference at a high political level in 1987 to deal with all aspects of drug abuse and trafficking and expressed the hope that action would be expedited on the related proposed new Convention.

Ministers may wish to consider Dr Chatterjee's proposals in conjunction with the paper prepared by Professor David McClean LMM(86)12.

DRUG ABUSE AND ILLICIT TRAFFICKING - COMMONWEALTH INITIATIVE

A paper prepared by Dr S K Chatterjee, Senior Lecturer in Law,
City of London Polytechnic

THE PROBLEM

There can be no need to emphasise the importance that combatting illicit trafficking in narcotic drugs, and more recently psychotropic substances, has been accorded at both national and international levels. It here suffices to identify the broad areas of special concern recognised as emanating directly and indirectly from this evil, as well as the illegal and uncontrolled production and manufacture of these substances:

- (i) the impact of illicit production and trafficking on the political, social and economic stability and security of societies;
- (ii) the recognition that trafficking in such substances is a primary activity of organised crime, with proven and in many instances substantial connections with other criminal and terrorist activities;
- (iii) the direct and indirect impact on economic efficiency, integrity and stability of the vast, and often 'unaccountable' proceeds of this illicit traffic;
- (iv) the strain on resources involved in combatting illicit trafficking and in dealing with offenders;
- (v) the problems associated with treatment of drug addicts;
- (vi) the terrible and indefensible waste that this activity generates in terms of social and human terms.

It is now appropriate to briefly discuss these perceived areas of special concern in a little more detail.

(1) Political, Social and Economic Destabilisation

The Draft Convention Against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities (1984), consequential upon the United Nations General Assembly Resolution on the Control of Drug Trafficking, has summarised the impact of illicit trafficking in drugs on societies. It states, inter alia, that 'illicit traffic in and use of narcotic drugs and psychotropic substance transcend the sphere of the physical and moral well-being of mankind and are detrimental to the identity and integration of peoples, since they constitute a factor of dependence and corruption which undermines their spiritual, cultural, social and economic values, and that such problems must be dealt with within the framework of international co-operation and global geopolitics, since drugs are goods used to weaken the legislative economies of the countries and to undermine their sovereignty'.¹

Commonwealth Heads of Government at their meeting in Nassau in October 1985 recognised the dangers in similar terms.² Other organisations, at an international level, such as the World Health Organisation and the International Criminal Police Organisation (Interpol) have also been equally perceptive in their recognition that in many instances it is the very security and sovereignty of states that is in jeopardy. It is sadly not difficult to identify states, involved in production, transit or consumption of this evil product, where the essential social and political fabric has been so undermined by corruption and other wholly anti-social aspects that its very existence as a sovereign state, entitled of international respect, becomes a matter for debate.

More recently, the grave dangers consequent on facilitating, either knowingly or recklessly, the operations of evil men peddling an evil product, through the 'washing' and transmission of the profit associated with this 'trade' has been recognised.³ The social and political perversion that states, often those least able to defend their integrity and reputations, risk by carelessly providing a facility for criminals and others associated with this illicit trade to launder and, thus, to some extent legitimise their illgotten gains, has been well documented in recent years.

(ii) Drug Trafficking as an enterprise of Organised Crime

Whilst it is axiomatic that not all organised crime is involved in illicit trafficking in narcotics and psychotropic substances, it is virtually the case that those that do engage in such activities can accurately be described as organised crime. Of course, it is wrong to sensationalise or over-estimate the seriousness and impact of organised crime both at the national and international level, and sort to isolate and minimise those areas of high risk. Naturally, illicit trafficking in contraband, and in particular in narcotics and other such substances, provides a most attractive 'investment'. The rewards are still disproportionate to any risk of disruption, and such factors as have contributed in some measure to an increased risk of discomfort or loss, have simply persuaded these criminal entrepreneurs to move higher up the 'illicit corporate hierarchy' or into merely financing the activity, leaving the higher risk aspects often to 'expendable' ethnic crime groups.

Given the resources, structure and modus operandi of modern organised crime and its essential ability to infiltrate the systems at all levels, in its aim to achieve the maximum degree of immunity and protection from law enforcement - and other competitors it is not surprising that few national law enforcement agencies are in a position to clearly see the true picture, let alone adequately combat it. Organised crime in the protection of its enterprise will corrupt, extort, penetrate and undermine competition - whether legitimate or illegitimate. There are states where this has occurred to a noticeable extent, and there are others where the results and influence of this form of criminality are only perceived to a lesser degree. The desire to obtain virtual immunity from prosecution and other forms of disruption has resulted in organised crime attempting to virtually take over the control of governments and subvert those very institutions that society has created to protect the integrity and well-being of its members.

Apart from the more obvious abuses of corruption and extortion the desire to 'legitimate', or at least obscure the illicit origin of its power - in other words its vast profits, has inevitably led organised crime directly into the financial and business infrastructure, so that through a process of penetration, subversion and outright extortion that system itself becomes tainted leading to loss of respect, confidence and efficiency. To this extent, those connected with combatting commercial crime and protecting the economic institutions of the state are directly in the fight against organised crime. It is no coincidence that the Commonwealth Secretariat's own Commercial Crime Unit has on a number of occasions specifically underlined this grave danger, as has the Secretariats of the United

Nations Conference on Trade and Development (UNCTAD), Customs Co-operation Council, International Criminal Police Organisation (Interpol) and International Chamber of Commerce. In this context the resolution dealing with organised crime of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders should be specially noted.

Having regard to the nature of organised crime as a business, often a transnational and highly diversified business, it is clear that illicit trafficking in drugs will often be merely part of such an organisations activities. In other words, most organised crime groups engage in a host of potentially profitable operations, not only to spread the risk, but also to support and fund each other. The integration of diversified business is not, of course, a phenomenon confined to the world of illicit activity. Furthermore, to successfully operate in certain areas, or to 'launder' and maximise the return on such investments, it is often necessary for drug traffickers to resort to other forms of criminality, and in particular various forms of commercial and economic crime.

There is also unfortunately increasing evidence of organised crime involvement with terrorist type organisations throughout the world.⁴ There have been instances where in return for providing its expert services in 'laundering' money required for terrorist activities, or merely moving funds - secretly and safely through unaccountable channels, organised crime groups have sought the assistance of terrorist organisations in 'protecting' their propriety interests, reducing the burden of competition and in checking the more disturbing activities of law enforcement. On the other hand, terrorists organisations always concerned to secure and in particular store funds from relatively unaccountable sources, inevitably find traditional areas of organised crime business attractive as means of providing them with this finance. To this extent organised crime and terrorism are in competition, but it would be a forlorn and dangerous hope to think that this will substantially impede the effectiveness of either.

(iii) Organised Crime's Money

The estimates and 'guesstimates' of the money produced by illicit trafficking in narcotics and psychotropic substances are truly enormous. Suffice it to say that many experts, and some official agencies, have put the annual figure for the United States of America, far beyond the total national gross product of virtually every Commonwealth country and, indeed, a good proportion in aggregation. The incredible amounts involved in this illicit trade, and its related activities gives criminal organisations and their 'associates' the practical ability, should they wish, to penetrate and play havoc with the national economies or virtually every country in the world. Of course, rarely would it be advantageous for a particular group to assume such visibility, or to step beyond the 'immunity' that the present system affords to achieve the ultimate goal of simply enjoying the profit and securing a desired lifestyle.

According to the traditional, and in practical and pragmatic terms, accepted, process of legitimisation of these profits a very high proportion of this money will simply remain in some form or other in the relevant economy and operate in a manner not substantially different to other funds. However, a proportion - and no agency has ever felt able to do more than guess at what level, will be used for the maintenance and advancement of the criminal organisation, the funding and financing - often indirectly, of other criminal enterprises, the support of other organisations and activities with which those criminals are in 'sympathy' and the attainment of an acceptable degree of 'security' if not immunity through the corruption of politicians, officials and institutions. Even where this money is used to penetrate legitimate business, in the sense of merely amounting to some kind of direct investment in an otherwise unobjectionable activity, the implications for others competing in that activity, who will not enjoy the various 'privileges' of organised

criminals, are serious.⁵ Those who make their money through drug trafficking and arms trafficking are not likely to be as sensitised to the dictates of good business and the observance of general fiscal and other constraints within the business world as the ordinary and law abiding businessman. The implications for economic stability, integrity and efficiency should be obvious.

Apart from penetration and funding other criminal enterprises - through this pipeline of 'unaccountable' money, organised crime will generally need to 'wash' or 'launder' its illgotten gains. The devices that are employed for this are legion,⁶ but all have in common the importance of obscuring the original source, confusing ownership, confounding investigation and where possible ensuring the safety of and accessibility to, the money. Of course, it is common knowledge that so called tax havens and off-shore financial centres, often boasting some form of banking secrecy law or business confidentiality law which either in form or application can be assured to frustrate even the most dedicated, resourced and knowledgeable foreign investigator are often employed at some stage in the laundering process. Unfortunately, those jurisdictions, which invariably for wholly commendable reasons, provide offshore financial and other services, do not always realise the implications of allowing organised crime and other such groups to launder this money. In providing such a facility they are essentially condoning the very activity which generated the profit in the first place. Of course, many of these jurisdictions are well aware of the dangers. Most have taken steps to ensure that those setting up businesses, and in particular banks, within their territory are honourable. But there is no assurance that they will remain so or that they will not hand over control to persons who would never have been accepted in the first place.

However, it has to be admitted, as has been recognised specifically at the last two meetings of Attorneys-General and Senior Officials of Commonwealth Small States, that in reality there is little that can be done to assure the requisite degree of integrity without vastly increased international co-operation.⁷ Organised crime realising the plight that many developing countries find themselves in when they attempt to obtain necessary funds from, perhaps less usual sources, have stepped into the market, and offer funding to such countries at comparatively attractive rates. Of course, in the majority of cases the government concerned will be unaware that the funds with which it is building its schools and hospitals are a direct product of the misery caused by this illicit trade in drugs. However, whether that government is aware or not, the result is that the organised criminals will receive back principal and interest in a form which is practically unimpeachable. Unfortunately, given the greed and arrogance of these criminals, it is rarely the case that they will stop at simply 'investigating' in such a jurisdiction. Once the lines of communication, if not infiltration, have been established, it is relatively easy to penetrate more attractive areas of the state. Indeed, they are only protecting their investments.

(iv) Strain on national resources

Combating any abusive, or illicit activity, inevitably requires the deployment of resources at a local, national and occasionally at a regional or international level. In the field of drugs control, the expenditure of what are, and will always be a scarce resource, has traditionally, in most countries, been more generous than in other problem areas. Unfortunately, in the vast majority of jurisdictions this expenditure has not been well planned, the programmes that have developed have not always been well conceived and structured, and in the main it is the sad but usual story of 'too little too late'! A reactive stance, invariably stimulated by public and thus political concern, to a problem that has more or less assumed sensational proportions. There would appear to be widespread agreement that such resources, as are made available for enforcement in this context, could both at strategic as well as at tactical level be significantly better deployed. Whilst law enforcement agencies have inevitably to be concerned with obvious and immediate crime, it is

only recently that adequate attention has been given to combating this form of organised crime through the application of intelligence, financial investigations and integrated law enforcement techniques. At the international level, although the role of the General Secretariat of ICPO-Interpol must be commended, especially in regard to its Drugs Liaison Officer Scheme the level of resourcing is extremely limited. The Commercial Crime Unit of the Commonwealth Secretariat has, especially in the context of integrated intelligence and money tracing, developed a facility for international co-operation which certainly has considerable potential, but which at present is exceedingly limited in resources.

It is generally accepted that training of officers concerned with enforcement in regard to illicit trafficking in narcotics and psychotropic substances is of considerable importance. The United Nations has provided programmes for training since 1972, through a Central Training Unit for Law Enforcement Officers. In recent years the General Secretariat of ICPO-Interpol has worked closely with this Unit and a number of courses and workshops have been organised throughout the world. The Commonwealth Secretariat through the Commercial Crime Unit has itself, or in association with other agencies and national governments, initiated ad hoc training programmes for law enforcement officers in regard to the identification, tracing and forfeiture of property associated with organised crime and in particular illicit trafficking in narcotics. To date the Unit has held courses involving these issues in Malaysia, Singapore, Hong Kong and India. Of course, the general training mandate of the Unit is relevant, insofar as many aspects of anti-drugs enforcement impact on procedures designed for combating commercial crime. There is, however, despite these and other initiatives, such as by the Customs Co-operation Council and the Association of South East Asian Nations (ASEAN), considerable scope for more training and in particular the funding of exchange and other programmes for law enforcement officers.

The United Nations in 1971 established a fund called the United Nations Fund for Drug Abuse Control (UNFDAC) for the specific purpose of assisting states in their efforts to eradicate drug abuse. It has also established various institutions to cater for the needs of affected areas.⁸ The question remains whether all states, especially those most afflicted with these problems, in view of the possible incapacity or shortage of resources are able to implement these programmes sufficiently successfully.⁹

The question of resources is not only important in the context of law enforcement, but also in regard to the sentencing of offenders and the treatment of those who become addicted. The World Health Organisation in the context of its programme for developing national guidelines for combating drug and drug-related problems has emphasised the importance of an integrated approach and consequently it is desirable to consider here the position of the offender as well as the addict.

Generally speaking, sentencing policy in relation to crimes is based on the assumption that the alleged criminal must experience the sanctions of law. The following are the grounds on which this assumption is based:

- (a) that society should be protected from criminals; and
- (b) that sanctions of law will deter the criminal from committing crimes in the future.

Legal sanctions are usually determined by public authorities prompted by considerations of general deterrence and the avowed duty of law enforcement officers to uphold the morality of deterrence. Thus, sanctions of law may not necessarily be based on scientific principles or precepts. Punishments does not need any legal justification. However, societies being as they are, sanctions are necessary; they serve a purpose. Sanctions should ensure not only obedience to the law but also a standard of behaviour.

Article 22 of the Convention on Psychotropic Substances, 1971, deals with the penal provisions which may be applied in the event of any breach of Convention obligations undertaken by the Parties. According to paragraph 1, sub-paragraph (a) of this Article, 'subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed internationally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other deprivation of liberty.' This paragraph bears a close resemblance to Article 36(1) and Article 14 of the Single Convention on Narcotic Drugs and the 1972 Protocol respectively.¹⁰

According to paragraph 2 of this Article, an offence, if committed in different countries, becomes a multi-effect offence, that is, each of them shall be treated as a distinct offence, and obviously punished according to the law of the country in which it has been committed. Additionally, paragraph 2, sub-paragraph (a) clause (iii) of the Article provides that 'foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism.'¹¹

As in the Single Convention, offence in the context of this Convention extends to include conspiracy to commit and attempts to commit any act deemed to be an offence, as well as preparatory acts and financial operations in connection with the offences referred to in this Article.

The Fifth Congress on the Prevention of Crime and the Treatment of Offenders, 1975,¹² considered measures to be taken against drug offences and identified the following areas as deserving the urgent attention of States:

- (a) consideration of illicit drug traffic as a transnational crime;
- (b) appropriate sentencing policy pursued by States;
- (c) the sharing of expertise in drug law enforcement and exchange of intelligence;
- (d) improvement of the mechanism for promptly disseminating and receiving evidence concerning drug offenders;
- (e) strengthening of border control;
- (f) increasing the degree of penalties for illicit traffickers;
- (g) development of means to ensure that convicted drug traffickers do not take refuge in other countries; and
- (h) destruction of seized drugs and material connected with illicit activities.

The United Nations initiatives in drawing the attention of the international community to the problems relating to youth and drugs have been consistent and timely.¹³ However, it is up to States to take necessary action in this regard. The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders¹⁴ indicated that:

"... success in crime prevention can be achieved only through a specific analysis of crime trends inherent in a given country and region, as well as through the use of the means and methods of crime prevention which correspond to the country's historical, socio-economic and cultural peculiarities.'

One study has very clearly identified the intricacy of the relationship between drug abuse and crime:

'Clinical experience and direct research confirm the existence of an association between drug abuse and crime, although the nature of the relationships is not clear.

The relationship between drugs and crime is not only interesting from a purely scientific standpoint, but may also be useful in identifying and adopting an adequate crime and drug control policy in society.

It is obvious that for the legislator and administrator it is important to understand if, how and to what extent crime favours drug abuse, or drug abuse causes crime, or whether both behaviours are caused or facilitated by other intervening factors.

A final answer to these questions has so far not been found. Very important studies recently carried out suggest a probability of a casual relationship between drug abuse and crime, but do not exclude a purely correlational link between the two phenomena. In any case, countries with different drug legislations show very different crime rates in their population of drug addicts.¹⁵

The punishment of drug-traffickers and forfeiture of ill-gotten gains although an important aspect of the sentencing policy, is not its only and total aspect. Moreover, sentencing policies vary from legal system to legal system.

The absence of mutual recognition of offences and the lack of uniformity in sentencing policies present a crucial problem. In this respect the involvement of an institution such as the Commonwealth Secretariat as an agent of harmonisation of programmes would appear to be important. Uniformity in the degree and nature of punishment would eliminate 'forum shopping' by drug traffickers. Given the nature of the problem, a common pool of resources seems urgently required.

(v) Problems associated with treatment

Although the treatment of addicts is naturally of the utmost importance, in the context of this paper it is sufficient to emphasise that this is only one element in what should be an integrated policy to drug abuse control and eradication. It cannot be an end in itself and should not be perceived as isolated and distinct from those aspects of law enforcement and supply and demand reduction that are discussed elsewhere in this paper. In the context of treatment there appears to be a crying need for drug education both at home and at educational institutions. Article 20 of the Convention on Psychotropic Substances, 1971, details measures against the abuse of psychotropic substances. Paragraph 1 of Article 20 provides that, in addition to their taking all practical measures for the prevention of abuse of psychotropic substances, the Parties shall co-ordinate their efforts for early identification, treatment, education, after-care, rehabilitation and social integration of the persons involved. The implementation of this provision is fraught with difficulties in view of the fact that 'standard measures' for the prevention of abuse, treatment or education

etc, depend primarily on the availability in the country of effective machinery for these purposes and/or on the socio-economic conditions. Paragraph 2 of the same Article provides that the 'Parties shall as far as possible promote the training of personnel in the treatment, after-care, rehabilitation and social integration of abusers of psychotropic substances'. 'Social integration' being part of their objectives, the Contracting Parties are required to ensure that persons involved in this process, e.g. police officers, social workers, psychologists, judges, prison officers, doctors, etc. receive appropriate training. In this connection the limitations of legislation should however be borne in mind. Law alone cannot improve the value-standards and integration process in a society.

(vi) Waste of human resources

The degree of waste, in social and human terms, in the context of drug abuse is both self-evident and indefensible. It is universally accepted that drug addiction, unrelated to approved medical treatment, is an evil of horrendous proportions to the individual, his family and his society. Consequently no effort should reasonably be spared in combating this problem at all stages and all levels.

AN OVERVIEW OF THE TRADITIONAL SENTENCING POLICY APPLIED TO
DRUG TRAFFICKERS

The primary purposes of a sentencing policy are correction and deterrence. Where the economic gains are enormous, no sentencing policy however stringent it may be, will fulfil these two purposes. Such is the case with illicit drug traffickers.

The laws of the countries mentioned below have made provision for either severe punishment of drug traffickers and or seizure and forfeiture of proceeds of drug-related crimes.

Antigua, Austria, Bermuda, Bolivia, Canada, Colombia, Gambia,
Hong Kong, India, Ireland, Italy, Japan, Kenya, Malaysia,
Mauritius, Mexico, New Zealand, Nigeria, Pakistan, Portugal,
Singapore, United Kingdom, United States, Zambia.¹⁶

Punishment is not only permissible but also desirable. It is socially necessary too. Nevertheless, punishment must be consistent with its aim. It is common knowledge that there are three main approaches to crime prevention: individual deterrence, individual incapacitation and general deterrence. Sentencing policies in most legal systems are based on the belief that "to allow the offender to get away with impunity would undermine the point of having rules in the first place; it may engender a sense of unfairness in the law-abiding members of the community and so undermine the general attitude that the law is to be obeyed. The offender for his part does not have good grounds for feeling unfairly treated if the community responds to his breaking the law in some way which is to his disadvantage".¹⁷ How much punishment and on what principles the degree of punishment should be set will remain debatable for some time to come.

Then there are problems both as to procedural and substantive aspects of law: when to seize and forfeit; how to seize and forfeit; how to take evidence or cross-examine a witness; does the power of the judge to order confiscation need to cover conspiracy and other inchoate offences; how to define proceeds, etc.

Effective forfeiture of assets derived from criminal acts depend on two important conditions: first, an appropriate legislation and effective law enforcement machinery; and second, promptness of punishment. Delay of punishment is probably largely responsible for the apparent ineffectiveness of the current penal systems.¹⁸

No appropriate legislation can be enacted however unless certain important legal concepts have been satisfactorily settled. Forfeiture presupposes enquiry and search; these two procedures involve aspects of present day human rights law, which seems to be implicated at almost every stage of the process concluding in forfeiture. Time and the procedure for execution of judgments seem to be two significant factors in the successful enforcement of forfeiture judgments. Additionally, in imposing sentences the concepts of recklessness, negligence or liability are controversial, but they seem to be the determining factors or at least play an important role in most legal systems. What should be done if a drug addict is himself an illicit trafficker in large quantities of drugs?

LEGAL DEVELOPMENTS AT NATIONAL AND INTERNATIONAL LEVELS

(a) Legal Development at the National Level

The initiative taken by some of the States in regard to the eradication of drug-related problems has been varied and the following brief survey does not pretend to be other than illustrative:

Australia

Under the Customs Act as amended the Australian authorities have introduced stringent methods of seizure and confiscation in drug offences, which extend to ill-gotten gains acquired outside Australia and the courts have been empowered to investigate the financial position of accused both before and after a transaction has been completed. Under this legislation, penalty relates to turn-over and not to net profit.

Austria

In Austria, penal sanctions relating to drug offences are governed by the Narcotic Drugs Act, 1951 (Bundesgesetzblatt No 234), as amended by the Narcotic Drugs Amendment Act, 1971 (Bundesgesetzblatt No 271), the Penal Code Adaptation Act (Bundesgesetzblatt No 1974/22) and the Narcotic Drugs Amendment Act, 1977 (Bundesgesetzblatt No 1978/532). Section 6 of the Act provides that:

- '(1) Persons who wittingly and in violation of these provisions produce, import, export or trade in narcotic drugs in such quantities as to constitute a general danger to human life or health shall be guilty of an offence against the public health and shall be liable to terms of imprisonment of from one to five years, or in the case of aggravating circumstances, and in particular when the offender is a member of a ring, two terms of imprisonment not exceeding 10 years. Fines not exceeding 225,000 shillings may be imposed in addition to such imprisonment.

- (2) The amount of the fine shall be so assessed as to exceed the profit which was derived or was intended to be derived from the punishable act. If the maximum fee imposable by law does not suffice, it may be exceeded, but shall not exceed twice the amount of the profit. A term of imprisonment imposed in default of payment of a fine may not exceed one year.
- (3) The objects used in the punishable act or the proceeds therefrom shall be declared confiscated if they are owned by the offender or an accomplice or accessory to the offence or if they were owned by such persons at the time of the seizure. In other cases, they may be declared confiscated. Similarly, materials and apparatus used for manufacture or processing may be declared confiscated, and also vehicles used for transport other than vehicles owned by a public transport undertaking if the owner of the vehicle was aware that it was to be misused for unlawful purposes.
- (4) If the objects of their proceeds cannot be seized or are not declared confiscated, a fine equal to the value of such objects or their proceeds shall be imposed. The fine shall be imposed in the judgment, but if it only subsequently transpires that the confiscation cannot be executed, the fine shall be imposed without argument in court. The parties shall be informed of the decision, and appeal may be lodged within three days.
- (5) The term of imprisonment imposed (in addition to the sentence for the offence) in default of payment of fine, and the term of imprisonment imposed in default of payment of a fine imposed in lieu of confiscation, shall not in the aggregate exceed a total of 18 months.'

Canada

Recently, in Canada, it has been made an offence to receive or possess the proceeds of crime irrespective of whether the relevant crime took place in Canada.

Ireland

In Ireland, the Misuse of Drugs Act 1971 has made elaborate provisions for penalties for various drug-related offences. This Act has made provisions for penalties in respect of drug-related offences committed by a person presumably of Irish nationality outside the territorial jurisdiction of Ireland.

Italy

In September 1982, the Italian authorities enacted Law No 646 (popularly known as La Torre Law, named after one of its initiators, Pio La Torre, a member of the Italian Parliament who was assassinated at Palermo by the Mafia) to introduce to the Italian legal system a new crime called the Mafia conspiracy and to empower the courts to seize and confiscate goods of the persons belonging to the Mafia conspiracy. 'Persons' in this context includes relatives, partners and cohabitants who in the five years previous to the commission of a crime played the role of 'front man'. La Torre has already been successfully enforced in Calabria, Campania, Lombardy and Sicily.

New Zealand

The law in this regard seems to be quite elaborate in New Zealand. The levels of punishment for drug-related offences have been increased by the Misuse of Drugs Order (No 2), amending the Misuse of Drugs Act 1975. The most important provisions can be found in sections 38-47.

Section 38: 'Fine may reflect illicit gains. In any case where any person is convicted of a drug dealing offence and the court by which he is convicted is satisfied on the balance of probabilities that any money or assets owned by the offender at the date of his trial has or have been acquired by him directly or indirectly from the offence, the court may, having regard to the amount of such money or the value of such assets, impose a fine greater than it would otherwise have imposed on the offender for the offence.

Under Section 39, the Court has the power to impose a greater fine having regard to previous dealings.

Section 41: 'Inability of the offender to explain the source of money or assets may be evidence:

- (i) Where, in any case to which section 38 of this Act applies, the offender fails to explain to the court's satisfaction the source of any money or assets owned by him, the court may accept that as evidence that the money or assets was or were derived by the offender from the offence.
- (2) Where, on any application for the exercise of the court's power under section 39 of this Act, the court is satisfied in accordance with sub-section (1) (a) of that section that the offender has committed any previous drug-dealing offence, and the offender fails to explain to the court's satisfaction the source of any money or assets owned by him, the court may accept that as evidence that the money or assets was or were derived by the offender from that previous drug-dealing offence.

Under Section 42 of the Act, the court may treat alienated property as the offender's property.

Section 46(1) Garnishee Proceedings: For the purpose of enforcing the payment of any fine imposed by any court on conviction of an offender of a drug-dealing offence, a sum that stands to the credit of the offender with any person (including a bank or savings bank) and that is on deposit with that person or is held by him in a current or other account (including a deposit account) shall be deemed to be a sum due or accruing to the Registrar enforcing the fine and shall be attachable accordingly, notwithstanding that any of the following conditions applicable to the deposit or account, that is to say,

- (a) Any condition that notice is required before any money is withdrawn;
- (b) Any condition that a demand for payment must be made;
- (c) Any condition that a personal application must be made before any money is withdrawn;
- (d) Any other condition (other than a condition that a deposit book, receipt for money deposited, or other like document must be produced before any money is withdrawn),

has not been satisfied.

Poland

Article 29 of the Law of 8 January 1951 provides that:

'Any person manufacturing, converting, importing, exporting, transporting, storing or marketing a narcotic drug without a licence shall be liable to imprisonment for a term not exceeding five years and to a fine.'

Under Polish Law, confiscation of narcotic drugs as objects of crime along with the tools and equipment used for its commission is permissible.

United Kingdom

In England, specific powers to order forfeiture of goods and gains connected with drug offences are contained in several Acts. Section 27(c) of the Misuse of Drugs Act provides that:

'The court shall not order anything to be forfeited under this section, where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.'

This section does not indicate whether the order to forfeit shall be made at the time of conviction. Sections 32 and 43 of the Powers of the Criminal Courts Act 1973 have conferred on the English courts a general power of forfeiture which must be exercised within 28 days after conviction. In R v Menocol the House of Lords ruled that 'Because the forfeiture order made against the appellant had not been made within 28 days of her original sentences, it was therefore invalid'.¹⁹

The Operation Julie case²⁰ (R v Cuthberton) shows us another weakness in English law in this regard. In this case three appellants manufactured and supplied an hallucinogenic drug for several years and made enormous profits. Two of them transferred a substantial part of their share in the profits to bank accounts in France and Switzerland. They were convicted of conspiracy in contravention of s.4 of the Misuse of Drugs Act 1971. The trial judge ordered forfeiture of their ill-gotten gains under s.27 of the Misuse of Drugs Act. The appellants contended that the power of forfeiture under the Act applied where 'a person is

convicted of an offence under the Act and not to a conviction for conspiracy to commit under the Act.' They also contended that the power of forfeiture extended only to anything shown 'to relate' to an offence. The Court of Appeal dismissed their appeal. The House of Lords, however, allowed the appeal in support of the contention of the accused.

National legislation must encompass an international dimension covering problems relating to forfeiture of assets held abroad. In England, the Hodgson Committee in its Report on the Profits of Crime and Their Recovery made a number of recommendations relating to forfeiture and confiscation of the proceeds of crime, but it did not make any recommendations on transnational questions. Courts cannot make a personal order for the payment of compensation or a pecuniary penalty out of assets held abroad.

The Drug Trafficking Offences Bill (1985)²¹ has made provisions for confiscation of proceeds of drug trafficking. In making a confiscation order the court shall first determine whether the drug-offender has been benefited either in the form of any payment or other reward in connection with drug trafficking carried on by him. It is believed that 'benefit' will be determined only by referring to economic gains, apparent or real, present or future. The court may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of the proceeds of drug trafficking by him, make the following assumptions:

- (a) that any property appearing to the court -
 - (i) was held by him at the time of his conviction, or
 - (ii) was transferred to him in the period of five years ending with his conviction and was received by him as a payment or reward in connection with drug trafficking carried on by him, or
 - (iii) any expenditure of his in that period was met out of payments received by him in connection with drug trafficking carried on by him.

The Bill has substantially increased the amount of fines and the term of imprisonment of drug offenders. Section 6 of the Bill provides for restraint orders where the court is satisfied that there is reasonable cause to believe that the defendant has benefited from drug trafficking and hence may by order prohibit any person from dealing with any property available in respect of the defendant, other than property for the time being subject to a charge under section 7 in respect of land, securities, etc. The Bill authorises police constables, under authorisations from the appropriate court to obtain evidence which may appear to be relevant to the investigation against a drug offence. Police constables have also been empowered to seize and retain any material which is likely to be of substantial value to the investigation for the purpose of which the warrant for search was issued. The Bill also provides for disclosure of information held by government departments and not by others, such as, banks and finance houses. One of the interesting aspects of the Bill is that the High Court may, on an application by or on behalf of the government of a designated country, register an external confiscation order made there and enforce it. Incidentally, this provision will immensely facilitate drug investigation work particularly within the Commonwealth.

United States

The United States seems to be far ahead of others in respect of preventive and curative legislation. In 1970, the US Congress passed two Acts: the Racketeer Influenced and Corrupt Organisations Act (RICO) and the Controlled Substances Act, Continuing Criminal Enterprises Offences (popularly known as s. 848). Whereas the former aims at widening the provisions of forfeiture, the latter is particularly concerned with organised crimes in relation to drug industry. Under both RICO and s. 848 forfeiture of assets is mandatory and it covers profits, any interest in, and anything that may afford a source of influence over the enterprise. Forfeiture does not alter the presumption of innocence under either of these Acts.

The Forfeiture Act of 1984, which came into force on 12 October 1984, strengthened, inter alia, the existing RICO forfeiture provisions. The new legislation has not only expanded the definition of property in order to allow the criminal forfeiture of proceeds of various types from racketeering activity but also extended the doctrine of 'relation back'. The new legislation has many dimensions, for example, it has given the Attorney-General the authority to transfer, if necessary, the custody or ownership of forfeited property to any Federal, State or local agency; it has also created a Department of Justice Asset Forfeiture Fund. In addition to this new legislation, the amendments to the Customs Law, which came into force on 12 October 1984, permit administrative forfeiture of property of a value up to US\$100,000 compared to the previous ceiling of US\$10,000. This forfeiture can be enforced in addition to the administrative forfeiture of contraband articles, and vessels or any means of transportation used in the process of trafficking.

Even a perfunctory and arbitrary study of legislation in various countries reveals a number of gaps: the tradition of bank secrecy preventing disclosure without the approval of the central bank or other competent authorities; non-disclosure of information filed with the Inland Revenue authorities; lack of stringent foreign exchange regulations, etc. Lack of intelligence in many cases stands in the way of the prompt detection of criminals and also of methods of trafficking in drugs. It is not by law alone that effective machinery as to the collection of useful intelligence may be achieved; constant vigilance over drug-related matters, training of personnel (police force, customs officials, judges, magistrates, etc), monitoring of production, manufacture and trade in drugs by national authorities are the pre-requisites of informed intelligence acquisition. These are some of the important issues to which national authorities should pay urgent attention.

(b) Legal Development at the International Level

This should be discussed from two standpoints: (i) legal development through inter-state relationship; and (ii) legal development through international and inter-governmental institutions.

(1) Legal Development through Inter-State Relationship

There are a number of possible situations in which assistance may be required from a foreign jurisdiction:

- (a) in the detection of a crime;
- (b) in obtaining evidence which may be recognised by the domestic courts of the requesting State;
- (c) in returning the accused to the jurisdiction requesting assistance; and
- (d) in securing an effective criminal law sentence.

What is required is 'international judicial assistance' rather than 'international legal assistance' because the former entails, in addition to co-operation of States in the enforcement of law, such extra-legal co-operation between States as the collection and dissemination of criminal intelligence, and informal investigations without taking resort to legal process.

This is not only a politically sensitive area, but also entails delicate human rights issues. The US practice of providing judicial assistance to external courts despite the lack of a reciprocal action by the external authority may not find support in many other jurisdictions. Therefore, it is essential to conclude either bilateral treaties or multilateral treaties between States. It would be inappropriate solely to rely on the specific provisions of any particular statute; a general enabling statute at the national level implementing the provisions of such treaties would be required. Otherwise, the prospects of success would be remote. Under the Companies Act 1980 in England, although a Department of Trade Inspector enjoys a significant investigatory powers, these powers do not extend beyond the territorial jurisdiction of the United Kingdom.²² However, in practice, it is not possible for a State to empower the officials of another State to conduct investigations on behalf of the first State. In 1982, the Government of New Zealand appointed the Australian Government's Royal Commission on Drug Trafficking as a Commission of Inquiry in New Zealand. This should be considered as a significant breakthrough in judicial assistance on a bilateral basis. Otherwise, generally speaking, collection of evidence from a foreign jurisdiction still poses considerable difficulties. To this must be added the costs involved in collecting admissible evidence from foreign jurisdiction.

Given these difficulties, collection of information from a foreign jurisdiction may follow two procedures - voluntary and involuntary. Success in the voluntary method of collecting information primarily depends upon the nature of the relationship prevailing between the two countries concerned; but it must be maintained that no municipal statute can have a provision which could compel a witness to attend before a consul. If the offence admits of a political dimension, it may be extremely difficult to extract any information from a foreign jurisdiction on the basis of a letter of request (letters rogatory). Letters of request are subject to different uses in common law and civil law jurisdictions. (Under the common law system, the letters rogatory procedure is primarily intended to assist parties who have difficulties in obtaining evidence. In the civil law system this procedure is used for investigations into cases which have not yet come to court). It is common knowledge that the letters rogatory procedure is slow, expensive, involves numerous formalities and technical legal issues. Additionally, there is the enormous problem of formulating or concluding extradition treaties between countries.

Some of these problems may be resolved by means of bilateral forms of co-operation or multilateral forms of co-operation. On the bilateral side, the Swiss-US treaty of co-operation may exemplify. It combines the common law evidentiary system with that of the civil law system. This treaty provides wide ranging compulsory assistance measures to include, among other things, taking of testimony or statements of persons, service of judicial and

administrative documents and the preservation of items of evidence. Under this treaty legal assistance includes the disclosure of banking information. This treaty has proved to be particularly helpful in detecting corporate fraud, and in narcotics investigations. One can only hope that other countries may follow suit and conclude treaties between themselves along the same lines.

The Agreement of 26 July 1984 between the Government of the United Kingdom and the Government of the United States concerning the Cayman Islands, which provided that, in disregard of the Cayman laws, confidential relationships should not protect narcotic traffickers, is a remarkable step forward in the appropriate direction. Under this Agreement, the Cayman Islands authorities shall produce business and bank records if so requested by the Attorney-General of the United States for purposes of investigation or proceedings connected with narcotics activity.

Bilateral and multilateral co-operation can only be successful if the States are able to co-operate meaningfully. Appropriate steps may be taken to restrict the operation of the system of bank secrecy in respect of non-residential accounts and to restrict the operation of free ports, free zones and tax havens. In respect of forfeiture of proceeds of drug-related crimes, the principle of Mareva injunctions and Anton Pillars could be usefully explored.

(ii) Legal Development through International and Inter-governmental Institutions

The UN initiative in the prevention and eradication of drug-based crimes and problems has been consistent since the 1960s. Both the International Narcotics Control Board and the Division of Narcotic Drugs in conjunction with the UN Crime Prevention Office are engaged in formulating policies as to how to prevent and eradicate crimes based on drugs. Practical support to the prevention of illicit drug traffic and related matters are given by the UN Fund for Drug Abuse Control (UNFDAC).

The principal inter-governmental and regional institutions involved in the eradication of drug-trafficking and related criminal activity are the international Criminal Police Organisation (ICPO/INTERPOL), the Customs Co-operation Council, the Council of Europe Co-operative Group to Combat Drug Abuse and Illicit Trafficking in Drugs (the Pompidou Group) and the Commonwealth Secretariat in London.²³ Of these institutions the contributions of INTERPOL and the Commercial Crime Unit of the Commonwealth Secretariat should be emphasised from a practical law enforcement standpoint.

INTERPOL

The aims of the organisation are stated in Article 2 of its Constitution.

Article 2(a): 'To ensure and promote the widest possible mutual assistance between all criminal police authorities, within the limits of the laws existing in the different countries and in the spirit of the Declaration of Human Rights.

- (b): To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.'

Interpol acts as inter-police force clearing house into which member police forces feed information, and from which they receive assistance, when requested. It acts exclusively through the police agencies of the various member states. The success of Interpol in regard to crime detection and crime prevention very much depends on the degree of promptness and efficiency a country has attained in supplying information to it. An effective communication system is a sine qua non of an effective system of data supply. The services of Interpol may therefore be appropriately and effectively enjoyed only by those countries that have attained sophistication in acquiring and delivering information and intelligence. It must, however, be pointed out, that the degree of co-operation between various international and inter-governmental institutions, e.g. the United Nations (UN Division of Narcotic Drugs) and the Commonwealth Secretariat is appreciable and, indeed, remarkable.

The Role of the Commonwealth Secretariat

A solution of the drug-based problems and commercial crimes would require a thorough understanding of the economy, societal conditions and attitude of peoples in various countries. The Commonwealth is based on the common understanding of its members and, indeed, bound within the association by common ties. Additionally, the common legal traditions operate as one of its foundations. There exists a formidable degree of affinity among its members. No special efforts require to be made to attain homogeneity and integration. Unlike other inter-governmental institutions, the Commonwealth is already in a position to anticipate a degree of co-operation and understanding from its members over matters of common concern and importance.

At the Commonwealth Law Ministers' Meeting in Winnipeg, Canada, in 1977, Ministers expressed concern about the growing rise in transnational commercial crime which were undermining developing countries' economies leading in turn to political and social instability. They recognised that the problems were compounded by the increasing sophistication of criminals operating at a transnational level and in a highly organised manner. Consequently, Ministers requested the Commonwealth Secretary-General to consider ways in which the special bonds between Commonwealth countries could be utilised to combat commercial crime. The recommendations contained in the report prepared by a consultant on the promotion and development of international co-operation to combat commercial and economic crime was endorsed at the Commonwealth Law Ministers' Meeting in Barbados in 1980. At the regional meeting for Asia and the Pacific of the Commonwealth Heads of Government in Sydney in February 1978, it was acknowledged that illicit traffic in drugs was a growing problem within that region and therefore the meeting called for the establishment of a special working group in illicit drugs to facilitate co-operation among the Commonwealth countries. In November 1981 the Commonwealth Secretary-General appointed an Assistant Director to head a Unit within the Legal Division, with special responsibility for developing this Commonwealth initiative against commercial crime. In February 1983, the Commonwealth Law Minister' Meeting in Sri Lanka not only extended the terms and reference of the Commonwealth Fraud Liaison Service to include commercial crime intelligence, but also resolved that the Commonwealth Secretariat should continue its work in encouraging countries to attack transnational organised crime, especially in relation to drug trafficking, through the means of seizure and forfeiture of proceeds on drug-related crime. At the same meeting, the Ministers after comprehensively reviewing the work of the Commercial Crime Unit, called upon the Commonwealth Secretary-General to strengthen the facility by the provision of additional resources and personnel, and to 'extend the service specially in regard to the development and deployment of intelligence orientated to commercial loss prevention'. A meeting of senior law officers of small Commonwealth jurisdictions held in the Isle of Man in July 1983, expressed the view

that small off-shore financial centres should not be used to facilitate financial transactions related to drug-trafficking. At the subsequent meeting of Senior Law Officers of Small Commonwealth Jurisdictions in July 1985 in Vanuatu, Ministers reiterated their concern and called for urgent action to establish a viable intelligence facility within the Unit.²⁴

Since November 1983, the nomenclature - Commonwealth Commercial Crime Unit - has been in use, and the Unit, under the Assistant Director, functions within the Legal Division under the supervision of the Director of that Division and reports to the Deputy Secretary-General (Political) of the Commonwealth.

Although relatively recently established, the Commercial Crime Unit has already been involved in numerous cases in which its aid has been sought in detecting criminals, and in guidance to its member States as to the prevention, including training of personnel, of crimes, including drug-based crimes. The Unit's terms and reference are wide:

- (i) to develop criminal financial and other intelligence systems between Commonwealth law enforcement agencies and between Commonwealth and such other law enforcement agencies as may be appropriate and to this end in a catalytic manner engender and enhance the flow of information to and between Commonwealth law enforcement agencies from both official and unofficial sources;
- (ii) to liaise with ICPO/Interpol and such other organisations, as may be appropriate, and work closely with the liaison officers within the organisation concerned with the same fields of crime;
- (iii) to gather and disseminate relevant information;
- (iv) to assist in the development of appropriate training programmes, exchange of personnel, and the publicising of existing training opportunities both within countries and organised by other international agencies;
- (v) to undertake and assist in the facilitation of international investigations, inter alia, with a view to eliminating duplication of effort; and
- (vi) to assist in the creation of a Commonwealth Panel of Experts and to liaise as necessary between individual Commonwealth governments and members of the Panel.

This Unit is not restricted to liaising only with Commonwealth agencies; it has established rapport with various non-Commonwealth countries and international agencies. In this context a strengthened intelligence role by the Unit, oriented to loss prevention, was advocated by many distinguished speakers at the Seventh Commonwealth Law Conference in Hong Kong in 1983 and at a variety of official and unofficial meetings in Commonwealth and in certain cases non-Commonwealth countries. The Unit's work has been noted with approval by a number of international and inter-governmental agencies, such as the World Health Organisation, UN Division of Narcotic Drugs, UNCTAD, Commission of the European Communities, ASEAN and UN Congress on Crime Prevention.

The Unit is not limited simply to dealing with police or official agencies, which is in sharp contrast to ICPO-Interpol which works only through its official National Central Bureaux. Law Ministers have emphasised that the traditional methods of police co-operation, in particular, through ICPO-Interpol, are not wholly adequate for combating criminal and abusive activity. The Communique of the 1980 Law Ministers specifically stated that 'co-operation on a police basis was felt not to be complete answer', and this sentiment was reiterated at the meeting in 1983. The communique also stated that 'the Commonwealth Fraud Officer had a unique role to play ... and in this there was no overlap with any other international agency.' The Unit has developed effective working relationships with authorities such as stock exchanges, professional bodies and other self-regulatory authorities. This underlines the flexible nature of the Commonwealth initiative, and its ability to seek and obtain assistance and information from sources normally well beyond the scope of traditional co-operation in law enforcement.

The Unit is authorised to facilitate and co-ordinate transnational investigations. Its authority to co-ordinate and develop criminal intelligence and also to co-ordinate transnational investigations provides it with a unique authority to 'target' criminals. The status of the Secretariat as an inter-governmental organisation allows it to have direct access to governments at the highest level. In relation to day-to-day liaison, Commonwealth Governments have already designated an official to work with the Unit. In many cases it has been instrumental in preventing the commission of a crime. The Unit is sufficiently cautious not to encroach upon the jurisdiction of ICPO-Interpol. There is no duplication of efforts if a matter is pursued by the Commonwealth Commercial Crime Unit, and ICPO-Interpol have recognised and endorsed that.

At the Commonwealth Law Ministers' Conference held in Sri Lanka (1983) the Law Ministers themselves called for a strengthening of the Unit and in particular development of a criminal intelligence facility. Given the limited resources of the Unit, this has been compiled on an ad hoc basis, although it is already producing valuable strategic and tactical intelligence for law enforcement agencies. The Unit exercises considerable caution and circumspection in both the development of its intelligence and in its deployment.

Of course, the Legal Division, of which the Commercial Crime Unit is part, has been concerned to promote co-operation on a somewhat broader basis through the improvement of the Commonwealth Scheme for the Rendition of Fugitive Offenders, the development of a Commonwealth Scheme for Mutual Legal Assistance in Criminal Matters and the preparation of model legislation for the forfeiture of property associated with serious criminal activity. When the work of the Division and in particular the Unit is considered it is already tolerably clear that the role of the Secretariat in combating, inter alia, illicit trafficking in narcotics is already recognised.

THE COMMONWEALTH INITIATIVE

Irrespective of the Heads of Government's concern over the extent and implications of illicit trafficking in narcotics it is clear that the Commonwealth Secretariat - has long been concerned with matters directly relevant to this subject as, of course, it should given the nature of the problem.²⁵ Invariably, this concern which has always been directly referable to a political mandate given by a ministerial or regional meeting, has been ad hoc and pragmatic. The expertise and respect with which this expertise is regarded throughout the world, developed within the Secretariat in many areas should not be dissipated and consequently there is need for a Commonwealth programme in this area. It would be wrong for the Commonwealth, even considering its special status and the headway that has been made for example in the field of legal co-operation, to attempt to emulate or duplicate the work of other international and regional agencies. It should rather build upon those aspects of its

work which are clearly recognised as representing an almost unique facility for co-operation and which cannot reasonably be duplicated or emulated in other organisations. It is better to build where sound foundations have already been laid than to seek to risk an edifice on sand.

It is undoubtedly helpful to set out here the relevant paragraphs from the Communiqué of the last Commonwealth Heads of Government Meeting in Nassau in October 1985:

Drug Abuse and Illicit Trafficking

66 Heads of Government were deeply concerned at the rising incidence of drug abuse and illicit drug trafficking that was seriously threatening the social fabric and security of many countries. They recognised that it called for a wide range of responses, including urgent attention to problems affecting young persons and to the rehabilitation of its victims. They agreed that governments should co-operate, both to counter the international traffic in illicit drugs and to deny to those convicted of drug trafficking the proceeds of their crime, and looked to the early implementation of a scheme for enhanced co-operation between Commonwealth countries in this regard.

67 Heads of Government were also disturbed by the extent to which the profits made by drug traffickers were used in criminal and subversive activities often across international borders. They invited Commonwealth Law Ministers to explore measures to counter this trend. While supporting the work of existing international organisations in the field of narcotics control, Heads of Government welcomed the proposal of the United Nations Secretary-General for the convening of an international conference at a high political level in 1987 to deal with all aspects of drug abuse and trafficking and expressed the hope that action would be expedited on the related proposed new Convention.

The Second Expert Group Meeting on the Forfeiture of the Proceeds of Drug Crimes, held in Vienna under the auspices of the UN Division of Narcotic Drugs between 29 October and 2 November 1984, rightly re-affirmed that there is a need for further co-operation and co-ordination at national level to support bilateral, regional or international efforts. It also provided that as far as drug trafficking and associated phenomena are concerned, the broadest possible interpretation should be placed by State Parties on those provisions of Article 35 of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol and Article 21 of the Convention on Psychotropic Substances relating to co-ordinated action against the illicit traffic. Such arrangements at the national level could usefully include the involvement in any co-ordinating agency of officers with specialised experience in the investigation of economic crimes. This could be done either by the establishment of 'economic crime units', by setting up broad-based task forces, or by the attachment to national drug law enforcement units or agencies of officers with specialised experience in the investigation of such crime.²⁶ Of course, task forces are already in operation in the United States.

As has been recognised by the United Nations the area where the Commonwealth Secretariat has to date made most impact in the field of combating illicit trafficking in drugs, is through the work of the Commercial Crime Unit. It has already been pointed out that there is a close relationship between various forms of organised crime, of which illicit trafficking is but a manifestation, and commercial crime. The techniques developed, particularly at an international level by the Unit, for preventing and combating economic crime and destabilisation are highly relevant in the field of organised crime and in particular drug-related activity. Indeed, establishing the 'audit trail' for forfeiture and similar

laws to operate requires the skills which have been developed within the Unit. Indeed, at an international level the investigatory experience of the Unit is unique. The FOPAC Unit in ICPO-International being circumscribed by both exceedingly limited resources, and the constitution of that organisation. Furthermore, rendering money laundering a specific criminal offence and creating various reporting and other devices to assist in tracing and identification of suspicious money flows are essentially commercial crimes.

It is estimated that at least 40 per cent of the cases referred to the Unit involve the identification and monitoring of money flows. Of course, not all such cases involve illicit trafficking in drugs, but the reasons for laundering money from other crimes and in particular to escape taxation or evade exchange control are more or less identical. The Unit has had a number of cases where it has proved possible to establish a clear 'audit trail' and the flexibility of its network and procedures has often allowed it to secure co-operation and assistance in circumstances where other agencies, whether national or international, would certainly have failed. In not a few instances the Unit has been able to assist in action being taken to neutralise the relevant funds, and in one or two instances actually facilitated their recovery. The intelligence and information base that has been established to assist in its general loss prevention role has proved extremely useful, especially in regard to off-shore banks and other financial institutions. Indeed, in several cases mere intelligence analysis has allowed the identification of money laundering and related operations unrelated to a specific request for assistance. It is this particular aspect of the Unit's work that has been most noticed and applauded outside the Commonwealth. The Unit enjoys excellent co-operation from many agencies whose primary mandate is combating drugs trafficking.

The reasons why the Unit has been able to achieve the success it has are many, but it is possible to discern a few considerations which would be relevant should the same approach with suitable modifications be used for combating illicit trafficking in narcotics. The nature of the Commonwealth and the special position of the Secretariat are extremely significant factors. The close and dedicated network through which extremely efficient liaison is possible on a very timely basis characterise the work of the Unit to an extent which in terms of traditional law enforcement is unique. The flexibility and expertise with which inquiries can be made and the information evaluated are critical. The tasking approach and the ability to interface with agencies not normally accessible to ordinary law enforcement agencies, and the ability to, in appropriate cases, invoke a political dimension by securing access to ministers and senior officials is particularly important.

Having regard to the importance that Heads of Government have attached to combating organised crime and illicit drug trafficking through an attack on its assets, it seems logical and cost effective to build upon the services that has already been developed within the Legal Division of the Commonwealth Secretariat.

The establishment of a facility within the Secretariat for the co-ordination or the servicing of an international inquiry at an investigatory or purely intelligence level of the financial and related aspects of illicit drug trafficking would represent a most significant and practical step forward. It would not in any way adversely impact on the work of any other agency or organisation and would not amount to a duplication of work or diversion of resources. It would have all that the establishment of the Commercial Crime Unit had to commend it, but in addition would given its narrower mandate, achieve through a process of targetting and case selection a degree of practical significance of unquestionable value. It could build upon the experience, expertise and network that the Commercial Crime Unit has built up and if necessary work as an integral aspect of that wider facility.

This programme could be run as an adjunct to that of the Commercial Crime Unit, or as integral to it, given the importance that organised crime assumes in both areas and the common investigatory and intelligence problems. Apart from providing a facility for co-ordination and the servicing of international inquiries, it would assume a teaching and training role for financial investigators. It is important to appreciate the degree of expertise that has already been built up within the Secretariat in this area. The General Secretariat of ICPO-Interpol has drawn upon this expertise in the development of its own programme for police officers and national agencies that have long struggled with enforcement in this area, such as the Anti-Narcotics Commission in Malaysia and the Customs and Excise Department of India have called in the Unit for training. The Unit has also participated in expert working groups at the UN Division on Narcotic Drugs and the World Health Organisation's national guidelines programme.

Assuming that co-operation at a legal level will increase with recent moves in the Commonwealth, and through the United Nations, and the various national initiatives especially to combat the problem through attacking financial assets, there will be an even greater need for the co-ordination of inquiries and this will not be adequately discharged through mere police force to police force communication. Indeed, this has already been recognised in the context of the work of the Commercial Crime Unit and the Commonwealth Scheme on Legal Assistance in Criminal Matters. A facility in the Secretariat for the co-ordination of inquiries would therefore be a material benefit to law enforcement and related activities. It is contemplated that only a modest investment would need to be made in establishing this service, provided it was adequately interfaced with the work already being undertaken by the Unit. A single officer, at diplomatic level, supported by a professional officer, with adequate secretarial and clerical support would, on the experience of the commercial crime initiative, be adequate to establish the facility. Consequently the cost would be in the order of about £75,000 a year. The facility given its narrower and more 'dedicated' role than the Commercial Crime Unit would be able to interface and therefore rely much more on national and other agencies. It would not require the same ability as the Commercial Crime Unit to assume responsibility for inquiries due to the absence of any adequate facility within a member country.

It is important to emphasise that the proposed facility for co-operation within the Secretariat would not become involved in the operational work of police or other agencies, but would simply provide a co-ordinating and facilitative role as does the Commercial Crime Unit in the vast majority of matters referred to it. It would supplement, through the network that already exists and which it would be charged with further expanding and dedicating, the work of traditional law enforcement agencies and would foster access to information germane to financial and asset investigations from organisations and bodies that would not be accessible directly or generally indirectly to police agencies working through the ICPO-Interpol network or otherwise.

Footnotes

1. U.N GA Res A/Res/39/141 of 26 February 1985.
2. Nassau Communique, October 1985 paras 66 and 67.
3. Supra at 2, para 67.
4. Note the concern expressed by Commonwealth Heads of Government about this menace, supra at 2, para 46.
5. See generally, Rider, The Promotion and Development of International Co-operation to combat Commercial and Economic Crime LMM(80)2.
6. See Chaikin, Money Laundering Techniques and Bank Secrecy (1984) CCU, Commonwealth Secretariat.
7. Meetings, July 1983, Isle of Man and July 1985, Vanuatu.
8. For example, the Narcotics Foundation of the Phillipines.
9. UNFDAC has assisted the Afghan Government considerably in the latter's plan to plough back a higher proportion of profits into providing law enforcement. The Fund has extended assistance to many countries, notably, Bolivia, Burma, Peru, Portugal, Thailand and Turkey.
10. See Chatterjee, Legal Aspects of International Drug Control (1981) Martinus Nijhoff at 483.
11. See supra at 10.
12. Report of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1975.
13. See supra at 2, para 66 for comments of Commonwealth Heads of Government.
14. Report of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1980, Ch I sec. B, Resolution I.
15. T Asuni and F Bruno, Survey of an Eleven-Country Study of Socio-Legal Measures to Combat Drug Abuse and Related Crime Bulletin on Narcotics, vol. XXXVI No 3 (1984).
16. See generally Chatterjee, Forfeiture of Proceeds of Drug-Related Crimes: A Commonwealth Perspective Bulletin on Narcotics vol. XXXV, No 2 (1983) and Liverpool, The Seizure and Forfeiture of Property Associated with Criminal Activity LMM(83)22.
17. Galligan, 'The Return to Rehabilitation' in Crime, Proof and Punishment, Taper (Ed) 1981 London.

18. See supra at 16 and Report of the Second Expert Group Meeting on the Forfeiture of the Proceeds of Drug Crimes (1984) U.N Doc MNAR/1984/13 dated 2 November 1984.
19. (1979) 2 All E.R 510.
20. (1980) 2 All E.R 401.
21. See generally Kerrigan, Drug Forfeiture Bill in UK (1986) CXCU, Commonwealth Secretariat.
22. It has been proposed that a single inspector could be appointed under the relevant laws of a number of Commonwealth countries: see Rider, supra, at 5, and Seally, The Enforcement of Civil Liability in regard to Commercial Crime and Corporate Abuse LMM(83)17.
23. See Appendices I and II.
24. See Appendix III.
25. See Appendix I.
26. Report of the Second Expert Group, supra at 18.

The role of the Commonwealth Secretariat in the fight against illicit drug traffic

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ABSTRACT

The Commonwealth Secretariat is an international diplomatic agency servicing the Commonwealth, an association of some 47 independent countries that derive a common heritage from the former British Empire. Although the Commonwealth Secretariat's role in combating the illicit traffic in drugs has developed pragmatically in response to specific needs, it reflects a deep concern on the part of member countries to do everything within their power to further the fight against this serious criminal activity. To this end the various divisions of the Secretariat have commissioned studies, facilitated training, prepared model legislation, promoted the exchange of information, participated at international forums and made a determined effort to concentrate enforcement at an international level against the resources and property of those engaged in this illicit traffic.

The Commonwealth

When discussing the role of the Commonwealth Secretariat in the fight against illicit drug trafficking it is appropriate to first describe the Commonwealth. It is a voluntary association of some 47 independent countries. These countries, with their various dependencies, contain more than one quarter of the world's population. Although independent, each member of the Commonwealth is bound within the association by common ties. While these bonds are complete and numerous, perhaps the most noticeable are the common language—English—and the sharing of a common heritage derived in large measure from the old British Empire from which the association has grown. The Commonwealth's strength is in its members' enthusiastic desire to approach problems in a spirit of co-operation and mutual understanding.

Playing a pivotal role in servicing this association, and its members, is the Commonwealth Secretariat. The Secretariat, which is based in London, is an intergovernmental organization with full diplomatic rights and immunities within the Commonwealth.

Recognition of the problems

The problems related to drug abuse have been discussed at all levels within the Commonwealth association and in many contexts. However, no single organ of the Commonwealth or division of the Secretariat is charged with special, let alone exclusive, responsibility for these matters. At first glance it may be difficult to identify a constructive contribution to the solution or mitigation of these problems on the part of the Secretariat. A more careful examination of the concern expressed within the Commonwealth family and the positive steps taken, especially in the last few years, would show this first impression to be misguided.

Heads of Government, ministers and senior officials hold regular meetings within the Commonwealth. On a number of occasions the problems associated with drug abuse and in particular the control of illicit supply have been discussed. For example, at the regional meeting for Asia and the Pacific of the Commonwealth Heads of Government at Sydney in February 1978, it was acknowledged that illicit drug traffic was a growing problem for a number of Commonwealth jurisdictions in the region. The meeting called for the establishment of a special working group on illicit drugs to facilitate co-operation. More recently, the Commonwealth law ministers, meeting in Sri Lanka in February 1983, resolved that the Commonwealth Secretariat should continue its work in encouraging countries to attack international organized crime, especially where drug trafficking is involved, through the seizure and forfeiture of assets and property related to criminal activity. A meeting of senior law officers of small Commonwealth jurisdictions, held in the Isle of Man in July 1983, expressed concern that off-shore financial centres should not be used to facilitate commercial and financial transactions related to drug trafficking and other types of serious crime. The meeting of Commonwealth Finance Ministers in September 1982 in London received a paper from the Commonwealth Secretariat making the same point.

Therefore, it is clear that the problems have been recognized in the Commonwealth, at all levels, and there is a desire within the Commonwealth to foster co-operation, both inside the association and on a world-wide basis, to combat illicit traffic and mitigate the level of abuse.

Activities of the Commonwealth Secretariat

Activities at the divisional level

Within the Commonwealth Secretariat a number of divisions and offices have responded to this desire and are now actively engaged in facilitating co-operation and especially the exchange of information in their various areas. For example, the Medical Division is concerned with the problem of abuse

specifically in the context of overall health promotion and care. The Youth Division is especially mindful of the appalling consequences that illicit trafficking may have on the most precious natural resource of each nation—the youth. The Office of the Special Adviser on Women and Development has been concerned with the special aspects of the problem relating to women and their role in society. Of course, within the Commonwealth Secretariat and the various other organs and arms of the Commonwealth there is a high degree of co-operation, and it would be wrong to assume that these various programmes and areas of concern are exclusively the preserve of one particular division or office.

It is perhaps the Legal Division that has become most actively involved in the fight against illicit traffic. The Legal Division has co-operated closely in the programmes of the other sections of the Secretariat, but in a number of areas it has proceeded in close association with international organizations. For example, the Legal Division has maintained a close relationship with the Special Working Party of the World Health Organization (WHO) in the preparation of the Guidelines in the Context of the International Treaties for the Control of Narcotics and Psychoactive Substances. The Division has also co-operated with the General Secretariat of ICPO/Interpol in the preparation of a study on the development of provisions in the law to facilitate the seizure and forfeiture of property associated with criminal activity and in particular illicit drug trafficking. Similar co-operation has also existed in regard to the refinement of the Commonwealth Scheme for the Rendition of Fugitive Offenders.

In November 1981 the Commonwealth Fraud Liaison Service became operational. This office within the Legal Division of the Commonwealth Secretariat enjoys a wide mandate to *inter alia* co-ordinate and facilitate the fight against international commercial and organized crime within the Commonwealth. Its terms of reference were extended at the meeting of Commonwealth law ministers in Sri Lanka in February 1983 to the development of commercial criminal intelligence. The Service works with police and law enforcement agencies throughout the world, not only in the Commonwealth. Although its primary concern is serious commercial crime, given the relationship between this type of criminal activity and other forms of organized crime—especially illicit traffic in drugs—the Office has not taken an over-restrictive attitude to the scope of its mandate. Money laundering and other financial transactions whereby organized crime's operations are facilitated or obscured are within its purview.

Studies

The Commonwealth Secretariat has commissioned studies on various topics related to illicit trafficking in drugs. For example, studies have been prepared on the relationship between illicit trafficking and other serious crimes; the seizure and forfeiture of property associated with serious

criminal activity; the use of intelligence and money tracing techniques in combating serious organized international crime; and the abuse of children and young persons in regard to illicit trafficking. Perhaps the most significant initiative in this respect is the preparation of a detailed report on the position of Commonwealth jurisdictions in regard to their obligations under the various treaties relating to the control and suppression of illicit traffic in drugs. A "model bill" for the accession to these treaties and the enactment of their obligations has been prepared and appended to the report. This "accession kit" will be particularly useful for the smaller jurisdictions where legal resources are not as plentiful as they are in the larger and more developed member countries.

Regional co-operation

It would be wrong to create the impression that the Commonwealth Secretariat has itself been solely responsible for these initiatives. In some cases the impetus has come from member countries and regional assemblies. Reference has already been made to the meeting of Commonwealth Heads of Government of Asia and the Pacific in February 1978 and the Special Working Group of officials that was consequently set up to facilitate international co-operation in the fight against illicit traffic of drugs on a regional basis. This Special Working Group met on several occasions and was served by a special consultant supplied by the Commonwealth Secretariat. At these meetings observers were invited from a number of non-Commonwealth countries in the region and interested international agencies such as ICPO/Interpol, the Colombo Plan Bureau and the United Nations Division of Narcotic Drugs.

The Special Working Group on Illicit Drugs was concerned that the regional initiative should complement and strengthen the co-operation that already existed in the region and particularly through and with the relevant international agencies. It was accepted that the main contribution of the Special Working Group was in the identification of major policy issues. At the First Meeting of the Group in June 1979 at Kuala Lumpur, which was attended by a representative of the United Nations Division of Narcotic Drugs, it was resolved that a series of country status reports would be prepared on matters ranging from demand reduction to intelligence. These reports were received and reviewed at a meeting at New Delhi in September 1980. The Working Group made a series of recommendations which included the fostering of a basic common attitude in legislative and judicial action against drug trafficking within the region; improvement in the flow of intelligence and the maximization of its use through the establishment of a central data base; and the use of legal provisions to attack the financial assets of traffickers. The constructive deliberations of this Working Group has provided a basis for other initiatives in different regions of the Commonwealth.

Training

Finally, the Commonwealth Secretariat and other agencies and organs of the Commonwealth, such as the Commonwealth Fund for Technical Co-operation and the Commonwealth Foundation, stand ready to assist in training persons in various skills and procedures that might facilitate the fight against illicit trafficking and in certain cases there is the possibility of providing expertise and advice directly.

Conclusions

It cannot be said that the Commonwealth Secretariat's role in combating illicit trafficking in drugs is based on a decided and refined programme of action; in truth, its various initiatives appear pragmatic according to the special exigencies. Nevertheless, its concern in assisting others in resolving or at least minimizing the impact of the problem is clearly manifest. The Commonwealth Secretariat stands ready to assist any Commonwealth Government in this important battle and is prepared to co-operate as fully as it can with any other international agency in this endeavour.

Commonwealth initiatives in the tracing, seizing, freezing and forfeiture of drug proceeds

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ABSTRACT

Commonwealth Law Ministers have recognized that improved domestic measures for tracing, seizing, freezing and forfeiting illegally acquired assets, including the proceeds of drug trafficking, should be complemented by international initiatives. To this end, the Commonwealth Secretariat is formulating a Commonwealth scheme for mutual judicial assistance in criminal matters to strengthen the ability of national authorities to investigate, prosecute and convict international drug traffickers. Work is also being done to develop model legislation governing the attachment of assets believed to have been illegally acquired. In addition, the Commonwealth Commercial Crime Unit has for the past three years been developing intelligence on illicit money operations relating to drug traffickers and other organized criminals. The Commonwealth Secretariat considers that the fight against organized drug crimes requires a wide-ranging response, including improved laws, greater training and education and increased international co-operation.

Introduction

Since 1977, Commonwealth Law Ministers have considered the efficacy of laws for seizing, freezing and forfeiting assets engaged in illicit drug trafficking and also those relating to serious white collar crimes and the organized criminal enterprises. More recent Commonwealth Law Ministers meetings have recognized that improved domestic measures for tackling the problem of organized drug-related crimes should be complemented by international initiatives.

International aspects

The commission of drug trafficking offences often involves two or more jurisdictions. Similarly, the proceeds of drug trafficking are, except for casual or small-scale drug trafficking, inevitably transferred out of jurisdic-

tion and laundered so as to become untraceable. It thus follows that if law enforcement authorities are to combat illicit trafficking in drugs and laundering of moneys derived from such trafficking, they will require assistance from a foreign jurisdiction.

International judicial assistance is usually granted to foreign authorities on the basis of comity, declarations of reciprocity, bilateral treaties or multilateral conventions. Co-operation is based on mutual trust and confidence. Diplomatic and political considerations are crucial. In regard to the forfeiture of property associated with criminal activity there would seem to be at least three common law principles which need to be highlighted. They are as follows:

- (a) The lack of a domestic power to order the preservation of property pending the outcome of a foreign proceeding;
- (b) The want of jurisdiction to transfer title to movable property situated abroad;
- (c) The inability of courts of one country to enforce the criminal judgements including forfeiture orders of another country.

The compound effect of these principles is that even if the profits arising from drug trafficking are identified and traced, it may be difficult to freeze them and it may not be possible to forfeit the illicit moneys to a foreign jurisdiction.

Commonwealth scheme and model legislation

There is a common legal tradition within the Commonwealth of providing mutual assistance in the administration of justice. The Legal Division of the Commonwealth Secretariat is at present formulating a Commonwealth scheme for mutual judicial assistance in criminal matters which is, *inter alia*, intended to strengthen the ability of national authorities to investigate, prosecute and convict international drug traffickers. The Commonwealth scheme may include a provision for the recognition and enforcement of criminal court orders. Such a provision would mean that a forfeiture order in one country would be enforced in another Commonwealth country and that there would be no safe haven in the Commonwealth for drug-generated money.

At the Law Meeting in February 1983, Commonwealth Law Ministers recognized that one of the most effective methods of attacking serious crime was through the seizure of profits derived from crimes and that this was particularly appropriate in such crimes as drug trafficking and fraud. They requested the Legal Division to study the matter further and to prepare model legislation. The Legal Division is at present giving attention to the development of model legislation for the attachment of assets derived from a broader spectrum of offences than merely those relating to narcotics.

Commonwealth Commercial Crime Unit

The Commonwealth Law Ministers have given the Commonwealth Commercial Crime Unit (CCCU) an extensive mandate, *inter alia*, to combat organized crime through the strategic and tactical use of intelligence. CCCU has for the past three years been concerned with developing intelligence on illicit money operations of drug traffickers and other organized criminals. Of the 500 cases in which CCCU has provided direct investigatory and intelligence assistance, a substantial number have involved the laundering of moneys derived from drug trafficking. The seriousness of some of these cases may be illustrated by the following cases:

(a) Letters of credit were found in the possession of a courier arrested in a Commonwealth country. Inquiries pursued by CCCU established that these letters of credit were falsified and had been issued by a bank in the Pacific, which was controlled by an organized crime figure in North America. The documents were part of a scheme to launder substantial amounts of money representing the profits from illicit narcotics trafficking. Appropriate action was taken against the bank. Confirmation that this individual was still involved in this “business” convinced the authorities to reactivate their inquiries that led to prosecution and conviction.

(b) A jurisdiction in a developed Commonwealth country seeking a substantial investment in a specific project, entered into agreements with several companies in North America and Europe. Although those companies had been given a clean bill of health by various official and unofficial bodies, CCCU inquiries revealed that one of the main companies involved in the transaction was operated by a known mafia drug launderer and that his associates had been involved in major fraudulent schemes. The companies in North America that entered into those agreements also had connections with various organized crime activities. The Government was duly warned.

(c) CCCU received a request from the Government of a country that was not a member of the Commonwealth for assistance in tracing the whereabouts of the daughter of a wealthy politician who had allegedly been kidnapped and brainwashed by a socio-religious cult. After five days CCCU confirmed the location of the daughter and received intelligence that the cult had unaccountable income. After placing an informant in the cult, CCCU was able to verify that the cult was controlled by an organized criminal syndicate and was being used to launder money derived from illegal drug-related activities. Information was passed to the appropriate authorities and action has been taken against the cult in a number of countries.

These cases indicate the close relationship between commercial crime, drug trafficking and money laundering. The integration of international criminal activities requires new responses and in particular the development of an effective intelligence capability orientated to loss prevention.

Apart from its more operational role, in regard to investigations and intelligence, CCCU has a mandate to assist in training law enforcement personnel, and to this end has organized two international symposia and a number of regional workshops which have been directed to the financial aspects of crime including the role of offshore bank centres and tax havens.

CCCU has also advised Commonwealth jurisdictions on the development and structure of their offices to deal with economic crime. It has encouraged developing countries to use the intelligence generated by their exchange control laws to detect and interdict the movements of illegally obtained money. This has enhanced the ability of such countries to trace money.

CCCU has also commissioned a number of studies into various subjects directly relevant to the question of forfeiture of illicit assets. In addition to a report entitled "The seizure and forfeiture of property associated with serious criminal activity", which was considered at the meeting of the Commonwealth Law Ministers in 1983, a number of studies, including one on police powers and the seizure of drug moneys and another on the use of offshore banks and crime, are currently being prepared. CCCU is particularly concerned about facilitating research into drug laundering techniques which do not leave an audit trail. The creation of underground banking systems in certain ethnic communities and the advent of a true cashless, if not paperless, society in the more developed States, will have immeasurable effects on the tracing, investigation and prosecution of organized drug-related crime.

Conclusion

The Commonwealth Secretariat considers that combating organized drug crimes requires a wide-ranged response, including improved laws, greater training and education and increased international co-operation. The Commonwealth initiatives are, however, only a small contribution to the international efforts directed at removing profits from drug traffickers. The Commonwealth Secretariat welcomes the developments that are taking place in other international agencies, such as the International Criminal Police Organization (Interpol) and the Division of Narcotic Drugs, and is ready to work closely with such agencies in order to remove the profits from drug crimes.

Law Officers, special consultants and observers from various jurisdiction within the Commonwealth met at the invitation of the Hon. Walter Lini, Prime Minister of Vanuatu, in Port Vila from 28 July to 2 August 1985 to discuss matters of common interest to small jurisdictions. The Hon. Silas Hakwa, Attorney-General of Vanuatu was elected Chairman.

The Law Officers recognised the serious danger that confronts many small jurisdictions arising from the activities of organised crime, illicit narcotics trafficking, and the perpetration of crimes and other abuses which tend to undermine the integrity of their economies and thus their political and social stability. Consequently, Law Officers firmly endorsed the work of the Commonwealth Secretariat's Commercial Crime Unit in protecting the economies of Commonwealth jurisdictions and called upon Commonwealth countries to co-operate with the Commonwealth Secretariat in further strengthening and developing this service.

The Law Officers recognised the important role played by the Commercial Crime Unit in loss prevention and noted the dependence of effective loss prevention mechanisms on the development and deployment of timely intelligence. The Law Officers repeated their request to the Commonwealth Secretariat, made at their first meeting, to develop an intelligence facility, within the Unit, to assist Commonwealth agencies in ensuring the prevention of abuse in the development of offshore and other financial centres within the Commonwealth. Law Officers considered that this was a matter of urgency, and if necessary the participation of other appropriate agencies in the creation of such a facility should be contemplated.

RECENT DEVELOPMENTS IN COMBATING DRUG TRAFFICKING: AREAS OF POSSIBLE COMMONWEALTH CO-ORDINATION

Paper by the Government of the UNITED KINGDOM

INTRODUCTION

In the final Communique (Appendix A) of their meeting in Nassau in October 1985, the Commonwealth Heads of Government expressed their deep concern at the rising level of drug abuse and illicit drug trafficking. The Communique called for enhanced cooperation between Commonwealth countries in this field and in particular invited Commonwealth Law Ministers to explore measures to reduce the extent to which the profits made by drug traffickers were used in criminal and subversive activities including those across international borders.

BACKGROUND

United Kingdom National Measures

1. The level of drug abuse and trafficking in the UK has increased considerably in recent years. Heroin remains the main drug of abuse. But other drugs such as cocaine and amphetamines are also abused.
2. The British Government attaches the highest priority to combatting drug abuse and has developed a comprehensive five-point strategy to attack the problem by:
 - (i) reducing supplies from abroad;
 - (ii) making enforcement more effective;
 - (iii) strengthening deterrents and tightening domestic controls;
 - (iv) developing prevention measures;
 - (v) improving treatment and rehabilitation.

An inter-departmental group, the Ministerial Group on the Misuse of Drugs, has been established to oversee, co-ordinate, give impetus to and review this strategy.

Domestic Measures

3. In 1985 the Government launched a major health education and information campaign to discourage drug misuse through educational leaflets, films, posters and video packages. Money has also been allocated to local education authorities for the appointment of drug advice co-ordinators. Health departments are involved in funding research projects.
4. The Government is improving and expanding the treatment and rehabilitation services available to drug misusers. Facilities will provide for a range of treatment for acute medical cases such as overdose, helping drugs misusers to withdraw from drugs and long-term consultation and support during rehabilitation.
5. HM Customs and Excise attach highest priority to the interdiction of drug traffickers. Greater emphasis has been placed, and additional resources provided, on

intelligence gathering and the use of mobile forces. The number of uniformed preventive staff on routine controls is also being increased. £10 million is being spent on the development and procurement of equipment to detect concealed drugs.

6. The police also accord a high priority to the investigation of drugs offences. All police forces in England and Wales and 7 of the 8 Scottish forces now have specialist drug squads. Co-operation between police and customs has been further enhanced by collaboration in the new National Drugs Intelligence Unit (NDIU) which provides both forces with nationally co-ordinated intelligence.

Legislation

7. The Misuse of Drugs Act 1971 has been strengthened over the past two years to bring more drugs under Government control, and the United Kingdom has recently ratified the UN Convention on Psychotropic Substances 1971. The Home Office are involved also in reviewing the security of premises licenced to hold controlled drugs.

8. In September 1985 the Controlled Drugs (Penalties) Act 1985 came into force. This provided the courts with the power to sentence those convicted of trafficking in the most dangerous drugs to life imprisonment, compared with the previous maximum sentence of 14 years.

9. Currently before Parliament is the Drug Trafficking Offence Bill (Appendix B). This provides new powers for tracing and freezing the proceeds of drug trafficking and for a confiscation order to be imposed on a person convicted of a drug trafficking offence. It also provides increased maximum periods of imprisonment in default where the amount of the confiscation order is not paid in full.

10. The Bill envisages making it an offence to assist another person to retain the proceeds of drug trafficking and an offence to disclose information likely to prejudice a drug trafficking investigation. The Bill gives new powers to the police and to HM Customs and Excise to obtain court orders for the disclosure of information from banks and financial institutions and to freeze the assets of an accused person. These powers have been so drawn up as to enable the police and customs forces to use information obtained from bank and other records to assist investigations by foreign law enforcement authorities.

11. The Bill provides also for international action to enable designated countries to apply for the recovery of drug trafficking profits lodged in England or Wales. This is designed to provide a basis for reciprocal agreements with other countries to enable courts in England and Wales to recover the overseas assets of convicted drug traffickers.

International Measures

12. International co-operation to reduce supplies of narcotics from overseas is an important part of the Government's overall strategy. The main international fora for discussing drugs matters are the United Nations drugs bodies:

- (1) United Nations Commission on Narcotics Drugs (UNCND) established in 1946 by the Economic and Social Council, responsible for overseeing the

effectiveness of the two existing UN conventions which regulate the trade in drugs world-wide, and directly concerned with the reduction of demand for, illicit production of and international trafficking in drugs. The UK has been an active member of the Commission since its inception;

- (ii) The International Narcotics Control Board (INCB) established in 1961 to promote compliance by Governments with the various drug control treaties. Members serve in their personal capacity and do not represent Governments;
- (iii) UN Fund for Drug Abuse Control (UNFDAC) established in 1971 and funded by voluntary contributions from Governments and private donors. UNFDAC is involved in developing and financing international programmes of assistance in countries where drugs are produced, trafficked or abused and which lack the means to mount effective measures against the problem. The UK attaches considerable importance to the work of the Fund and is a major contributor.

13. Within the framework of these Organisations assistance from the international community is directed at

- (i) stopping illicit drugs production through law enforcement, crop eradication and crop substitution/rural development;
- (ii) co-operating to prevent international trafficking; and
- (iii) exchanging information on means of preventing, reducing and treating drug abuse.

Experience suggests that only a combination of these 3 approaches stands any chance of success.

New UN Initiatives

14. There have been two important recent drugs initiatives within the United Nations:

- (i) in 1984 the UN adopted a Venezuelan resolution calling for a new UN Convention on drug trafficking. The existing conventions, the UN Single Convention on Narcotics Drugs 1961 and the UN Convention on Psychotropic Substances 1971, provide controls on the world-wide trade in opium and its derivatives, cocaine and cannabis and a wide range of synthetic drugs which act on the central nervous system. The aim of the proposed third UN Convention is to improve controls on international drug trafficking, including measures to facilitate the extradition of drug traffickers and the tracing, freezing and forfeiture of the proceeds of drug trafficking. Member nations have submitted proposals for possible elements to be included in the convention and a draft will be put to the Commission on Narcotic Drugs for consideration at its next meeting in 1987;
- (ii) in 1985 the UN adopted a Malaysian resolution calling for an international ministerial conference on drug abuse and trafficking to be held in Vienna in June 1987. One of the main purposes of the Conference will be to develop an international strategy for tackling the drugs problem to the end of the century. Proposals for incorporation in the strategy have been invited by the Commission on Narcotic Drugs who will consider a draft plan of action at its next meeting in 1987.

POSSIBILITIES FOR COMMONWEALTH ACTION

15. The United Nations has well-developed machinery through its various agencies for coordinating action against illicit drugs. It is, therefore, important that the Commonwealth avoid initiatives or activities which would overlap or duplicate those already being carried forward.

16. There are, however, areas of potential Commonwealth co-ordination which, without duplicating other efforts, could be of real value in combatting the misuse of drugs:

(i) Commonwealth-wide Legislation

Reciprocal agreements were envisaged under the Drug Trafficking Offences Bill (Appendix B) which would enable countries to confiscate the assets of convicted drug traffickers even when these were lodged overseas. Commonwealth Law Ministers might consider if there is scope for Commonwealth-wide arrangements for the confiscation of assets of convicted drug traffickers;

(ii) Penalties for drug trafficking offences

Commonwealth countries could agree to review their domestic legislation to ensure that the most stringent penalties are available to the courts;

(iii) Extradition and mutual assistance

Improved arrangements, which can have a significant impact upon the prevention of drug trafficking offences, are for discussion under other items of the Conference agenda;

(iv) Donations to the United Nations Fund for Drug Abuse Control

UNFDAC is, for example, under-subscribed for programmes in law enforcement, without which the widespread efforts to control illicit drug production and trafficking are unlikely to succeed;

(v) Co-operation between Drug Law Enforcement Authorities

Commonwealth countries could agree to encourage closer liaison between their drug law enforcement authorities, strengthening co-cooperation via liaison officers posted overseas and to develop the speedier exchange of operational intelligence;

(vi) Political commitment

Commonwealth countries could agree further to raise the profile of the drugs problem on their political agenda and, in particular, to ensure that the subject is raised in all appropriate bilateral discussions with governments of countries where drugs are produced or through which they are trafficked.

Extract from the Commonwealth Heads of Government
Nassau Communique, October 1985:

Drug Abuse and Illicit Trafficking

Heads of Government were deeply concerned at the rising incidence of drug abuse and illicit drug trafficking that was seriously threatening the social fabric and security of many countries. They recognised that it called for a wide range of responses, including urgent attention to problems affecting young persons and to the rehabilitation of its victims. They agreed that governments should co-operate, both to counter the international traffic in illicit drugs and to deny to those convicted of drug trafficking the proceeds of their crime, and looked to the early implementation of a scheme for enhanced co-operation between Commonwealth countries in this regard.

Heads of Government were also disturbed by the extent to which the profits made by drug traffickers were used in criminal and subversive activities often across international borders. They invited Commonwealth Law Ministers to explore measures to counter this trend. While supporting the work of existing international organisations in the field of narcotics control, Heads of Government welcomed the proposal of the United Nations Secretary-General for the convening of an international conference at a high political level in 1987 to deal with all aspects of drug abuse and trafficking and expressed the hope that action would be expedited on the related proposed new Convention.

Drug Trafficking Offences Bill

[AS AMENDED IN COMMITTEE]

ARRANGEMENT OF CLAUSES

Confiscation of proceeds of drug trafficking

Clause

1. Confiscation orders.
2. Assessing the proceeds of drug trafficking.
3. Statements relating to drug trafficking.
4. Amount to be recovered under confiscation order.
5. Confiscation orders: definition of terms.
6. Application of procedure for enforcing fines.
7. Cases in which restraint orders and charging orders may be made.
8. Restraint orders.
9. Charging orders in respect of land, securities etc.
10. Charging orders: supplementary provisions.
11. Realisation of property.
12. Application of proceeds of realisation and other sums.
13. Exercise of powers by High Court or receiver.
14. Variation of confiscation orders.
15. Compensation.
16. Enforcement of orders in Scotland.

Offence of assisting drug traffickers

17. Assisting another to retain the benefit of drug trafficking.

Enforcement of external orders

18. Enforcement of Northern Ireland orders.
19. Enforcement of other external orders.

Miscellaneous and supplemental

20. Order to make evidence available.
21. Authority for search.
22. Sections 20 and 21: supplementary provisions.
23. Disclosure of information held by government departments.
24. Offence of prejudicing investigation.
25. Authorisation of delay in notifying arrest.
26. Prohibition of supply etc. of articles for administering controlled drugs.
27. Power to appoint additional assistant commissioner.
28. Drug trafficking offences to be serious arrestable offences.
29. Expenses.
30. Interpretation.
31. Minor amendments.
32. Short title, commencement and extent.

[Bill 109]

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49/3

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B I L L

[AS AMENDED IN COMMITTEE]

INTITULED

An Act to make provision for the recovery of the proceeds A.D. 1986.
of drug trafficking and other provision in connection
with drug trafficking, to make provision about the
supply of articles which may be used or adapted for
use in the administration of controlled drugs and to
increase the number of assistant commissioners of
police for the metropolis.

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:—

5 *Confiscation of proceeds of drug trafficking*

1.—(1) Subject to subsection (7) below, where a person appears **Confiscation**
before the Crown Court to be sentenced in respect of one or more **orders.**
drug trafficking offences (and has not previously been sentenced
or otherwise dealt with in respect of his conviction for the offence
10 or, as the case may be, any of the offences concerned), the court
shall act as follows.

(2) The court shall first determine whether he has benefited
from drug trafficking.

(3) For the purposes of this Act, a person who has at any
15 time (whether before or after the commencement of this section)
received any payment or other reward in connection with drug

[Bill 109]

A 2

49/3

trafficking carried on by him or another has benefited from drug trafficking.

(4) If the court determines that he has so benefited, the court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with section 4 of this Act the amount to be recovered in his case by virtue of this section. 5

(5) The court shall then, in respect of the offence or offences concerned—

(a) order him to pay that amount, 10

(b) take account of the order before—

(i) imposing any fine on him, or

(ii) making any order involving any payment (other than the payment of costs) by him, or

1971 c. 38. (iii) making any order under section 27 of the 15
1973 c. 62. Misuse of Drugs Act 1971 (forfeiture orders), section 39 of the Powers of Criminal Courts Act 1973 (criminal bankruptcy orders) or section 43 of that Act (deprivation orders), and

(c) subject to paragraph (b) above, leave the order out of 20
account in determining the appropriate sentence or other manner of dealing with the defendant.

(6) No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of an order 25
under this section restrict the Crown Court from dealing with an offender in any way the court considers appropriate in respect of a drug trafficking offence.

(7) Subsection (1) above does not apply in relation to any offence for which a person appears before the Crown Court to 30
be sentenced if—

1980 c. 43. (a) he has been committed to the Crown Court for sentence in respect of that offence under section 37(1) of the Magistrates' Courts Act 1980 (committal to Crown Court with a view to sentence of youth custody), or 35

(b) the powers of the court (apart from this section) to deal with him in respect of that offence are limited to dealing with him in any way in which a magistrates' court might have dealt with him in respect of the offence. 40

(8) In this Act—

(a) an order under this section is referred to as a "confiscation order", and

(b) a person against whom proceedings have been instituted for a drug trafficking offence is referred to (whether or not he has been convicted) as “ the defendant ”.

2.—(1) For the purposes of this Act—

Assessing the
proceeds of
drug
trafficking.

5 (a) any payments or other rewards received by a person at any time (whether before or after the commencement of section 1 of this Act) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking, and

10 (b) the value of his proceeds of drug trafficking is the aggregate of—

- (i) in the case of payments, their amount, and
- (ii) in the case of other rewards, their market value at the time when he received them.

15 (2) The Court may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the following assumptions, except to the extent that any of the assumptions are shown to be incorrect in the defendant’s case.

20 (3) Those assumptions are—

(a) that any property appearing to the court—

(i) to have been held by him at any time since his conviction, or

25 (ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him,

30 (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him, and

35 (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

(4) Subsection (2) above does not apply if the only drug trafficking offence in respect of which the defendant appears

[109]

A 3

before the court to be sentenced is an offence under section 17 of this Act.

(5) The court may adjust the assessment of the value of the defendant's proceeds of drug trafficking for the purpose of reflecting changes appearing to the court to have taken place since the defendant received the proceeds concerned in the value of those proceeds and in the value of money. 5

(6) For the purpose of assessing the value of the defendant's proceeds of drug trafficking in a case where a confiscation order has previously been made against him, the court shall leave 10 out of account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in determining the amount to be recovered under that order.

Statements
relating to
drug
trafficking.

3.—(1) Where—

- (a) there is tendered to the Crown Court by the prosecuting 15 authority a statement as to any matters relevant to the determination whether the defendant has benefited from drug trafficking or to the assessment of the value of his proceeds of drug trafficking, and
- (b) the defendant accepts to any extent any allegation in 20 the statement,

the court may, for the purposes of that determination and assessment, treat his acceptance as conclusive of the matters to which it relates.

(2) Where—

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- (a) a statement is tendered under subsection (1)(a) above, and
- (b) the court is satisfied that a copy of that statement has been served on the defendant,

the court may require the defendant to indicate to what extent 30 he accepts each allegation in the statement and, so far as he does not accept any such allegation, to indicate any matters he proposes to rely on.

(3) If the defendant fails in any respect to comply with a requirement under subsection (2) above he may be treated for 35 the purposes of this section as accepting every allegation in the statement apart from—

- (a) any allegation in respect of which he has complied with the requirement, and
- (b) any allegation that he has benefited from drug trafficking 40 or that any payment or other reward was received by him in connection with drug trafficking carried on by him or another.

(4) Where—

(a) there is tendered to the Crown Court by the defendant a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made from property available in respect of the defendant, and

(b) the prosecuting authority accepts to any extent any allegation in the statement,

the court may, for the purposes of that determination, treat the acceptance by the prosecuting authority as conclusive of the matters to which it relates.

(5) An allegation may be accepted or a matter indicated for the purposes of this section either—

(a) orally before the court, or

(b) in writing in accordance with Crown Court Rules.

(6) No acceptance by the defendant under this section that any payment or other reward received by him in connection with drug trafficking carried on by him or another shall be admissible in evidence in any proceedings for an offence.

4.—(1) Subject to subsection (3) below, the amount to be recovered in the defendant's case under the confiscation order shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking.

Amount to be recovered under confiscation order.

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made from property available in respect of the defendant (whether by an acceptance under section 3 of this Act or otherwise), the court may issue a certificate giving the court's opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3) below.

(3) If the court is satisfied that the amount that might be realised at the time the confiscation order is made from the property available in respect of the defendant is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised.

5.—(1) For the purposes of this Act, property is available in respect of the defendant (subject to subsection (2) below) if—

Confiscation orders: definition of terms.

(a) the property is held by him, or

[109]

A 4

- (b) the property has been held by him at any time since the beginning of the period of six years ending when the proceedings were instituted against him and has been transferred by him for less than full value, or
- (c) the property has been held by him at any time and either—
 - (i) was received by him in connection with drug trafficking carried on by him or another, or
 - (ii) directly or indirectly represented in his hands property received by him in that connection, 10
 and has been transferred by him for less than full value.

(2) Property is not available in respect of the defendant for those purposes if—

- 1973 c. 62. (a) an order under section 43 of the Powers of Criminal Courts Act 1973 (deprivation orders), or 15
- 1971 c. 38. (b) an order under section 27 of the Misuse of Drugs Act 1971 (forfeiture orders), 10

is in force in respect of the property.

(3) In this Act, “relevant interest”, in relation to property available in respect of the defendant, means— 20

- (a) any interest held by the defendant beneficially in that property, and
- (b) if that property is property available in respect of the defendant by virtue of subsection (1)(b) or (c) above, 25 any interest held by another person beneficially in the property, being an interest transferred or granted by the defendant or an interest derived from an interest so transferred or granted, unless it is shown that the property was not transferred to the person holding it, 30 or to a person (other than the defendant) through whom he claims it, for less than full value.

(4) In this Act—

- (a) references to property held by a person include a reference to property vested in his trustee in bankruptcy or liquidator ; and 35
- (b) references to an interest held by a person beneficially in property include a reference to an interest which would be held by him beneficially if the property were not so vested. 40

(5) The following provisions apply for the purpose of interpreting sections 3 and 4 of this Act.

(6) The amount that might be realised at the time a confiscation order is made against the defendant from the property available in respect of the defendant is—

(a) the total of the values of all such property at that time, less

(b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations.

(7) For the purposes of subsection (6) above—

(a) where there is any interest in property other than a relevant interest, the value of the property is—

(i) the market value of the relevant interest in the property, less

(ii) the amount required to discharge any incumbrance (other than a charging order) on the relevant interest, and

(b) in any other case, the value of property (other than cash) is its market value.

(8) For the purposes of that subsection, an obligation has priority at any time if it is an obligation of the defendant to—

(a) pay an amount due in respect of a fine, or other order of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the confiscation order, or

(b) pay any sum which, if the defendant had been adjudged bankrupt or was being wound up, would be among the preferential debts.

(9) In subsection (8)(b) above, “preferential debts” means subject to the following paragraphs the debts listed in Part I of Schedule 4 to the Insolvency Act 1985, assuming the date the confiscation order is made to be the relevant date for the purposes of that Schedule, but—

(a) in relation to bankruptcy means, at any time before section 166 of that Act comes into force, the debts to be paid in priority under section 33 of the Bankruptcy Act 1914, assuming the date the confiscation order is made to be the date of the receiving order for the purposes of section 33, and

(b) in relation to winding up means, at any time before section 89 of the Insolvency Act 1985 comes into force, the preferential debts listed in Schedule 19 to the Companies Act 1985, assuming the date the confiscation order is made to be the relevant date for the purposes of that Schedule.

Application
of procedure
for enforcing
fines.

1973 c. 62.

6.—(1) Where the Crown Court orders the defendant to pay any amount under section 1 of this Act, sections 31 and 32 of the Powers of Criminal Courts Act 1973 (powers of Crown Court in relation to fines and enforcement of Crown Court fines) shall have effect as if—

5

(a) that amount were a fine imposed on him by the Crown Court, and

(b) in the Table in section 31(3A) (imprisonment in default), for the entry relating to an amount exceeding £10,000 there were substituted—

10

“ An amount exceeding £10,000

but not exceeding £20,000.....12 months

An amount exceeding £20,000

but not exceeding £50,000.....18 months

An amount exceeding £50,000

15

but not exceeding £100,000.....2 years

An amount exceeding £100,000

but not exceeding £250,000.....3 years

An amount exceeding £250,000

but not exceeding £1 million.....5 years 20

An amount exceeding £1 million.....10 years ”.

(2) Where—

(a) a warrant of commitment is issued for a default in payment of an amount ordered to be paid under section 1 of this Act in respect of an offence or offences, and 25

(b) at the time the warrant is issued, the defendant is liable to serve a term of custody in respect of the offence or offences,

1982 c. 48.

the term of imprisonment or of detention under section 9 of the Criminal Justice Act 1982 (detention of persons aged 17 to 20 for default) to be served in default of payment of the amount shall not begin to run until after the term mentioned in paragraph (b) above. 30

(3) The reference in subsection (2) above to the term of custody which the defendant is liable to serve in respect of the offence or offences is a reference to the term of imprisonment, youth custody or detention under section 4 or 9 of the said Act of 1982 which he is liable to serve in respect of the offence or offences; and for the purposes of this subsection—

(a) consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term, and 40

(b) there shall be disregarded—

(i) any sentence suspended under section 22(1) of the said Act of 1973 which has not taken effect at the time the warrant is issued, 45

(ii) in the case of a sentence of imprisonment passed with an order under section 47(1) of the

Criminal Law Act 1977, any part of the sentence 1977 c. 45.
which the defendant has not at that time been re-
quired to serve in prison, and

- 5 (iii) any term of imprisonment or detention fixed
under section 31(2) of the said Act of 1973 for which
a warrant of commitment has not been issued at that
time.

(4) In the application of Part III of the Magistrates' Courts 1980 c. 43.
Act 1980 to amounts payable under confiscation orders—

- 10 (a) such an amount is not a sum adjudged to be paid by a
conviction for the purposes of section 81 (enforcement
of fines imposed on young offenders) or a fine for the
purposes of section 85 (remission of fines), and
15 (b) in section 87 (enforcement by High Court or county
court), subsection (3) shall be omitted.

(5) The reference in section 143(2) of that Act (power to
alter sums specified in certain provisions) to the Table in section
31(3A) of the Powers of Criminal Courts Act 1973 includes a
reference to that Table as it has effect by virtue of subsection
20 (1) above.

(6) This section applies in relation to confiscation orders
made by the criminal division of the Court of Appeal, or by the
House of Lords on appeal from that division, as it applies in
relation to confiscation orders made by the Crown Court, and
25 the reference in subsection (1)(a) above to the Crown Court shall
be construed accordingly.

7.—(1) The powers conferred on the High Court by sections Cases in which
8(1) and 9(1) of this Act are exercisable where— restraint orders
and charging
orders may
be made.

- 30 (a) proceedings have been instituted in England and Wales
against the defendant for a drug trafficking offence,
(b) the proceedings have not been concluded, and
(c) the court is satisfied that there is reasonable cause to
believe that the defendant has benefited from drug
trafficking.

35 (2) Those powers are also exercisable where the court is
satisfied—

- (a) that an information is to be laid under section 1 of the
Magistrates' Courts Act 1980 that a person has or is
suspected of having committed a drug trafficking
40 offence, and
(b) that there is reasonable cause to believe that he has
benefited from drug trafficking.

(3) For the purposes of sections 8 and 9 of this Act, at any time when those powers are exercisable by virtue only of subsection (2) above—

- (a) references in this Act to the defendant shall be construed as references to the person referred to in subsection (2)(a) above, 5
- (b) references in this Act to the prosecuting authority shall be construed as references to the person who the court is satisfied is to have the conduct of the proposed proceedings, and 10
- (c) references in this Act to property available in respect of the defendant shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (2)(a) above for a drug trafficking offence. 15

(4) Where the court has made an order under section 8(1) or 9(1) of this Act by virtue of subsection (2) above, the court shall discharge the order if the proposed proceedings are not instituted within such time as the court considers reasonable.

**Restraint
orders.**

8.—(1) The High Court may by order (in this Act referred to as a “restraint order”) prohibit any person from dealing with any property available in respect of the defendant, other than property for the time being subject to a charge under section 9 of this Act, subject to such conditions or exceptions as may be specified in the order. 20 25

(2) A restraint order—

- (a) may be made only on an application by the prosecuting authority, 30
- (b) may be made on an ex parte application to a judge in chambers; and
- (c) shall provide for notice to be given to persons affected by the order.

(3) A restraint order—

- (a) may be discharged or varied in relation to any property on the application of any person holding the property, and 35
- (b) shall be discharged when proceedings for the offences are concluded.

(4) Where the High Court has made a restraint order, the court may at any time appoint a receiver— 40

- (a) to take possession of any property available in respect of the defendant, other than property for the time being subject to a charge under section 9 of this Act, and

- (b) in accordance with the court's directions, to manage or otherwise deal with any property in respect of which he is appointed,

subject to such exceptions and conditions as may be specified by the court; and may require any person having possession of property in respect of which a receiver is appointed under this section to give possession of it to the receiver.

- (5) For the purposes of subsection (1) above, dealing with property includes removing it from the jurisdiction; and, where the High Court has made a restraint order, a constable may, for the purpose of preventing any property available in respect of the defendant being removed from the jurisdiction, seize the property.

- (6) Property seized under subsection (5) above shall be dealt with in accordance with the court's directions.

9.—(1) The High Court may make a charging order on property available in respect of the defendant for securing the payment to the Crown of any amount which is recoverable in the defendant's case under a confiscation order or which, if a confiscation order were made in the proceedings, might be recoverable in his case under the order.

Charging orders in respect of land, securities etc.

- (2) For the purposes of this Act, a charging order is an order made under this section imposing on any such property available in respect of the defendant as may be specified in the order a charge for securing the payment of money to the Crown.

- (3) A charging order—

(a) may be made only on an application by the prosecuting authority, and

- (b) may be made on an ex parte application to a judge in chambers.

- (4) Subject to subsection (6) below, a charge may be imposed by a charging order only on—

(a) any relevant interest in property available in respect of the defendant, being an interest held beneficially—

- (i) in any asset of a kind mentioned in subsection (5) below, or

(ii) under any trust, or

- (b) any interest in property available in respect of the defendant held by a person as trustee of a trust if the interest is in such an asset or is an interest under another trust and a charge may by virtue of paragraph (a) above be imposed by a charging order on the whole beneficial interest under the first-mentioned trust.

(5) The assets referred to in subsection (4) above are—

(a) land in England and Wales, or

(b) securities of any of the following kinds—

(i) government stock,

(ii) stock of any body (other than a building society) 5
incorporated within England and Wales,

(iii) stock of any body incorporated outside Eng-
land and Wales or of any country or territory outside
the United Kingdom, being stock registered in a
register kept at any place within England and Wales, 10

(iv) units of any unit trust in respect of which a
register of the unit holders is kept at any place within
England and Wales.

(6) In any case where a charge is imposed by a charging order
on any interest in an asset of a kind mentioned in subsection 15
(5)(b) above, the court may provide for the charge to extend to
any interest or dividend payable in respect of the asset.

(7) The court may, on the application of any person holding
any interest in property to which a charging order relates, make 20
an order discharging or varying the charging order and shall 20
make an order discharging the charging order if the proceedings
for the offence are concluded or the amount payment of which
is secured by the charge is paid into court.

**Charging
orders:
supplementary
provisions.**

10.—(1) A charging order may be made either absolutely or
subject to conditions as to notifying any person holding any 25
interest in the property to which the order relates or as to the
time when the charge is to become enforceable, or as to other
matters.

1972 c. 61.
1925 c. 21.

(2) The Land Charges Act 1972 and the Land Registration Act
1925 shall apply in relation to charging orders as they apply in 30
relation to orders or writs issued or made for the purpose of
enforcing judgments.

(3) Subject to any provision made under section 11 of this Act
or by rules of court, a charge imposed by a charging order shall
have the like effect and shall be enforceable in the same courts 35
and in the same manner as an equitable charge created by the
person holding the relevant interest or, as the case may be, the
trustees by writing under their hand.

1979 c. 53.

(4) References in any enactment other than the Charging
Orders Act 1979 to charging orders under section 1 of that Act 40
include a reference to charging orders under section 9 of this
Act.

(5) Where a charging order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 1925, an order under section 9(7) of this Act discharging the charging order may direct that the entry be cancelled.

(6) The Secretary of State may by order made by statutory instrument amend section 9 of this Act by adding to or removing from the kinds of asset for the time being referred to there any asset of a kind which in his opinion ought to be so added or removed.

An order under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) In this section and section 9 of this Act, "building society", "dividend", "government stock", "stock" and "unit trust" have the same meanings as in the Charging Orders Act 1979.

11.—(1) Where—

(a) in proceedings instituted for a drug trafficking offence, a confiscation order is made,

(b) the order is not subject to appeal, and

(c) the proceedings have not been concluded,
the High Court may, on an application by the prosecuting authority, exercise the powers conferred by subsections (2) to (6) below.

(2) The court may appoint a receiver in respect of the property available in respect of the defendant.

(3) The court may empower a receiver appointed under subsection (2) above, under section 8 of this Act or in pursuance of a charging order—

(a) to enforce any charge imposed under section 9 of this Act on property available in respect of the defendant or on interest or dividends payable in respect of such property, and

(b) in relation to any property available in respect of the defendant other than property for the time being subject to a charge under section 9 of this Act, to take possession of the property subject to such conditions or exceptions as may be specified by the court.

(4) The court may order any person having possession of property available in respect of the defendant to give possession of it to any such receiver.

(5) The court may empower any such receiver to realise any property available in respect of the defendant in such manner as the court may direct.

Realisation of property.

(6) The court may order any person holding an interest in property available in respect of the defendant to make such payment to the receiver in respect of any relevant interest as the court may direct and the court may, on the payment being made, by order transfer, grant or extinguish any interest in the property. 5

(7) Subsections (4) to (6) above do not apply to property for the time being subject to a charge under section 9 of this Act.

(8) The court shall not in respect of any property exercise the powers conferred by subsections (5) or (6) above unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court. 10

Application
of proceeds of
realisation and
other sums.

12.—(1) The following sums in the hands of a receiver appointed under section 8 or 11 of this Act or in pursuance of a charging order, that is— 15

(a) the proceeds of the enforcement of any charge imposed under section 9 of this Act, after making such payments (if any) as the High Court may direct, in a case where the relevant interest is held by a person other than the defendant, to the other person, 20

(b) the proceeds of the realisation, other than by the enforcement of such a charge, of any property under section 8 or 11 of this Act, after making such payments (if any) as the High Court may direct to any person holding an interest in the property, and 25

(c) any other sums, being property available in respect of the defendant,

shall, subject to subsection (2) below, be applied on the defendant's behalf towards the satisfaction of the confiscation order. 30

(2) If, after the amount payable under the confiscation order has been fully paid, any such sums remain in the hands of such a receiver, the receiver shall distribute those sums—

(a) among such of those who held property which was property available in respect of the defendant, and 35

(b) in such proportions,

as the High Court may direct.

(3) Any sum applied by any person towards the satisfaction of a confiscation order shall be treated—

1979 c. 55.

(a) for the purposes of the Justices of the Peace Act 1979 40
and, in particular, section 61 of that Act (application
of fines etc.), and

- (b) for the purposes of section 139 of the Magistrates' 1980 c. 43.
Courts Act 1980 (disposal of sums adjudged to be paid
by conviction),

as if it were a fine imposed by a magistrates' court on a sum-
mary conviction.

13.—(1) The following provisions apply to the powers conferred on the High Court by sections 8 to 12 of this Act or on a receiver appointed under section 8 or 11 of this Act or in pursuance of a charging order. Exercise of powers by High Court or receiver.

10 (2) Those powers shall be exercised with a view to—

- (a) making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant's case the value of any property available in respect of the defendant (including where it has been transferred by the defendant, any increase in its value since the transfer), but
15 (b) allowing any person, other than the defendant, to retain or recover any consideration given by him.

(3) In exercising those powers, no account shall be taken
20 of any obligations of the defendant or any other person which conflict with the obligation to satisfy the confiscation order.

(4) Those powers shall not be exercised in the case of any property vested in a trustee in bankruptcy or liquidator.

(5) Subsection (7) of section 5 of this Act applies for the
25 purposes of subsection (2) above as it applies for the purposes of subsection (6) of that section.

14.—(1) If, on an application by the defendant in respect of a confiscation order, the High Court is satisfied that the property available in respect of the defendant is inadequate for the payment of any amount remaining to be recovered under the order the court shall issue a certificate to that effect, giving the court's reasons. Variation of confiscation orders.
30

(2) For the purposes of subsection (1) above, in the case of property vested in a trustee in bankruptcy or liquidator the court
35 shall take into account the extent to which the property or proceeds of the realisation of the property may be distributed among creditors.

(3) Where a certificate has been issued under subsection (1) above, the defendant may apply to the Crown Court for the
40 amount to be recovered under the order to be reduced.

(4) The Crown Court shall, on an application under subsection (3) above—

- (a) substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case, and 5
- (b) substitute for the term of imprisonment or of detention fixed under subsection (2) of section 31 of the Powers of Criminal Courts Act 1973 in respect of the amount to be recovered under the order a shorter term determined in accordance with that section (as it has effect 10 by virtue of section 6 of this Act) in respect of the lesser amount.

1973 c. 62.

Compensation.

15.—(1) If proceedings are instituted against a person for a drug trafficking offence or offences and either—

- (a) the proceedings do not result in his conviction for any 15 drug trafficking offence, or
- (b) where he is convicted of one or more drug trafficking offences—
 - (i) the conviction or convictions concerned are quashed (and no conviction for any drug trafficking 20 offence is substituted), or
 - (ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,

the High Court may, on an application by a person who held property which was property available in respect of the defen- 25 dant, order compensation to be paid to the applicant.

(2) The High Court shall not order compensation to be paid in any case unless the court is satisfied—

- (a) that there has been some serious default on the part of a person concerned in the investigation or prosecution 30 of the offence or offences concerned, being a person mentioned in subsection (4) below, and that, but for that default, the proceedings would not have been instituted or continued, and
- (b) that the applicant has suffered substantial loss in conse- 35 quence of anything done in relation to the property by or in pursuance of—
 - (i) an order of the High Court under sections 8 to 11 of this Act, or
 - (ii) an order of a court in Scotland made in pur- 40 suance of any provision made by an Order in Council under section 16 of this Act.

(3) The amount of compensation to be paid under this section shall be such as the High Court thinks just in all the circumstances of the case. 45

(4) Compensation payable under this section shall be paid—

- (a) where the person in default was or was acting as a member of a police force, out of the police fund out of which the expenses of that police force are met,
- 5 (b) where the person in default was a member of the Crown Prosecution Service or acting on behalf of the service, by the Director of Public Prosecutions, and
- (c) where the person in default was an officer within the meaning of the Customs and Excise Management Act 1979 c. 2.
- 10 1979, by the Commissioners of Customs and Excise.

16.—(1) Her Majesty may by Order in Council make provision for the purpose—

Enforcement of orders in Scotland.

- (a) of enabling property in Scotland which is property available in respect of the defendant to be used or realised for the payment of any amount payable under a confiscation order, and
- 15 (b) of securing that, where proceedings have been instituted in England and Wales for a drug trafficking offence and have not been concluded, property in Scotland which—
- 20 (i) if a confiscation order were made in the proceedings, might be used or realised for the payment of any such amount, and
- (ii) is property available in respect of the defendant,
- 25 will be available to be so used or realised.

(2) An Order in Council under this section may for the purposes set out in subsection (1) above amend or apply, with or without modifications, any enactment.

30 (3) An Order in Council varying or revoking a previous Order in Council under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient.

(4) An Order in Council under this section shall not be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.

Offence of assisting drug traffickers

17.—(1) If a person enters into or is otherwise concerned in an arrangement whereby—

Assisting another to retain the benefit of drug trafficking.

- 40 (a) the retention or control by or on behalf of another (call him “A”) of A’s proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise), or

(b) A's proceeds of drug trafficking—

(i) are used to secure that funds are placed at A's disposal, or

(ii) are used for A's benefit to acquire property by way of investment,

knowing or suspecting or having reasonable grounds to suspect that A is a person who carries on or has carried on drug trafficking or has benefitted from drug trafficking, he is guilty of an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) 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 A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1) above.

(4) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine or to both, and

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

1982 c. 48.

(5) In Part II of Schedule 1 to the Criminal Justice Act 1982 (persons convicted of offences under certain enactments not eligible for early release), after paragraph 25 there is inserted—

“DRUG TRAFFICKING OFFENCES ACT 1986

26. Section 17 (assisting another to retain the benefit of drug trafficking).”

Enforcement of external orders

Enforcement
of Northern
Ireland orders.

18.—(1) Her Majesty may by Order in Council provide that, for the purposes of sections 7 to 15 of this Act, this Act shall have effect as if—

(a) references to confiscation orders included a reference to orders made by courts in Northern Ireland which appear to Her Majesty to correspond to confiscation orders,

- (b) references to drug trafficking offences included a reference to any offence under the law of Northern Ireland (not being a drug trafficking offence) which appears to Her Majesty to correspond to such an offence,
- 5 (c) references to proceedings in England and Wales or to the institution or conclusion in England and Wales of proceedings included a reference to proceedings in Northern Ireland or to the institution or conclusion in Northern Ireland of proceedings, as the case may be,
- 10 and
- (d) references to the laying of an information or the issue of a summons or warrant under section 1 of the Magistrates' Courts Act 1980 included a reference to making 1980 c. 43.
- 15 a complaint or issuing a summons or warrant (as the case may be) under Article 20 of the Magistrates' S.I. 1981 - Courts (Northern Ireland) Order 1981. 1675 (N.I. 26).

(2) An Order in Council under this section may provide for those sections to have effect in relation to anything done or to be done in Northern Ireland subject to such further modifications as may be specified in the order.

(3) An Order in Council varying or revoking a previous Order in Council under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient.

25 (4) An Order in Council under this section shall not be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.

19.—(1) Her Majesty may by Order in Council apply this section to any order made after the Order in Council comes into force by a court of a country or territory outside the United Kingdom, being an order— Enforcement of other external orders.

- (a) of a description specified in the Order in Council, and
- (b) made for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value.

(2) An order to which this section applies is referred to below in this section as an "external confiscation order"; and in this section "designated country" means a country or territory outside the United Kingdom designated by an Order in Council under this section.

(3) The High Court may, on an application by or on behalf of the government of a designated country, register an external confiscation order made there, subject to subsection (4) below.

(4) The High Court shall not register an external confiscation order unless—

- (a) the court is satisfied that at the time of registration the order is in force in the designated country and is not subject to appeal in the designated country, 5
- (b) the court is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them, and
- (c) the court is of the opinion that enforcing the order 10 in England and Wales would not be contrary to the interests of justice.

(5) The High Court shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied (whether by payment of the amount due under 15 the order, by the person against whom the order is made serving imprisonment in default or otherwise).

(6) In relation to an external confiscation order registered under this section, sections 8 to 14 of this Act shall have effect subject to such modifications as may be specified in an Order 20 in Council under this section as they have effect in relation to a confiscation order.

(7) In subsection (4) above, “appeal” includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or a stay of execution. 25

(8) In any case where the High Court is satisfied, on an application by or on behalf of the government of a designated country, that proceedings which might result in an external confiscation order being made against a person have been instituted in the designated country and have not been con- 30 cluded, sections 8 to 10 of this Act shall have effect in relation to those proceedings—

- (a) as they would have effect in relation to proceedings instituted in England and Wales against that person for a drug trafficking offence which have not been 35 concluded, and
- (b) as if references to a confiscation order were references to an external confiscation order and references to an application by the prosecuting authority were references to an application by or on behalf of that government, 40 and
- (c) subject to such other modifications as may be specified in an Order in Council under this section.

(9) An Order in Council under this section may include such provision— 45

- (a) as to evidence or proof of any matter for the purposes of this section, and

(b) as to the circumstances in which proceedings are to be treated for those purposes as instituted or concluded in any designated country,

as Her Majesty considers expedient.

5 (10) An Order in Council varying or revoking a previous Order in Council under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient.

10 (11) An Order in Council under this section shall not be made unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament.

Miscellaneous and supplemental

20. —(1) A constable may, for the purpose of an investigation Order to make into drug trafficking, apply to a Circuit judge for an order under evidence subsection (2) below in relation to particular material or material available. of a particular description.

(2) If on such an application the judge is satisfied that the conditions in subsection (4) below are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates shall—

(a) produce it to a constable for him to take away, or

(b) give a constable access to it,

within such period as the order may specify.

This subsection is subject to section 23(6) of this Act.

25 (3) The period to be specified in an order under subsection (2) above shall be seven days unless it appears to the judge that a longer or shorter period would be appropriate in the particular circumstances of the application.

(4) The conditions referred to in subsection (2) above are—

30 (a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking,

(b) that there are reasonable grounds for suspecting that the material to which the application relates—

35 (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and

40 (ii) does not consist of or include items subject to legal privilege or excluded material, and

- (c) that there are reasonable grounds for believing that it is in the public interest, having regard—
 - (i) to the benefit likely to accrue to the investigation if the material is obtained, and
 - (ii) to the circumstances under which the person 5 in possession of the material holds it,
 that the material should be produced or that access to it should be given.

(5) Where the judge makes an order under subsection (2)(b) above in relation to material on any premises he may, on the 10 application of a constable, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material.

(6) Provision may be made by Crown Court Rules as to—

(a) the discharge and variation of orders under this section, 15 and

(b) proceedings relating to such orders.

(7) An order under this section shall have effect as if it were an order of the Crown Court.

(8) Where the material to which an application under this 20 section relates consists of information contained in a computer—

(a) an order under subsection (2)(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible, and 25

(b) an order under subsection (2)(b) above shall have effect as an order to give access to the material in a form in which it is visible and legible.

(9) An order under subsection (2) above—

(a) shall not confer any right to production of, or access 30 to, items subject to legal privilege or excluded material,

(b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise, and

(c) may be made in relation to material in the possession 35 of an authorised government department.

Authority
for search.

21.—(1) A constable may, for the purpose of an investigation into drug trafficking, apply to a Circuit judge for a warrant under this section in relation to specified premises.

(2) On such an application the judge may issue a warrant 40 authorising a constable to enter and search the premises if he is satisfied—

(a) that an order made under section 20 of this Act in relation to material on the premises has not been com- 45 plied with, or

- (b) that the conditions in subsection (3) of that section are fulfilled in relation to any material on the premises but that it would not be appropriate to make an order under that section in relation to the material because—
- 5 (i) it is not practicable to communicate with any person entitled to produce the material, or
- (ii) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated, or
- 10 (iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a constable could secure immediate access to the material, or
- 15 (c) that the conditions in subsection (3) below are fulfilled.
- (3) Those conditions are—
- (a) that there are reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking, and
- 20 (b) that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person or to drug trafficking which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material
- 25 cannot at the time of the application be particularised, and
- (c) that—
- (i) it is not practicable to communicate with any person entitled to grant entry to the premises, or
- 30 (ii) entry to the premises will not be granted unless a warrant is produced, or
- (iii) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable arriving at the premises could
- 35 secure immediate entry to them.
- (4) Where a constable has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege and excluded material, which is likely to be of substantial value
- 40 (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.

Sections 20
and 21:
supplementary
provisions.
1984 c. 60.

22.—(1) For the purposes of sections 21 and 22 of the Police and Criminal Evidence Act 1984 (access to, and copying and retention of, seized material)—

- (a) an investigation into drug trafficking shall be treated as if it were an investigation of or in connection with an offence, and
- (b) material produced in pursuance of an order under section 20(2)(a) of this Act shall be treated as if it were material seized by a constable.

(2) In sections 20 and 21 of this Act “items subject to legal privilege”, “excluded material” and “premises” have the same meanings as in the said Act of 1984.

Disclosure of
information
held by
government
departments.

23.—(1) Subject to subsection (3) below, at any time after proceedings have been instituted against the defendant for a drug trafficking offence but before they have been concluded the High Court may, on an application by the prosecuting authority, order any material mentioned in subsection (2) below which is in the possession of an authorised government department to be disclosed to the court or to a receiver appointed under section 8 or 11 of this Act or in pursuance of a charging order.

(2) The material referred to in subsection (1) above is any material which—

- (a) has been submitted to an officer of an authorised government department by the defendant or by a person who has at any time held property which was property available in respect of the defendant,
- (b) has been made by an officer of an authorised government department in relation to the defendant or such a person, or
- (c) is correspondence which passed between an officer of an authorised government department and the defendant or such a person,

and an order under that subsection may require the disclosure of all such material or of a particular description of such material, being material in the possession of the department concerned.

(3) An order under subsection (1) above shall not require the disclosure of any material unless it appears to the High Court that the disclosure is likely to facilitate the exercise of the powers conferred on the court by sections 8 to 11 of this Act or on a receiver appointed as mentioned in subsection (1) above.

(4) Subject to subsection (5) below, where the court has made an order under subsection (1) above the court may, at any time after the material to which the order relates is disclosed, by

order authorise the disclosure of the material or any part of the material to the prosecuting authority subject to such conditions as may be specified in the order.

(5) An order under this section shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise but an order under subsection (4) above shall not be made unless—

- 10 (a) a reasonable opportunity has been given for an officer of the department to make representations to the court, and
- (b) it appears to the court that the material is likely to be of substantial value in exercising functions relating to drug trafficking.

(6) An order under subsection (1) above and, in the case of 15 material in the possession of an authorised government department, an order under section 20(2) of this Act may require any officer of the department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order shall be served 20 as if the proceedings were civil proceedings against the department.

(7) It shall be the duty of any person in receipt of such an order so served to bring the order to the attention of the officer concerned.

25 24.—(1) Where, in relation to an investigation into drug trafficking, an order under section 20 of this Act has been made or has been applied for and has not been refused or a war-
 30 rant under section 21 of this Act has been issued, a person who, knowing or suspecting or having reasonable grounds to suspect that the investigation is taking place, makes any disclosure which is likely to prejudice the investigation is guilty of an offence. Offence of prejudicing investigation.

(2) In proceedings against a person for an offence under this section, it is a defence to prove—

- 35 (a) that he did not know or suspect that the disclosure was likely to prejudice the investigation, or
- (b) that he had lawful authority or reasonable excuse for making the disclosure.

(3) A person guilty of an offence under this section shall be liable—

- 40 (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both, and

- (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.

Authorisation
of delay in
notifying
arrest.
1984 c. 60.

25.—(1) In section 56 of the Police and Criminal Evidence Act 1984 (right to have someone informed when arrested), at the beginning of subsection (5) there is inserted “Subject to subsection (5A) below” and after that subsection there is inserted—

“(5A) An officer may also authorise delay where the serious arrestable offence is a drug trafficking offence and the officer has reasonable grounds for believing—

- (a) that the detained person has benefited from drug trafficking, and
(b) that the recovery of the value of that person’s proceeds of drug trafficking will be hindered by telling the named person of the arrest.”

(2) In section 58 of that Act (access to legal advice) at the beginning of subsection (8) there is inserted “Subject to subsection (8A) below” and after that subsection there is inserted—

“(8A) An officer may also authorise delay where the serious arrestable offence is a drug trafficking offence and the officer has reasonable grounds for believing—

- (a) that the detained person has benefited from drug trafficking, and
(b) that the recovery of the value of that person’s proceeds of drug trafficking will be hindered by the exercise of the right conferred by subsection (1) above.”

(3) In section 65 of that Act (interpretation)—

- (a) after the definition of “appropriate consent” there is inserted—

““drug trafficking” and “drug trafficking offence” have the same meaning as in the Drug Trafficking Offences Act 1986”, and

- (b) at the end of that section there is inserted “and references in this Part to any person’s proceeds of drug trafficking are to be construed in accordance with the Drug Trafficking Offences Act 1986”.

(4) Without prejudice to section 20(2) of the Interpretation Act 1978, the Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 1985 applies to sections 56 and 58 of the Police and Criminal Evidence Act 1984 as those sections have effect by virtue of this section.

26.—(1) After section 9 of the Misuse of Drugs Act 1971 there is inserted the following section—

“ Prohibition of supply etc. of articles for administering controlled drugs. 5 9A.—(1) A person who supplies or offers to supply any article which may be used or adapted to be used (whether by itself or in combination with another article or other articles) in the administration by any person of a controlled drug to himself or another, believing that the article (or the article as adapted) is to be so used, is guilty of an offence. 10

(2) It is not an offence under subsection (1) above to supply or offer to supply a hypodermic syringe, or any part of one.

(3) In proceedings against a person for an offence under this section in respect of any article it is a defence to prove that he believed on reasonable grounds that the article was to be used— 15

(a) in the administration by any person of a controlled drug to another in circumstances where the administration of the drug would not be unlawful under section 4(1) of this Act, or 20

(b) in the administration by any person of a controlled drug to himself in circumstances where having the controlled drug in his possession would not be unlawful under section 5(1) of this Act. 25

(4) In this section, references to administration by any person of a controlled drug to himself include a reference to his administering it to himself with the assistance of another”. 30

(2) In Schedule 4 to that Act, after the entry relating to section 9 there is inserted—

“ Section 9A. Prohibition of supply etc. of articles for administering controlled drugs. Summary — — — 6 months or level 5 on the standard scale, or both.” 35

27. In section 2 of the Metropolitan Police Act 1856 (power to appoint two assistant commissioners of police for the metropolis, increased to five by the Metropolitan Police Act 1933) for the word “ two ” there is substituted “ six ”; and the Metropolitan Police Act 1933 is repealed. 40

Power to appoint additional assistant commissioner. 1856 c. 2. 1933 c. 33.

- Drug trafficking offences to be serious arrestable offences. 1984 c. 60. **28.** In section 116(2) of the Police and Criminal Evidence Act 1984 (arrestable offences that are always serious) after paragraph (a) there is inserted—
 “(aa) any of the offences mentioned in paragraphs (a) to (d) of the definition of “drug trafficking offence” in section 30(1) of the Drug Trafficking Offences Act 1986 ”. 5
- Expenses. **29.** There shall be paid out of money provided by Parliament any increase attributable to this Act in the sums payable out of money so provided under any other Act. 10
- Interpretation. 1947 c. 44. **30.—**(1) In this Act—
 “authorised government department ” means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947 ;
 “charging order ” has the meaning given by section 9(2) of this Act ; 15
 “confiscation order ” has the meaning given by section 1(8) of this Act ;
 “ constable ” includes a person commissioned by the Commissioners of Customs and Excise ; 20
 “ corresponding law ” has the same meaning as in the Misuse of Drugs Act 1971 ;
 “ defendant ” has the meaning given by section 1(8) of this Act ;
 “ drug trafficking ” means doing or being concerned in any of the following, whether in England and Wales or elsewhere—
 (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971 or a corresponding law ; 30
 (b) transporting or storing a controlled drug where possession of the drug contravenes section 5(1) of that Act or a corresponding law ;
 (c) importing or exporting a controlled drug where the importation or exportation is prohibited by section 3(1) of that Act or a corresponding law ; 35
 and includes a person doing the following, whether in England and Wales or elsewhere, that is entering

into or being otherwise concerned in an arrangement whereby—

(i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or

(ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment ;

“ drug trafficking offence ” means any of the following—

(a) an offence under section 4(2) or (3) or 5(3) of the Misuse of Drugs Act 1971 (production, supply and possession for supply of controlled drugs) ;

(b) an offence under section 20 of that Act (assisting in or inducing commission outside United Kingdom of offence punishable under a corresponding law) ;

(c) an offence under—

(i) section 50(2) or (3) of the Customs and Excise Management Act 1979 (improper importation),

(ii) section 68(2) of that Act (exportation), or

(iii) section 170 of that Act (fraudulent evasion), in connection with a prohibition or restriction on importation or exportation having effect by virtue of section 3 of the Misuse of Drugs Act 1971 ;

(d) an offence under section 17 of this Act ;

(e) an offence under section 1 of the Criminal Law Act 1977 of conspiracy to commit any of the offences in paragraphs (a) to (e) above ;

(f) an offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit any of those offences ;

(g) an offence of inciting another to commit any of those offences, whether under section 19 of the Misuse of Drugs Act 1971 or at common law ; and

(h) aiding, abetting, counselling or procuring the commission of any of those offences ;

“ interest ”, in relation to property, includes right ;

“ property ” includes money and all other property, real or personal, including things in action and other intangible property ;

“ property available in respect of the defendant ” is to be construed in accordance with section 5 of this Act ;

“prosecuting authority”, in relation to any proceedings instituted for a drug trafficking offence, means the person having the conduct of the proceedings;

“relevant interest” is to be construed in accordance with section 5(3) of this Act; and 5

“restraint order” has the meaning given by section 8(1) of this Act.

(2) This Act applies to property whether it is situated in England and Wales or elsewhere.

(3) References in this Act to offences include a reference to 10 offences committed before the commencement of section 1 of this Act; but nothing in this Act imposes any duty or confers any power on any court in or in connection with proceedings against a person for a drug trafficking offence instituted before the commencement of that section. 15

(4) References in this Act to anything received in connection with drug trafficking include a reference to anything received both in that connection and in some other connection.

(5) The following provisions shall have effect for the interpretation of this Act. 20

(6) Property is held by any person if he holds any interest in it.

(7) Property is transferred by one person to another if the first person transfers or grants to the other any interest in the property. 25

(8) Property is transferred by a person (call him “A”) to another (call him “B”) for less than full value if—

(a) A makes a gift of it to B or otherwise transfers it to B on terms that do not provide for A to receive any consideration, or 30

(b) A transfers it to B for a consideration the value of which is significantly less than the value of the consideration provided by A.

(9) Proceedings for an offence are instituted in England and Wales— 35

(a) where a justice of the peace issues a summons under section 1 of the Magistrates’ Courts Act 1980, when the information for the offence is laid before him,

(b) where a justice of the peace issues a warrant for the arrest of any person under that section, when the in- 40 formation for the offence is laid before him,

(c) where a person is charged with the offence after being taken into custody without a warrant, when he is taken into custody,

5 (d) where a bill of indictment is preferred under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 in a case falling within paragraph (b) of subsection (2) of that section, when the bill of indictment is preferred before the court ;

and where the application of this subsection would result in
10 there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.

(10) Proceedings in England and Wales for an offence are concluded on the occurrence of one of the following events—

- 15 (a) the discontinuance of the proceedings ;
- (b) the acquittal of the defendant ;
- (c) the quashing of his conviction for the offence ;
- (d) the grant of Her Majesty's pardon in respect of his conviction for the offence ;
- 20 (e) the court sentencing or otherwise dealing with him in respect of his conviction for the offence without having made a confiscation order ; and
- (f) the satisfaction of a confiscation order made in the proceedings (whether by payment of the amount due
25 under the order or by the defendant serving imprisonment in default).

(11) An order is subject to appeal so long as an appeal or further appeal is pending against the order or (if it was made on a conviction) against the conviction ; and for this purpose an
30 appeal or further appeal shall be treated as pending (where one is competent but has not been brought) until the expiration of the time for bringing that appeal.

31.—(1) Section 28 of the Bankruptcy Act 1914 (effect of order of discharge) shall have effect as if amounts payable under confiscation orders were debts excepted under subsection (1)(a) of that section. Minor amendments.
1914 c. 59.
35

(2) In section 1(2)(a) of the Rehabilitation of Offenders Act 1974 (failure to pay fines etc. not to prevent person becoming rehabilitated) the reference to a fine or other sum adjudged to
40 be paid by or imposed on a conviction does not include a reference to an amount payable under a confiscation order.

[109]

B

1985 c. 65.

(3) Section 128(4) of the Insolvency Act 1985 (discharge of bankrupt not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.

Short title,
commence-
ment and
extent.

32.—(1) This Act may be cited as the Drug Trafficking 5
Offences Act 1986.

(2) This Act, except section 27 (which comes into force on the day on which this Act is passed), shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed 10
for different provisions and for different purposes.

(3) Subject to subsection (4) below, this Act extends to England and Wales only.

(4) Section 16 of this Act extends also to Scotland and section 26 extends also to Scotland and Northern Ireland. 15

Drug Trafficking Offences Bill

A

B I L L

[AS AMENDED IN COMMITTEE]

INTITULED

An Act to make provision for the recovery of the proceeds of drug trafficking and other provision in connection with drug trafficking, to make provision about the supply of articles which may be used or adapted for use in the administration of controlled drugs and to increase the number of assistant commissioners of police for the metropolis.

The Lord Glenarthur

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THE HONG KONG EXPERIENCE IN ATTEMPTING TO REDUCE THE DEMAND FOR AND SUPPLY OF ILLICIT DRUGS

A paper prepared by the Government of HONG KONG

CONTENTS

	<u>Paragraphs</u>
1. Introduction	1 - 4
2. Central Registry of Drug Abuse	5 - 8
3. The policy (Implementation of the policy)	10 - 12
4. <u>Demand reduction</u>	13
Preventive education and publicity	14 - 28
Treatment and rehabilitation	29 - 32
Custodial Placement Treatment - the Drug Addiction Treatment Centre (DATC)	33 - 35
Voluntary In-Patient Treatment	36 - 39
Voluntary Out-Patient Methadone Treatment	40 - 48
5. <u>Supply reduction</u>	
Legislation	49 - 55
The Narcotics Bureau, Royal Hong Kong Police Force (RHKPF)	56
The Customs and Excise Service	57 - 58
The Joint Intelligence Unit (JIU)	59
Prosecutions Annex V	60 - 61
Seizures Annex VI	62
6. Conclusion	63

THE HONG KONG EXPERIENCE IN ATTEMPTING TO REDUCE THE
DEMAND FOR AND SUPPLY OF ILLICIT DRUGS

"As drug addiction is one of Hong Kong's greatest social and economic problems, Government's policy is to neglect no measure that has a reasonable chance of contributing to its suppression."

Hong Kong Government White Paper November 1959

INTRODUCTION

The abuse of opiate drugs was a major social problem in Hong Kong as long ago as 1842 when the population was only 12,360. Today the problem of drug abuse is still serious and Hong Kong is one of the most densely populated areas on earth with 5.4 million people living on a little over 1,000 square kilometres of land, much of it unusable hillsides and barren islets. The urban population density is 28,500 per square kilometre. In one district the density reaches 165,000 per square kilometre and this is also one of the districts with the highest incidence of drug abuse.

2. Hong Kong is a free port with a minimum of customs formalities and trade controls. It is a free enterprise society with minimal restrictions on commercial activity. The indented coastline and isolated islets favour smuggling. Some 13,300 ocean-going vessels put into Hong Kong in 1985 and 37 million tons of cargo were handled with an emphasis on speed and trade facilitation. There are large fishing fleets and in 1985, 20.5 million passengers arrived by air, land and sea. Of these:

4.3 million (21%) arrived by air

5.6 million (27%) arrived by sea
(mainly re-entering Hong Kong after
visiting the Portuguese territory of Macau)

10.6 million (52%) entered at the land border with China.

Hong Kong is located within 1,000 miles of the poppy growing areas in Burma, Thailand and Laos, which are often referred to collectively as the "Golden Triangle".

3. These factors provide an indication of the complexity of Hong Kong's long standing and deeply entrenched opiate drug problem, despite which remarkable successes have been achieved in controlling the supply of and demand for illicit drugs.

4. Much of what has been achieved in Hong Kong in combating drug abuse has been done in accordance with the provisions of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol. The Convention was ratified by the United Kingdom on 2 August 1964 and extended to Hong Kong on the same date. The United Kingdom has not yet ratified the Convention on Narcotic Drugs 1971, but is expected to do so in the near future. Hong Kong follows, the requirements of the 1971 Convention in a voluntary basis.

Central Registry of Drug Abuse

On the basis of information in the computerised Central Registry of Drug Abuse the size of the known active addict population is around 37,000. This figure represents 0.8% of the general population over the age of 11 years, a percentage which has remained stable since 1982. The figure of 37,000 is derived from a total of over 50,000 persons who have been recorded since 1976. Of these, some 13,000 have not been reported again to the Registry for at least five years, many of whom would have died, achieved abstinence from drugs, emigrated or been sentenced to prison. Of the 50,000 persons recorded, 4,000 or 8% are women.

6. It is believed that the 41 voluntary reporting agencies of the Central Registry of Drug Abuse located throughout Hong Kong and comprising major treatment agencies, the Royal Hong Kong Police Force, the Correctional Services Department, hospitals and social service agencies provide a comprehensive and reliable system of notification.

7. Under the Dangerous Drugs Ordinance, Chapter 134 of the Laws of Hong Kong, the individual records in the Registry are immune from search and from production in court except under very compelling circumstances, in which even an application has to be made to Attorney-General for his personal consideration. This degree of confidentiality provides a firm basis for the continuous co-operation of the voluntary reporting agencies in regularly supplying reliable information on individual addicts. At the same time, addicts can be assured that their anonymity will be maintained, thus encouraging them to come forward for treatment.

8. Through the Registry it is possible to monitor patterns and trends in drug abuse and the effectiveness of the various treatment programmes. Special studies can be conducted e.g. the incidence of tetanus and suicides among drug addicts. The Registry indicates which are the districts with the highest incidence of drug abuse so that preventive efforts may be concentrated on those areas.

The policy

9. It is a major object of Hong Kong Government policy to stop the illicit trafficking of drugs into and through Hong Kong and to eradicate drug abuse from the community.

Implementation of the policy

10. The sole advisory body and co-ordinating instrument of the Hong Kong Government on all policy matters relating to the eradication of drug trafficking and abuse is the Action Committee Against Narcotics (ACAN) which was established in its present form in 1972. The full membership of the Committee and its terms of reference are given at Appendix I. The Narcotics Division of the Government Secretariat, headed by the Commissioner for Narcotics, is the executive arm of ACAN.

11. ACAN has two sub-committees, one on Preventive Education and Publicity and the other on Treatment and Rehabilitation.

12. The strategy adopted by ACAN incorporates both demand and supply reduction programmes and these are described in the following paragraphs.

Demand reduction

13. The reduction in demand for illicit drugs is tackled through preventive education and publicity on the one hand and treatment and rehabilitation on the other.

Preventive education and publicity

14. Article 38 of the Single Convention on Narcotics Drugs, 1961, makes it mandatory for the parties to

"give special attention to and take all practical measures for the prevention of the abuse of drugs" and

"to assist persons whose work so requires to gain an understanding of the problems of abuse of drugs and of prevention, and shall promote such understanding among the general public if there is a risk that the abuse of drugs will become widespread."

15. The Government's awareness of the importance of preventive education was first publicised in its 1959 White Paper on "The Problem of Narcotic Drugs in Hong Kong". In it, the Government said:-

"No campaign against drugs can hope to succeed without the backing of the people as a whole. Attempts will therefore be made to publicise the disastrous effect of drug addiction from the social as well as the economic angle, and then to enlist the support and co-operation of voluntary agencies and the public. Social sanctions will be sought through family and educational institutions, welfare associations, through Church bodies and places of employment. The assistance of the press, cinema-owners and the organizers of broadcasting and television programmes will be sought to explode the wide-spread myths about heroin and such facts as the following will be driven home to the masses, e.g.:

- (a) that heroin is not a cure for tuberculosis or any other chronic disease;
- (b) that heroin is not an aphrodisiac; and
- (c) that heroin is not a source of energy.

Stress will be laid not only on self protection, but on the duty of protecting other people from the disastrous consequences of acquiring this vice, and an appeal will be made to the people to join in a crusade against this vice. They will be made to realise that the aim of the campaign is to protect their homes, their lives, their children and their neighbours from a terrible and insidious menace which is being fostered by unscrupulous racketeers, and that it is only with their active support and co-operation that the campaign can succeed. It is hoped that the public conscience will be roused to the extent that traffic in drugs will be regarded with positive abhorrence and wholeheartedly condemned by the people of Hong Kong."

16. Although the 1959 campaign did succeed in launching anti-narcotics publicity and preventive education, it was unfortunate that its momentum was not sustained in the ensuing years. Hong Kong's anti-narcotics efforts tended to be dominated both in the allocation of resources and in public attention by law enforcement and treatment and rehabilitation.

17. Moreover, preventive education and publicity work became fragmented - Government and non-Government agencies planned their own educational programmes and campaigns, distributed their own information materials, and tended to go their own ways. There was neither co-ordination nor a strategic plan to deal with preventive measures, the crucial importance of which was being increasingly appreciated in a number of countries with drug abuse problems.

18. Recognizing the vital role that preventive education and publicity had to play as an integral part of any effective and co-ordinated drug abuse control programme, ACAN carried out a thorough review of its programmes in late-1975.

19. The first step taken by ACAN was to identify those who were most vulnerable to the risk of narcotics addiction, so that preventive measures could be tailored to their needs. From a computer analysis of the records of the Central Registry of Drug Abuse, ACAN noted that the profile of a potential addict was "a young male aged between 15 and 24, with no more than primary school education, employed as a semi-skilled or unskilled factory worker or casual labourer, living in overcrowded conditions, and having a poor relationship with his family."

20. The ACAN next reviewed the amount of Government resources then being used for preventive education and publicity. It noted that only 0.5 per cent of total anti-narcotics expenditure (which in 1974 was estimated to be about HK\$40 million annually) was being used for this purpose. It was subsequently recommended that the budget for preventive education and publicity be progressively built up over the ensuing five years to 2.5 per cent of Government's total annual anti-narcotics expenditure.

21. Finally, ACAN reviewed the past performance of preventive education and publicity in Hong Kong and then proposed a new strategy, incorporating the overall rationale, objectives, target groups, and the methods and mobilization of resources needed to implement it. The new strategy was acceptable to the Government and was immediately put into effect in 1976. The strategy has four major objectives:

- (a) to keep the drug abuse issue constantly before the public and to change their attitudes to it;
- (b) to prevent drug abuse among young people who are most exposed to the risk of becoming drug addicts, i.e. the potential addicts;
- (c) to inform existing drug addicts of the voluntary treatment and rehabilitation facilities available and to encourage them to come forward for treatment; and
- (d) to keep the international audience aware of Hong Kong's anti-drug actions, achievements and intentions.

22. The strategy for preventive education and publicity as outlined above has proved to be a sound basis for formulating and implementing programmes in this field. Surveys carried out by independent public relations companies have indicated that the programmes are effective in achieving the main objectives of the strategy.

23. Preventive education and publicity campaigns are mounted each year. The programmes consist of a series of projects:

- (a) community involvement projects and promotions;

- (b) education and publicity through the mass media; and
- (c) production of strategic material for education and publicity.

24. Community involvement projects and promotions usually take the form of district anti-narcotics campaigns. They include events such as variety shows, sports tournaments, TV games, exhibitions, band concerts, fun fairs, talks and seminars. These campaigns take place in various districts throughout the year and are always inaugurated by a person prominent in the public life of Hong Kong. In addition, at least one major project is mounted each year. In recent years these shows have taken the form of a Water Carnival, Mass Jogging, a Mass Rally and an educational variety show attended by an audience of 12,000 and televised to an audience of millions.

25. Education and publicity through the television, radio and newspapers continue to be the mainstay of the ACAN's methods of disseminating anti-narcotics information and publicity to the general public, reinforced by thousands of attractive posters and informative leaflets. Slogans which adopt a popular Chinese proverb with an anti-drug message are known to have the greatest impact on the public. Publicity banners and posters are also extremely effective when used in vast numbers during district anti-narcotics campaigns. TV publicity films of about 30 seconds duration are one of the best forms of mass communication and under the television franchise system these showing are provided free of charge at prime viewing times several nights each week. Reinforcing TV coverage, radio announcements of public interest are also broadcast. Posters are designed and located to reach specific target audiences. For example, operational experience has shown that many drug addicts who live in overcrowded conditions do not take drugs in their home. Places commonly used for drug-taking include public conveniences and communal toilets and bathhouses in public housing estates. With this in mind, notices have been produced and placed in all public conveniences likely to be used by addicts, encouraging them to seek treatment and giving them a contact telephone number to call.

26. Strategic education and publicity materials take the form of TV serialised dramas, exhibition kits to explain in words and pictures how the drug problem is being tackled and teaching kits for use in schools.

27. A School Talks Team of the Narcotics Division has been visiting junior secondary schools since early 1984 to give students some basic knowledge of the proper use of pharmaceutical drugs, the harm that drug abuse may bring to themselves and their families and to reinforce the lessons given by those schools which provide drug education in their curriculum.

28. To reach and assist those who leave school at the age of 15 after the nine-year period of compulsory education, the help of out-reach social workers has been enlisted. Seminars are held to give the social workers a better understanding of the drug problem so that they, in the course of their social work in the community, may contact and offer sound practical advice to young people at risk.

Treatment and Rehabilitation Programmes

29. Article 38 of the 1961 Single Convention on Narcotic Drugs stresses the responsibility of Contracting Parties to give special attention to the provision of facilities for the medical treatment, care and rehabilitation of drug addicts and to the training of relevant personnel.

30. Based on its experience of the past three decades, Hong Kong has developed a wide range of treatment programmes with different rationales, and using a variety of methods and

techniques. All programmes, however, are dedicated to the same ultimate objective of helping addicts stay free from drugs. Such a multi-modality strategy has been found necessary and is proving effective, as one form of treatment suitable for some addicts may not be suitable for others, owing to variations in age, history of addiction, personal background, employment and other characteristics.

31. At present, there are three major programmes operating in Hong Kong providing treatment and rehabilitation facilities to approximately 13,000 drug addicts daily. They are:

- (a) the compulsory placement programme operated by the Correctional Services Department in their Drug Addiction Treatment Centres (DATC);
- (b) the voluntary in-patient treatment programme run by the Society for the Aid & Rehabilitation of Drug Abusers (SARDA); and
- (c) the voluntary out-patient methadone programme provided by the Medical & Health Department.

32. Apart from these major treatment facilities, there are a number of treatment projects being operated by various voluntary agencies in Hong Kong, albeit on a relatively small scale. Amongst these are the Haven of Hope Hospital in Junk Bay which provides detoxification and medical treatment for addicts with tuberculosis, and five projects based on Christian therapy, namely Operation Dawn, the Home for Drug Addicts of the Norwegian Lutheran Mission, the Long Oi Youth Centre, the Wu Oi Centre and St. Stephen's Society.

Custodial Placement Treatment - the Drug Addiction Treatment Centre (DATC)

33. Prior to 1958, addicts admitted to prisons were treated like any other prisoners. This unsatisfactory situation, which overlooked the special needs of those sentenced to imprisonment, and who were also drug dependent, was changed when it was found the majority of prisoners (over 80%) were addicts. The need to establish special treatment facilities geared to treat drug addicted prisoners were recognized by the establishment of the first Drug Addiction Treatment Centre (DATC) in Tai Lam Chung, in the New Territories, in 1958.

34. In 1969, the DATC Ordinance (Cap. 244, Laws of Hong Kong) was enacted to formalise the establishment of addiction treatment centres; it resulted from 10 years' valuable experience and intensive research on addiction treatment at Tai Lam. Under this Ordinance, where a Court is satisfied that it is in his interest and in the public interest that a person found guilty of an offence punishable with imprisonment (other than for non-payment of fine) should undergo a period of treatment and rehabilitation, then the Court may order such person to be detained in a DATC. The period of detention will not be less than 4 months nor more than 12 months from the date of the order. (A Bill has been published which provides inter alia for the minimum period of detention to be reduced to 2 months.) During his detention, the inmate's progress is closely monitored by the Centre's Superintendent and staff. The Ordinance also provides for compulsory supervision of one year following an inmate's release from a treatment centre to assist in reintegrating him into society. During the supervision period a supervisee can be recalled for further treatment, for a period not exceeding four months, if he breaches any condition of his supervision order.

35. The Correctional Services Department's programme is aimed at complete cure of drug dependents. This entails three phases of meticulous efforts - first to restore the physical health of an inmate, then to up-root his psychological and emotional dependence on drugs and finally to facilitate his re-adjustment to society. On admission to a DATC, all inmates are required to undergo a medical examination and to receive specialist treatment if necessary.

Regular check-ups are made to monitor the inmate's physical progress. Psychological dependence is tackled through a combination of work therapy, individual and group counselling, and a clinical psychologist is available to deal with problem cases. Both physical and outdoor work, a very important part of the programme, are designed to improve the inmate's health and to instil a sense of pride and confidence in them. Much of their work is community-oriented and gives the inmate personal satisfaction that he has achieved something worthwhile and of benefit to the public. In addition, post-release employment and accommodation arrangements and aftercare services are offered to help the inmate to reintegrate into society as well as preventing him from relapsing to drugs.

Voluntary In-patient Treatment

36. The major voluntary in-patient treatment programme operated in Hong Kong is run by the Society for the Aid and Rehabilitation of Drug Abusers (SARDA). In 1959, a voluntary body, the Working Committee for the Aid Treatment and Rehabilitation of Drug Addicts was formed with the aim of establishing a centre where addicts could volunteer for treatment and rehabilitation. In November 1959, the Committee applied for the use of the outlying island - Shek Kwu Chau - as a centre for the treatment and rehabilitation of drug addicts, and this was subsequently granted in July 1960. The Shek Kwu Chau Treatment Centre was officially opened in June 1963 with a capacity for 500 addicts. Treatment Centres of SARDA are administered under the provisions of the Drug Addicts Treatment and Rehabilitation Ordinance (Cap. 326 of the Laws of Hong Kong).

37. During the period of treatment within the therapeutic community, SARDA encourages addict patients to participate in the management of the Centre, as a means of encouraging self-reliance, fostering their self-confidence, as well as impressing on them the need for co-operation, co-ordination and group responsibility in what is essentially a large community. Medical care, detoxification rehabilitation and counselling services are provided to addicts, but work therapy forms the backbone of the whole programme. Work therapy on Shek Kwu Chau takes the form of mass participation in the development and expansion of the Centre's facilities, using the skills and expertise of the inmates.

38. In 1969, SARDA opened a female treatment centre which offered methadone detoxification followed by more intensive programmes of psycho-social and rehabilitation services. In this centre, a mother-and-child-care service is provided, as are also antenatal and post-natal services.

39. Though SARDA is a voluntary treatment agency, it is fully subvented by the Government and its operational effectiveness is monitored through ACAN. In 1981, following evidence of administrative deficiencies, and a lack of co-ordination in SARDA, the Government's Management Services Division undertook a comprehensive review of the agency at the request of the Executive Committee. In response to recommendations made by the review team, SARDA is revising its Constitution and has created a post of Executive Director to strengthen its internal organization and functioning.

Voluntary Out-patient Methadone Treatment

40. In the early 1960's, many people including senior members of the Government service, believed that the treatment of addiction could only succeed in an environment isolated from society. In a meeting with the 'Kaifong' (local community) leaders in March 1960, the then Director of Medical and Health Services said that to treat a drug addict, it was essential to divorce him entirely from access to drugs and then to give him skilled medical and nursing care under strict security conditions. If during this period of treatment narcotics could in any way be got to him, whether at his own insistence or through traffickers anxious not to

lose a customer, he would relapse, and all the expense, time and effort expended would have been wasted. For this reason, no form of out-patient drug treatment was suitable or appropriate; not being under strict full-time medical supervision, it might even be dangerous and thus bring the whole system into disrepute. In addition, a report of a special working party appointed to investigate the relative effectiveness of in-patient and out-patient treatment of addicts in 1965, concluded that withdrawal from addiction could only be effectively achieved in a drug-free environment, and that this necessitated isolating the addict for a minimum of four months if social and psychological as well as physical rehabilitation was to be achieved; the working party also commented very strongly on the need for much more research into every aspect of drug addiction in Hong Kong.

41. However, over the years medical and social work professionals involved in the treatment of addicts began to realise that drug addiction is a chronic condition, that relapse following detoxification is the rule rather than the exception, and that a complete cure of both physical dependence and psychological craving for drugs is a very difficult, if not impossible, objective to achieve. This continues to be an area of healthy debate and discussion which is not confined to Hong Kong, as the following extract from a letter published in the "New York Times" date 3 March 1982, from Dr Daniel Shine (Medical Director, Drug Abuse Treatment Programme, Montefiore Hospital and Medical Centre, Bronx) illustrates:

.....An increasingly common confusion (is) the inability to distinguish between acute and chronic problems. Narcotic addiction, like many other medical and social diseases, is not an acute illness that kills or is cured. It is not an acute illness that kills or is cured. It is a chronic relapsing condition for which treatment is recurrent intervention and continuing management over many years.

In this respect, addiction is very like diabetes or unemployment, congestive heart failure or crime in the streets, arthritis or pollution, renal failure of inadequate housing. No physician and no politician can reasonably argue that conditions beyond cure are also beyond treatment. It is precisely from the management of chronic conditions that doctors and societies most plausibly derive their claim to humanism....."

42. It was as a result of the gradual realisation that, in drug addiction, we were facing a highly relapsing condition, that Hong Kong's treatment philosophy was gradually extended from the exclusive concept of in-patient treatment, both compulsory and voluntary, to include a voluntary out-patient modality. The objective of the latter was not only to help addicts free themselves of drugs, but also to enable them to obtain and to keep jobs, and thus to become contributing members of society, which in itself would assist in restoring their confidence and self-respect. The introduction of the outpatient methadone programme thus marked Hong Kong's metamorphosis from the dogmatism of the 60's to the pragmatism of the 70's, as far as the treatment of addicts was concerned.

43. The methadone out-patient programme started as two experimental pilot projects in December 1972, one run by the Medical and Health Department and the other by the Discharged Prisoners Aid Society (DPAS), since renamed the Society for the Rehabilitation of Offenders. Both schemes were scheduled to run for three years and were designed to investigate whether methadone maintenance, in Hong Kong's circumstances, could effectively eliminate heroin hunger and craving among gainfully employed addicts and facilitate social rehabilitation among hard-core addicts. From the findings of the two pilot schemes, it was concluded that methadone maintenance on an out-patient basis was practicable means of treatment of opiate addiction in Hong Kong and merited a permanent service. It was believed to be particularly useful for addicts who may have failed repeatedly in other forms of treatment. Methadone maintenance enables such people to be gainfully employed and thus restore a normal life for themselves and their families; it enables them to avoid the risk of being arrested for the illegal possession or taking of heroin whilst drug-induced crime is also lessened. Moreover,

after being stabilised on methadone for a period, they may become better motivated to seek detoxification treatment again.

44. In 1974/75, the programme was adopted as a permanent feature of the drug treatment scene, and four methadone maintenance clinics were opened. From June to October 1976, there was a major extension of the programme, with 17 new methadone detoxification centres being opened in Hon Kong, Kowloon and the New Territories; this resulted from an upsurge in the price of street heroin in mid-1976, when an increasing demand for treatment arose from addicts who could not afford the escalating cost. Following an overall examination of the methadone treatment programme by the Management Services Division of the Government Secretariat which revealed, inter alia, the practical difficulties in weaning a patient off the last 5 to 10 mg. of methadone, the Medical and Health Department decided in August 1979 that the maintenance and detoxification programmes should be combined so as to enable every clinic to handle both types of patients. The forms of treatment adopted by the patient is a matter for discussion between the doctor and himself/herself. Against this background of decisions the unanimous conclusions of a group of American experts in methadone treatment of narcotic addiction, at a series of symposia sponsored by the U.S. National Institute on Drug Abuse (NIDA) in the autumn of 1981, is of interest:

"(i) The decision to detoxify from methadone maintenance treatment should be made by the patient's physician in conjunction with the patient and other staff. No restriction should be placed on duration of maintenance treatment. Patients detoxified from methadone maintenance should be readmitted upon request.

(ii) No single methadone dose is best for all patients. The dose should be individualized for each patient up to to a maximum of 100 milligrammes per day, and higher under certain circumstances."

45. In early 1982, in view of the previous success of the methadone treatment programme, ACAN endorsed a decision to expand the programme by establishing more clinics in districts not already covered. At present there are 24 clinics operating throughout the Territory. The programme will be further expanded if and when necessary.

46. Methadone is administered under very strict controls, and all patients are required to take the medication in the presence of the dispensing staff. No methadone can be taken away from the clinics. Supportive services are provided by Medical Social Workers, and patients who attend regularly are assisted in job placement to the extent possible. All clinics are open 365 days a year.

47. To summarize, Hong Kong now recognizes the chronic, relapsing nature of drug addiction, and has taken this into account by establishing treatment objectives that are practical and realistic. Although methadone is itself a narcotic drug its use does not produce euphoria, is not associated with any significant side effects, prevents withdrawal symptoms for 24 to 36 hours, and permits the patient to achieve social stability within the community. Although the long-term objective is to assist patients to detoxify and achieve a drug-free state, it is well understood that this will not be possible for a significant segment of the addict population. With respect to short-term objectives, it is considered vitally important to provide a readily accessible, legal, medically safe and effective alternative to continued illicit self-administration of heroin to every single addict. The widespread network of methadone clinics effectively meets this need.

48. In terms of reducing the demand for illicit heroin, the methadone programme has been particularly successful. The 8,000 persons attending methadone clinics each day would

otherwise consume over the course of a year approximately 8 million doses of illicit heroin. Furthermore, the methadone patients are not driven to committing crimes to obtain the money to buy illicit drugs. The programme has proved attractive and beneficial to the many thousands of addicts who have enrolled voluntarily since the clinics were initiated. See Appendices II, III and IV.

49. Reduction in the supply of illicit drugs is primarily the responsibility of the law enforcement agencies.

50. The Dangerous Drugs Ordinance, Chapter 134 of the Laws of Hong Kong, provides for controls over a wide range of dangerous drugs, including opium and its derivatives, barbitone, methaqualone, amphetamines, cocaine, codeine, cannabis and synthetic drugs likely to be abused. It contains extensive sanctions against all types of drug offences including conspiracy, trafficking, and manufacture of dangerous drugs, operating a den, cultivating cannabis or opium poppy and unlawful possession of dangerous drugs. Law enforcement agencies may seize the travel documents of persons under investigation for serious drug offences. The law makes it an offence to traffic in any substances represented or held out to be a dangerous drug, thus covering cases where the drugs do not exist or are fake powders purported to be drugs, especially applicable in times of acute shortages of heroin when the harvest in the "Golden Triangle" is poor. For the purposes of the Ordinance the definition of "manufacture" of dangerous drugs includes cases where heroin is "diluted" or "cut". Another provision is that any quantity of dangerous drugs whether usable/measurable or not is regarded as dangerous drugs for the purposes of the Ordinance. This provision is particularly relevant when only minute traces of the drug are found but where weighty circumstantial evidence of manufacture exists. Under the Ordinance the search of body cavities of suspected couriers may be undertaken with or without consent, by a medical practitioner engaged by the Royal Hong Kong Police Force. Similar provision exists in the Customs and Excise Service Ordinance for the use of medical practitioners engaged by that Service, to conduct body cavity searches.

51. Owners of ships found to be smuggling an excessive quantity of dangerous drugs into Hong Kong on two occasions within 18 months are liable on conviction to a fine of HK\$5,000,000 or in default of payment, confiscation of the vessel. Excessive quantities are defined as 3,000 grams of opium or cannabis and 500 grams of any other dangerous drug.

52. Maximum penalties under the Dangerous Drugs Ordinance include life imprisonment and a fine of HK\$5,000,000 on conviction on indictment for trafficking, for possession of dangerous drugs for the purposes of trafficking for manufacturing. Cultivating cannabis or opium poppy on conviction on indictment carried with it a maximum of 15 years imprisonment and a fine of HK\$100,000. Possession of a dangerous drug other than for trafficking, smoking, inhaling or injection such a drug or possessing equipment for doing so on conviction on indictment carried 3 years imprisonment and a fine of HK\$10,000.

53. Provision exists under the Corporal Punishment (Amendment) Ordinance 1974 for a male drug offender to be subject to corporal punishment in addition to imprisonment and fine if convicted of trafficking or procuring dangerous drugs.

54. The Acetylating Substances (Control) Ordinance, enacted in 1975, controls the import, export, supply, manufacture, possession and dealing in acetylating substances, particularly acetic anhydride which is essential for the chemical conversion of morphine into heroin. Persons convicted on indictment for contravening the Ordinance are liable to 15 years imprisonment and a fine of HK\$1,000,000.

55. The Pharmacy and Poisons Ordinance, Chapter 138 of the Laws of Hong Kong provides for the registration of products, licensing of manufacturers and testing of products. It also

provides for the maintenance of an up-to-date poisons list to facilitate proper control over psychotropic substances, making them available only when prescribed by a doctor.

The Narcotics Bureau, Royal Hong Kong Police Force (RHKPF)

56. The Narcotics Bureau is primarily targeted towards the investigation of cases which demand specialist and protracted observation and enquiries, such as the suppression of organized syndicates, which, because of elaborate security measures taken by the organizers, defy detection by routine methods. At District level, operations are mounted against special targets affecting distribution and consumption. At Divisional level, Special Duty Squads are concerned with control of street-peddling, although the prevention and detection of narcotic offences is a general duty imposed on all police officers.

Customs and Excise Service

57. The Customs and Excise Service is a disciplined force headed by its own Commissioner. One of the major responsibilities of the Service is the prevention and suppression of illicit trafficking in narcotics, other dangerous drugs and acetylating substances under the Dangerous Drugs Ordinance, the Pharmacy and Poisons Ordinance and the Acetylating Substances (Control) Ordinance. More than half of the efforts of the Service are devoted to anti-narcotics activities. Apart from intercepting illegal imports by sea, action is also taken against the manufacture, storage, sale and smoking of drugs. The Service also maintains close liaison and co-operation with the Royal Hong Kong Police Force, overseas customs authorities and other law enforcement agencies.

58. The Customs and Excise Service underwent a major reorganization in 1981. The reorganized service has two specialist/support branches - the Customs and Excise Headquarters and the Customs Investigation Bureau - and a field structure comprising three regions which cover Hong Kong Island, Kowloon and the New Territories.

The Joint Intelligence Unit (JIU)

59. In addition to the continued exchange of information and co-operation between the Police and the Customs, a Joint Police/Customs Intelligence Unit (JIU) was formed in 1979. The main purpose of this special unit is to strengthen working links between the two forces and to develop and maintain an overall intelligence system so that surveillance on drug trafficking through Kai Tak Airport into and out of Hong Kong can be more efficiently monitored and controlled. This unit is staffed by officers from the two services. It is independent of the Customs and Excise Service Airport Division and comes under the command of Superintendent (Investigation) of the Customs, who is responsible for directing the day-to-day activities of this Unit; he also maintains a close liaison with the Superintendent (Operations) (Narcotics Bureau) to determine appropriate operational objectives for the Unit, whilst matters of general policy are the subject of directives agreed jointly by the Police Narcotics Bureau and the Customs and Excise Service.

Prosecutions and Convictions for Major and Minor Drug offences 1969-1983

60. Appendix V reflects the Hong Kong Government's successful efforts over the past 17 years in enforcing the law against illicit drug activities.

61. In 1974, the first ever major trafficking syndicate heads (Ng Sik-ho and Ng Chung-kwan) were arrested by the Police, and subsequently sentenced, in April 1975, to 30 years and 25 years imprisonment respectively. This effectively neutralised the major drug syndicates, and led to a complete fragmentation of the illegal narcotics trade. Thereafter, individual drug traffickers formed themselves into small loosely-knit groups which, lacking

in the financial backing to maintain sophisticated operations, deal in relatively small quantities of drugs which can be disposed of quickly. Over the past two years, however, there have been indications that these smaller syndicates have re-introduced the infamous Thai Trawler traffic, by which very large quantities of drugs can be brought into Hong Kong.

Seizures of Illicit Drugs

62. Information on the quantities of drugs seized by the Police and Customs in recent years is produced in Appendix VI.

Conclusion

63. Since there is no medical cure for drug dependence, the only effective measures are to suppress the illicit drugs as much as possible, to prevent through education members of the community, especially the young, from experimenting with drugs and to rehabilitate the addict until he is able to lead a drug-free life for as long as possible. On the basis of available facts it is considered that the co-ordinated efforts of the Hong Kong Government and the Action Committee Against Narcotics in controlling the supply of and demand for illicit drugs have succeeded in stabilising the drug abuse situation which, however, remains a serious social problem of an endemic nature.

ACAN Membership

Chairman Appointment ending

1.	Professor G H Choa, CBE, JP.	31.12.86

Ex-officio Members

2.	Secretary for Security (Mr D G Jeaffreson, CBE, JP.)	
3.	Director of Medical and Health Services (Dr K L Thong, CBE, JP.)	
4.	Commissioner of Police (Mr R H Anning, CBE, QPM.)	
5.	Director of Social Welfare (Mrs Anson Chan, JP.)	
6.	Commissioner of Correctional Services (Mr W S Chan, ISO, JP)	
7.	Commissioner of Customs and Excise (Mr H S Grewal, ED, JP.)	
8.	Commissioner of Narcotics (Mr G L Mortimer, ISO, JP.)	
9.	Representative of Health and Welfare Branch, Government Secretariat (Mr N C L Shipman)	

Unofficial Members

Unofficial Member of the Legislative Council

11.	The Hon Yeung Po-kwan , CPM, JP	31.12.87

Unofficials appointed by HE the Governor

12.	Mr K L Stumpf, CBE, JP	31.12.86
13.	Miss Debra M N Chow	31.12.87
14.	Mr Michael Cheng Tak-ki	31.12.87
15.	Mr J P Lee, MBE, JP.	31.12.87
16.	Dr So Sing-cho	31.12.86
17.	Mr Frederick Yu Sak-kwong	31.12.86
18.	Dr Nelson Chow Wing-su	31.12.86

Action Committee Against Narcotics

Terms of Reference

1. To advise the Governor on the policies to be adopted to interdict the illicit traffic in dangerous drugs into and through Hong Kong and to keep these policies under regular review.
2. To advise the Governor on the measures necessary to eradicate drug abuse from the community
3. To these ends, to be the channel for advice to the Governor on the appropriate allocation of resources to ensure the implementation of Government's policies.
4. To ensure co-ordination and co-operation between Government Departments and voluntary agencies in Hong Kong working towards the implementation of these policies and to enlist public support for them.
5. To keep under review programmes and projects being undertaken by Government Departments and voluntary agencies directed at implementing Government's policies to ensure that they are effective.
6. To draw the attention of the Government to those policies, programmes, projects, laws and procedures which in the opinion of the Committee should be changed in order to implement Government's policies more effectively.
7. To advise on any matter referred to it by the Government, or from any other appropriate source, which may be concerned either directly or indirectly with the implementation of Government's policies.

Appendix II

Yearly admissions to treatment institutions, 1969-1985

Year	DATC	SARDA	MHD Methadone Clinic	Total
1969	1017	865	-	1882
1970	828	937	-	1765
1971	772	838	-	1610
1972	1374	800	51	2225
1973	1497	1866	751	4078
1974	1960	2837	1480	6277
1975	2037	2551	3392	7980
1976	2160	2413	10400	14973
1977	2269	2594	9834	14697
1978	1999	2767	10291	15057
1979	1655	2254	10782	14691
1980	1518	2592	8046	12156
1981	1675	2706	9997	14378
1982	1783	2304	11404	15491
1983	2116	2231	11111	15458
1984	2577	2034	14035	18646
1985	2621	1779	13305	17705

Source: Correctional Services Department Medical
and Health Department
The Society for the Aid and Rehabilitation of
Drug Abusers

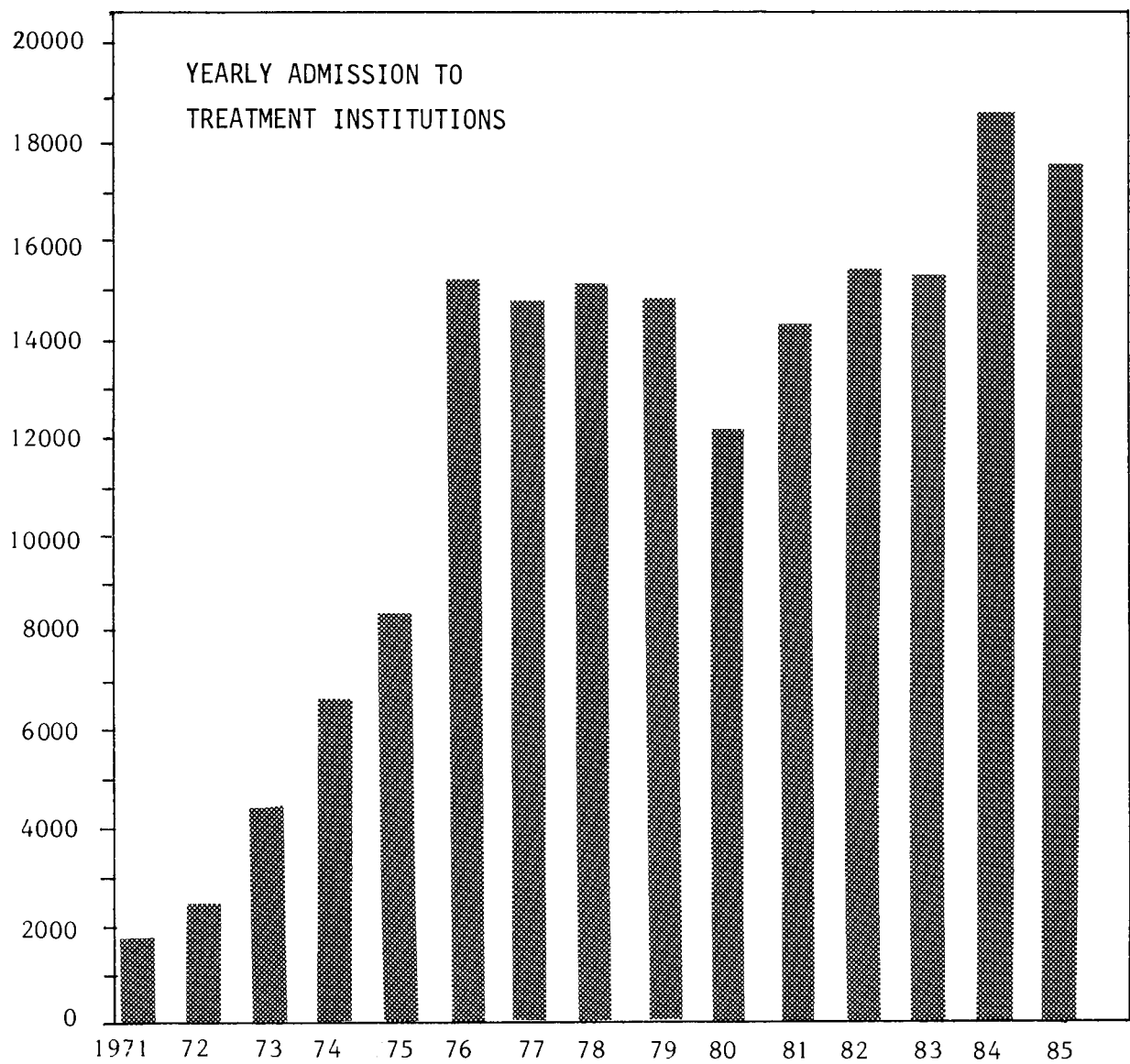
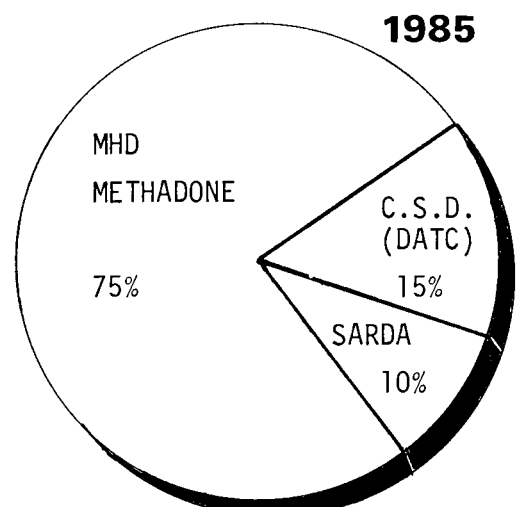
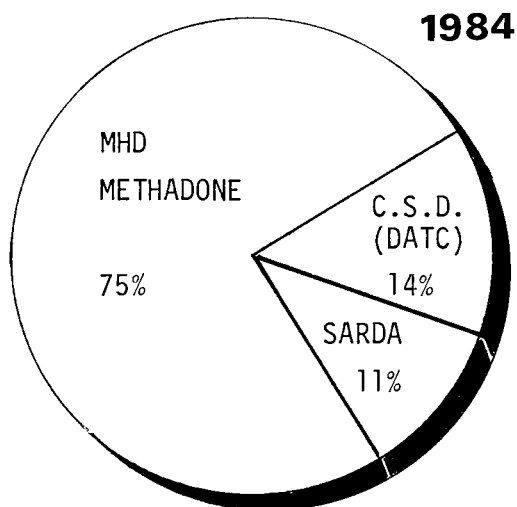
Appendix III

Percentage of yearly admissions to treatment institutions, 1969-1985

Year	DATC	SARDA	Methadone Clinic	Total
1969	54	66	-	100
1970	47	53	-	100
1971	48	52	-	100
1972	62	36	2	100
1973	37	46	17	100
1974	31	45	24	100
1975	26	32	42	100
1976	14	16	70	100
1977	15	18	67	100
1978	13	19	68	100
1979	11	15	74	100
1980	13	21	66	100
1981	12	19	69	100
1982	11	15	74	100
1983	14	14	72	100
1984	14	11	75	100
1985	15	10	75	100

Source: Correctional Services Department Medical
and Health Department
The Society for the Aid and Rehabilitation of
Drug Abusers

No. of Admissions

Breakdown of Admission by Institutions, 1984 & 1985

Appendix V

No. of persons prosecuted for major and minor drug offences, 1969-1985

<u>Year</u>	<u>Major drug offences</u>	<u>Minor drug offences</u>	<u>Total</u>
1969	955	12980	13935
1970	1267	12638	13905
1971	1306	14035	15341
1972	1593	15123	16716
1973	1569	18370	19939
1974	1955	16668	18623
1975	2038	11831	13869
1976	3496	9427	12923
1977	2292	6683	8975
1978	2372	6541	8913
1979	1996	4189	6185
1980	2039	3718	5757
1981	2563	5303	7866
1982	3405	6220	9625
1983	4025	7204	11229
1984	3658	7548	11206
1985	4867	7565	12432

Source: Royal Hong Kong Police Force

Appendix VI

Drug seizures in Kilograms, 1969-1985

<u>Year</u>	<u>Opium</u>	<u>Morphine</u>	<u>Heroin</u>	<u>Heroin base</u>	<u>Cannabis</u>
1969	4772	187	10	-	23
1970	399	77	14	-	24
1971	5583	300	55	-	51
1972	5118	551	73	-	15
1973	2328	388	69	-	17
1974	4735	285	95	-	6
1975	422	143	186	-	54
1976	3553	291	164	-	87
1977	147	98	179	-	19
1978	205	47	285	48	1
1979	125	12	129	19	12
1980	86	2	76	38	39
1981	140	7	77	85	8
1982	187	6	116	232	55
1983	91	*	164	460	12
1984	50	-	230	972	76
1985	104	*	259	113	162

* Less than 0.5 kg.

Source: Royal Hong Kong Police Force
Customs and Excise Department
Government Laboratory

DEVELOPMENTS IN COMBATING ILLICIT NARCOTICS TRAFFICKING

A Memorandum by the Government of Malaysia

In the international scenario of illicit narcotics trafficking, Malaysia has long stood as a transit country along the drug route from the notorious opium producing areas of the 'Golden Triangle' to Australia and the West. Malaysia is especially vulnerable as a transit country because of her geographical location, proximity to the Golden Triangle, long coastline and excellent communication system. In the process of their transportation into and out of Malaysia a certain proportion of the drugs have found their way into the Malaysian community, creating and meeting the local demand for drugs.

2. In Malaysia the habit of opium and cannabis smoking can be traced to the early 19th century. However, by the late 1960s this habit had developed into abuse of hard drugs. Within the last 15 years, drug abuse and illicit trafficking in Malaysia has become a frighteningly real and everpresent danger. This danger is not unique to Malaysia - drug abuse and illicit trafficking is rapidly spreading over an ever increasing number of countries, whether they be source, transit or consuming countries.

3. At the national level Malaysia has based its anti-narcotics measures on the objectives of supply reduction and demand reduction. More important, in 1983, Malaysia elevated its attitudinal approach to the narcotics problem to an unprecedented priority by declaring the problem a primary security concern. The rationale for this is the perception that narcotics production and trafficking is invariably associated with corruption, increased criminal activity, violence and intimidation, and that organisations dealing with production and trafficking of narcotics can reach heights of power which threaten the peace and stability of the countries in which they operate.

4. In its fights against the drug menace, Malaysia has adopted the strategies of prevention, rehabilitation, manpower development and evaluation and international cooperation. In both areas of prevention and rehabilitation, legislation has been utilized to assist in meeting the objectives and supporting the measures undertaken. The main legislations are -

- (i) the Dangerous Drugs Act, 1952;
- (ii) the Drugs Dependents (Treatment and Rehabilitation) Act, 1983; and
- (iii) the Dangerous Drugs (Special Preventive Measures) Act, 1985.

The Dangerous Drugs Act 1952

5. This Act provides for the regulating of the importation, exportation, manufacture, sale, and use of certain dangerous drugs, and makes special provision relating to the jurisdiction of courts in respect of offences thereunder.

6. The Act creates offences in relation inter alia to the following drug related activities -

- (a) possession;
- (b) trafficking;
- (c) importation and exportation;
- (d) manufacturing; and
- (e) cultivation of cannabis opium and coca plants.

7. The Dangerous Drugs Act 1952 has been frequently amended to keep pace with the changing patterns of drug abuse and illicit trafficking in this country. The purposes of the amendments are to confer wider powers on the enforcement agencies and to make the sentences for drug offences under the Act more deterrent. In 1983, the Dangerous Drugs Act 1952 was amended to:

- (a) confer power on any police officer or officer of Customs, on the authorisation of the Public Prosecutor to intercept, detain or open any postal article in the course of transmission by post or to intercept messages transmitted or received by telecommunication or to intercept or listen to any conversation by telecommunication;
- (b) provide that any person who is found in possession of 15 grammes or more in weight of heroin, 15 grammes or more in weight of morphine or a total of 15 grammes or more in weight of heroin and morphine or 1,000 grammes or more in weight of prepared opium be presumed, until the contrary is proved, to be trafficking in that dangerous drug;
- (c) introduce the mandatory death penalty for the offence of trafficking in dangerous drugs.

8. The latest amendment was made in 1984. It sought inter alia to redefine the term "opium poppy" so that any plant from which morphine may be produced falls within the meaning of "opium poppy". It also sought to introduce monoacetylmorphine as another drug upon which the presumption of trafficking will operate if any person is found in possession of 15 grammes or more of that drug. Heretofore analysis of seized drugs had revealed the presence of monoacetylmorphine in addition to morphine and heroine but no prosecution could be made in respect thereof because of a lacuna in the law. The amendment thus fills the lacuna.

The Drug Dependents (Treatment and Rehabilitation) Act 1983

9. The treatment and rehabilitation programme for drug dependants was initiated by the Ministry of Welfare Services in 1975. Initially the empowering legislation was the Dangerous Drugs Act 1952. On 25 March 1983, a new Act, the Drug Dependents (Treatment and Rehabilitation) Act 1983 (DDTRA) was passed. It repealed those provisions in the Dangerous Drugs Act 1952 which dealt with treatment and rehabilitation of drug dependants. The Act makes special provision with regard to the treatment and rehabilitation of drug dependants, their after care and related matters.

10. The DDTRA contains the following main provisions -

Provisions for Compulsory Treatment

(i) Drug dependants who are unwilling to volunteer themselves for treatment will be subjected to compulsory treatment. Compulsory treatment involves the bringing into legal custody of any person reasonably suspected to be a drug dependant for medical examination or observation by a medical officer. Where a person is found to be a drug dependant, the Magistrate is empowered by law to order such person to undergo compulsory institutional treatment at a Rehabilitation Centre for two years or to be placed under compulsory supervision by a Rehabilitation Officer for a period of between two to three years.

(ii) Drug dependants who are put on compulsory supervision are required to execute bonds containing terms and conditions which they have to observe. Breach of those terms and conditions would render the supervisees or his sureties liable to pay the penalty under the bond. Such supervisee would furthermore be brought before a Magistrate who may order him to undergo compulsory institutional treatment at a Rehabilitation Centre for two years.

(iii) Drug dependants who have been discharged from Rehabilitation Centres after having undergone two years of treatment and rehabilitation will be subjected to another two years of aftercare supervision by Rehabilitation Officers. If the aftercare supervisees were to suffer a relapse, they can be ordered by the Magistrate to undergo another term of treatment and rehabilitation at a Rehabilitation Centre.

Provisions for Adult Volunteers

(iv) Adult drug dependants can volunteer themselves for treatment. These cases are handled by Rehabilitation Officers who decide whether to send the drug dependants for treatment at Rehabilitation Centres or to place them under their supervision. Where drug dependants are placed under the supervision of Rehabilitation Officers, bonds will have to be executed by the drug dependants. Breach of the terms and conditions contained in the bonds would result in forfeiture of the money due under bonds.

Provisions for Minors

(v) Under section 9, minors who desire to seek treatment must do so through their parents or guardians. These cases, too, come within the province of Rehabilitation Officers. In such cases, the provisions which govern adult volunteers seeking treatment shall apply in the same manner, save that the bond required to be executed under subsection (4) of section 8 shall be executed by the parents or guardians of the minors concerned.

The Dangerous Drugs (Special Preventive Measures) Act 1985

11. The Act is directed against persons who though well known to the authorities as being involved in syndicates concerned in trafficking of dangerous drugs escape prosecution due to technicalities of the law. These persons are usually either the brains or the financial backers of drug trafficking operations. In accordance with the Government's declared tough stand against the drugs problem a special law was enacted to provide for the arrest and preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs. The initial period of detention is two years with possible extension for further periods of two years indefinitely.

12. The Act came into force on 13th June 1985 and shall remain in force for a period of five years from that date. It was subsequently amended by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985 in December 1985. The amended Act, inter alia, empowers the police to detain any person suspected of committing any offence under the Act for a period of not more than 60 days for purposes of investigation. The Minister may, after considering the investigation report and the report of the Inquiry Officer, issue an order of preventive detention in respect of the arrested person. The Minister is also empowered to issue in lieu of an order of preventive detention, an order of restriction in regard to the arrested person whereby the person is ordered to reside strictly within the limits of a specified place for a period not exceeding 2 years and be also subject to the supervision of the police.

13. A person subject to an order of detention or restriction issued by the Minister has the right to make representations to an Advisory Board constituted of a chairman who is qualified to be a judge of the High Court or the Supreme Court and two other members nominated by the Yang di Pertuan Agong (King). The Advisory Board makes recommendations to the Yang di Pertuan Agong (King) who may in turn give the Minister such directions as he may think fit regarding the order made by the latter.

14. In every other case of detention or restriction, the order or direction given by the Minister is reviewed as a matter of course by the Advisory Board not earlier than twelve months from the date of such order or direction. The Board submits its opinion to the Minister on whether or not the detention of any person should cease or continue, and the Minister is bound by law to act thereon.

15. At the international level, Malaysia recognises that it requires serious and concerted effort by all countries and international agencies concerned before we can hope to rid the world of the problem of drug abuse and trafficking. In the ASEAN region, cooperation in the fight against drugs was initiated by the signing of the ASEAN Declaration of Principles on Drug Abuse Control in 1976 by all the ASEAN countries. Since then regular meetings have been held to ensure uniformity of views, approaches and strategies to prevent and control drug abuse and illicit trafficking in the ASEAN countries. Some measure of coordination and uniformity has been achieved in the approach by ASEAN countries towards training programmes, treatment and rehabilitation of drug dependants and legislative measures including penalties for drug offenders, the underlying aim of which was to provide no haven in the ASEAN region for the drug offender.

16. The extent of influence which domestic policies and strategies have on the global production of raw materials for illicit drugs is, however, negligible, such production being largely an independent variable. What is still needed is the political will to progressively phase out the illicit production of narcotic drugs. In this respect Malaysia has in the recent past advocated and continues to advocate for international participation in the formulation of a master plan or schedule of action in the Golden Triangle and other source areas.

17. In February 1985 the 31st meeting of the United Nations Commission on Narcotics Drugs adopted a resolution related to the initiation of the preparation of a Draft Convention on Illicit Traffic of Narcotic Drugs and Psychotropic Substances. No doubt such a Convention would be expected to work towards internationalising efforts to combat drug abuse and trafficking and improving the existing situation by dealing with those aspects of the problem not envisaged in existing international instruments.

18. In the same year, Malaysia initiated an ASEAN Resolution entitled 'International Strategy For Combatting Drug Abuse and Trafficking' which was tabled at the 40th United Nations General Assembly in late 1985. The United Nations General Assembly then adopted a resolution containing a decision to convene an International Conference on Drug Abuse and

Illicit Trafficking at ministerial level in 1987 and to adopt a comprehensive multi-disciplinary outline of future activities which focuses on issues directly relevant to the problems of drug abuse and illicit trafficking. These include, inter alia -

- (a) consideration of existing mechanisms with a view to exchanging experiences methodologies and information on law enforcement and to improving or complementing them with new mechanisms;
- (b) intensification of concerted efforts by governmental, intergovernmental and non-governmental organisations to combat all forms of drug abuse, illicit trafficking and related criminal activities leading to further development of national strategies that could be a basis for international action;
- (c) achievement of as much harmonisation as possible to reinforce national legislations, bilateral treaties, regional arrangements and other international legal instruments especially in respect of enforcement and penalties against those involved in illicit trafficking including forfeiture of illegally acquired assets and extradition, and to develop cooperation in dealing with drug abusers, including their treatment and rehabilitation; and
- (d) making further progress towards eradicating the sources of raw materials for illicit drugs through a comprehensive programme of integrated rural development, development of alternative means of livelihood and retraining, law enforcement and crop substitution.

19. Needless to say, the proposed International Conference on Drug Abuse and Illicit Trafficking and the proposed United Nations programme of activities require the full support of all countries. Malaysia believes that an essential pre-requisite to success in solving the drug problem is the commitment thereto by the highest level of leadership in the various countries. It is noted that at least 16 Commonwealth countries gave their support to the United Nations resolution. It is hoped that this momentum in the global effort to combat drug abuse and trafficking is maintained both within and outside the Commonwealth.

MEASURES TAKEN BY SINGAPORE IN COMBATING NARCOTICS TRAFFIC

A memorandum by the Government of Singapore

According to Homer, when Ceyx, the King of Thessaly was drowned at sea, Morpheus the God of Dreams was despatched to deliver this dreaded message to Halcyone, his widow. Morpheus broke the news to Halcyone in her sleep through a dream. It was thought that this would help relieve her grief. But it was not to be. When she woke up, the grief over her husband's death turned her into a bird to cry over the troubled seas.¹ In 1806, when the German pharmacist Serturmer isolated and identified the analgesic property in the narcotic drug, he named it after Morpheus, or morphine as it is now better known.

2. The use of morphine as an analgesia was long known to man but its ill-effect was only fully recognised in relatively recent times. The habit of opium-smoking was rampant in Singapore among the early migrants. In 1848, Dr Robert Little, a private practitioner, estimated that 20% of the population in Singapore, then mainly labourers, were opium addicts. He and a few others campaigned to warn the government of the medical and social evils of opium-smoking, but he was dismissed as a crank as the levy on opium was then a substantial part of the government's revenue.² Even as late as 1909, the Opium Commission, after extensive study of the situation in Singapore, reported: "We recommend that improvement should be made in the arrangements of existing opium shops, but we consider there is no necessity of justification for the abolition of such shops".³

3. The consumption and sale of opium and chandu continued to be legal and under licence by the government until after the 2nd World War.⁴ By that time, it was estimated that more than 40,000 Singaporeans, most of them males, had taken to opium. Alarmed at the situation, the British Military Administration in Malaya issued a proclamation banning the sale, consumption and possession of all forms of opium and chandu.⁵

4. Due to sustained and vigorous enforcement and also partly to the fact that opium-smoking had lost its appeal to the younger and more westernised generation, the number of opium addicts had dropped to about 7,000 in 1970. The addicts then were mostly old people and continued to grow older with each passing year. The drug enforcement agencies were then optimistic. They believed that the scourge of the narcotic drugs, after a quarter century of relentless effort, would soon be a thing of the past. They were wrong. For the drugs were soon to return, this time with increased potency and afflicting their miseries on those in their tender years.

5. The drug enforcement agencies traditionally attributed this new wave of drug abuse to the drug experiencing aspect of the hippie culture. It is argued that young westernised Singaporeans worshipped the western idols and tried to imitate them in every way including their drug taking ways. However, a complete and satisfactory explanation on the causes of drug abuse is not easy to find. The sociologists and the psychologists can ruminate over it. We must move on to the problems of drug abuse in Singapore from the 70s onwards and the measures adopted by us to counter them.

6. Statistics showed that in the early 70s young people were mostly arrested for consumption or possession of soft drugs such as cannabis and methaqualone (MX pills). In 1972, of the total of 993 persons arrested who were below the age of 29, 889 of them were involved in soft drugs. 58 were in connection with opium, 34 with morphine and only 2 with heroin.

7. This pattern was to change drastically in the next few years. In the 1960s heroin was a rarity in Singapore. In 1971, only one person had been arrested for consumption of heroin. 3 were arrested in 1972, 10 in 1973. But from then on it spread like wildfire. 110 were arrested in 1974; 2,263 in 1975; 5,682 in 1976 and in 1977 19,888 were arrested. Of these, 18,738, or about 94% were below the age of 30 and over 1,000 were below the age of 16!⁶

8. This time, the government was not caught flatfooted. In November 1971, a new drug control agency was set up with increased manpower to deal with the new situation. The Misuse of Drugs Act was passed in 1973. Under this Act, controlled drugs were divided into 3 classes according to their potency and deleterious effect. Unlawful trafficking in controlled drugs was punishable with heavy maximum and substantial minimum sentence e.g. unlawful traffic of drugs to persons below the age of 18 carried a maximum sentence of 30 years' imprisonment and a minimum of 5. Unauthorised possession and consumption of controlled drugs also carry a sentence of up to 10 years' imprisonment. No minimum sentences, however, were prescribed for these offences. One new aspect of the Act is the provision enabling the Director of the drug enforcement agency to order an addict to undergo compulsory treatment and rehabilitation in an approved institution. In 1974 and 1975 512 and 232 persons were admitted to such rehabilitation centres. Many more were prosecuted and jailed under the 1973 Act, but the problems of drug abuse remained unabated. If at all, we witnessed an even steeper climb in the number of addicts. Those young addicts who in 1972 were experiencing soft drugs had by 1975 moved into hard drugs like heroin and morphine. Also evident from the drugs seized was the fact that the heroin in the illicit market was getting purer and purer in its content.

9. The drug problems in Singapore had by 1975 developed into a national crisis which called for unusual measures and massive mobilisation of resources.

10. Parliament promptly passed an amendment Act to the 1973 Misuse of Drugs Act. The 1975 amendment Act came into force in December 1975. Its main features include:

- (i) death penalty for traffickers and importers who traffic in more than 30 gm of morphine or 15 gm of heroin;
- (ii) death penalty for manufacturers of morphine or heroin;
- (iii) enhanced minimum penalty of 20 years imprisonment and 15 strokes of the cane for those who trafficked in -
 - (a) more than 6 kilogrammes of opium;
 - (b) more than 10 kilogrammes of cannabis;
 - (c) more than 4 kilogrammes of cannabis resin;
 - (d) 20 to 30 grammes of morphine; and
 - (e) 10 to 15 grammes of heroin.
- (iv) enhanced minimum sentence of 5 years imprisonment and 5 strokes of the cane for traffickers of Class A drug (i.e. opium, morphine, heroin).

11. All law enforcement agencies stepped up their enforcement efforts against both drug pushers and abusers. For the year 1975 alone 2,288 pushers and abusers were charged in court. They received penalties ranging from fine to 20 years imprisonment and caning. In 1977, 6 persons were convicted of the offences of trafficking in substantial quantities of heroin and were sentenced to death. 7 traffickers were sentenced to death in 1978. Since then, the number has dropped to the average of 1 or 2 a year.

12. The deleterious effect of the hard drugs and the pervasiveness of their abuse do call for such unusual measures. The constitutionality of the death penalty for drug traffickers

was indeed challenged in court by two convicted prisoners⁷. They argued that the law providing the death penalty for those who trafficked in more than 15 gm of heroin infringed the equality provision of the Constitution; that the 15 gm limit dividing the capital from the non-capital cases was an arbitrary and irrational classification and those who trafficked in more than 15 gms of heroin were unfairly discriminated. The Privy Council rejected the argument. It held, "... Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed". The amount of heroin involved in these capital cases was of course not just 15 gms. Often, they are in the kilos.

13. Prevention of the growth of drug addiction in Singapore, of course, does not depend solely on enforcement actions to stamp out the illicit drug trade. Nor can we ever hope to succeed by using the criminal law alone.

14. Treatment and rehabilitation and more importantly supervision and aftercare are used simultaneously.

15. In April 1977, Singapore started an island-wide exercise called "Operation Ferret" to identify drug addicts and send them for compulsory treatment in institutions. Police and army combed the whole island for suspected addicts. Parks, nightclubs, bars and other places frequented by drug addicts came under repeated raids. Thousands were rounded up and sent for medical examination and urine tests. Confirmed addicts were confined for treatment for periods from 6 months to 2 years. They were then put in a half-way house called the Day Release Centre where they had to return to stay for the night before their final discharge. After their discharge, they were each assigned an aftercare counsellor, usually a volunteer, and had to report weekly to police stations for urine tests. Needless to say, an intensive and sustained campaign of this nature involved thousands of fulltime officers, volunteers and our national servicemen. It involved the police, army, prisons, our health and scientific services. Any discharged addict who was found to have returned to drug consumption was promptly sent back to the institution for further treatment. The Army meanwhile carried out checks on its soldiers for drug addicts. Identified addicts were sent for treatment and recalcitrant offenders were jailed. The purpose of identifying and detaining addicts is both to treat them and to isolate them. Case study showed that peer group influence amongst youths was the major factor for the spreading of drug addiction. Young school dropouts often joined older ones in the same category and experienced drugs together. Older addicts deliberately went looking for new blood. More recruits meant more buyers and more money for drugs. Old drug addicts often were the worst pedlars. The requirements of weekly reporting and urine tests thus ensure that addicts do not remain at large for too long to contaminate others. Some hardcore addicts had since returned many times to the institutions. But many more were successfully rehabilitated under the scheme.

16. In view of Singapore's close proximity to one of the world's largest narcotic drug sources⁸, the Golden Triangle, drugs are relatively inexpensive outside Singapore. Huge profit can therefore be made to smuggle the drugs in. All the entry points in Singapore are vigilantly guarded by the Customs with their narcotic dogs. Many traffickers were detected and prosecuted. But these measures cannot be foolproof against traffickers who are out for big profits. Bombing of the Golden Triangle as the Americans did is also out of the question.⁹ We have therefore invoked the use of our preventive detention laws against traffickers to strengthen our hands. These traffickers are usually the big boys who finance syndicates, negotiate and clinch big deals overseas but are beyond the reach of the long arms of the law. The number of such detentions is only a fraction of the number of prosecutions mounted, but the message sent to the underworld of our resolve is loud and clear. Ruthless? Uncompromising? Maybe. But we offer no apology.

17. Our problems of drug abuse are not yet over. In 1984 we still prosecuted 178 cases of drug trafficking, 414 cases of unlawful possession and 468 cases of unlawful consumption. However, since 1979 the drug scene has taken a turn for the better. We have now fewer cases of fresh addicts. The rates of relapse have also gone down. Major suppliers of illicit drugs turn their attention elsewhere, at least for the time being. We do not have any major case of drug seizure in the last 2 years. Our youths today are far more aware of the dangers of drug abuse than ever before.

18. What about the future? This is always difficult to even hazard a guess. All I can say is that we have the situation under control. The drug scene even under our very strict laws has to be very closely monitored and we have always to be on the look-out for signs of any resurgence.

NOTES ON SOURCE MATERIALS

1. Bulfinch's Mythology, Illustrated Ed. 1978 pp.65 to 70
2. Turnbull, A History of Singapore 1819-1975 pp.64-65
3. Song Ong Siang, One Hundred Years' History of Chinese in Singapore, pp 437-438
4. Chandu Revenue Ordinance Ord. 117, 1909 Laws of Straits Settlements Vol. III 1908 to 1912.
5. British Military Administration Proclamation No. 43: Opium and Chandu Proclamation 1.2.46.
6. Statistics from Central Narcotics Bureau.
7. Ong Ah Chuan v. Public Prosecutor (1981) 1 M.L.J. 64.
8. National Geographic February 1985 pp.150-151.
9. Far Eastern Economic Review 20.2.86 pp.28 and 29.

RECENT DEVELOPMENTS IN COMBATING DRUG TRAFFICKING

A memorandum by the Government of Ghana

DOMESTIC PERSPECTIVE

Ghana's law on Drugs Trafficking is contained in The Pharmacy and Drugs Act 1961 Act 64.

2. There is a Schedule under the Act which classifies drugs into Clauses, namely:- Dangerous, restricted and exempted drugs. The possession of certain drugs classified as dangerous drugs is a Criminal Offence. These drugs include narcotic drugs e.g. Indian Hemp, Cocoa Leaves, Raw Opium or that prepared for smoking etc. and also include some intravenous drugs.

3. In Ghana it is an offence to mix, compound, prepare or supply restricted drugs unless the person is a pharmacist or is a licenced company or a licenced chemical seller and even then these drugs must only be supplied from licenced premises and only when the buyer has a prescription from a medical practitioner if it is a class A. Drug. Other controls apply to supply of certain drugs, all in an effort to prevent drug abuse.

4. There are similar restrictions on the supply of narcotic drugs. The law says, for example, that no person shall supply any opium or Indian Hemp of any species or description whatsoever, and no person is allowed even to possess without lawful excuse these narcotic drugs. It further says that no person shall, without lawful excuse, proof of which shall be on him, have any dangerous drug in his possession or control.

5. Smoking of Indian Hemp or opium is also prohibited and so is cultivation of any plant from which a narcotic drug can be extracted, without the written consent of the minister. There are also restrictions on the possession and supply of syringes designed for intravenous and intramuscular injections. Punishment is provided for breaches of these provisions. Section 57 of the Act provides:

"57(1) "If a person acts in such a way as to contravene a requirement, condition or prohibition imposed by or under the Act he shall be guilty of an offence under this act.

(2) A person guilty of an offence under this Act -

(a) where the offence relates to a narcotic drug, shall be liable -

- (i) on conviction on indictment to a fine not exceeding one thousand pounds, or imprisonment for a term not exceeding ten years or both;
- (ii) on summary conviction to a fine not exceeding two hundred and fifty pounds, or imprisonment for a term not exceeding 12 months or both;

- (b) where the offence is that of supplying of opium or Indian Hemp or of cultivating Indian Hemp contrary to section 28(2) or section 49 of this Act, as the case may be, and in each case the person has been convicted of that offence on two previous occasions, shall be liable to imprisonment for life;
 - (c) where the offence is that of smoking or having in his possession any opium or Indian Hemp contrary to section 48(a) or to sub-section (1) of section 47 of this Act as the case may be and the person has, in each case been convicted of that offence on two previous occasions, shall be liable to imprisonment not exceeding twenty years;
 - (d) in any other case, shall be liable on summary conviction to a fine not exceeding one hundred pounds, or imprisonment for a term not exceeding six months, or both.
- (3) A person guilty of an offence under this Act relating to Indian Hemp shall be sentenced to imprisonment for at least five years:

Provided that this subsection shall not apply if the court finds either that the offence was trivial or that there are special circumstances relating to the offence or the offender which would render its application unjust.

- (3)A Nothing in the last preceding subsection shall be construed as preventing a prosecution for an offence to which that subsection relates being brought before a District Court (other than in circumstances to which paragraph (b) or paragraph (c) of subsection (2) of this section applies) so however, that the District Court shall not pass sentence on a person convicted of such offence, but shall commit him for sentence to a Circuit Court, unless it finds in accordance with the proviso to the last preceding subsection; and the provisions of section 178 of the Criminal Procedure Code, 1960 (Act 30) (which section relates to committal for sentence), shall apply to any committal under this subsection as if it were a committal under that section.

- (4) Where proceedings are brought for an offence under this Act
- (a) the court may order the forfeiture and destruction or other disposal of any drug in respect of which an offence is found to have been committed;
 - (b) the court shall, as respects any drug taken away from its owner without payment and in respect of which no offence is found to have been committed, order that reasonable payment shall be tendered to the owner in respect of so much of the drug as is not returned to him in good condition."

6. In effect, therefore, in an endeavour by the Government of Ghana to control domestic drug trafficking the Pharmacy and Drugs Act was passed in 1961 which provides stiff penalties for unlawful trafficking and even possession and use of drugs. The provisions of this Act have always been strictly enforced and all contraventions have been prosecuted. It is believed that the strict enforcement of the law has resulted in a decline in the illegal trafficking of Drugs in this country.

7. But there still remains the problem of the cultivation and supply of narcotic drugs especially opium and Indian Hemp which plants thrive in our weather. Police have increased vigilance in detecting persons and areas where the plants are cultivated, and carry out raids and arrests. There is also the problem of illegal exportation and importation by suppliers and sellers but whenever arrested they are prosecuted.

8. There is no doubt that addiction of drugs is a modern development in all countries and the sad part is that the youth are the main users. This use of drug by the youth is assuming alarming proportions and needs to be curbed quickly. The criminal pedlers, for huge monetary profits introduce the youth to the drugs and these are the people who should be arrested and severely punished. The youth are victims who should be pitied and rehabilitated. Perhaps a method of detecting the big time drug pedlers is to grant immunity of prosecution to the mere small time possessor and user of drugs in exchange for information.

9. Addiction to drugs brings in many problems to the user, his family and the community at large including drug related disabilities like insanity, and other disability. Government is then saddled with cost of curing and rehabilitation. What is the solution? Preventive measures should be employed to advise and lecture the youth on the effects of drug abuse both at school and by other religious and voluntary organisation. The Social Welfare Department, the Medical Pharmaceutical Association and Medical Council should also hold periodic lectures and seminars both radio/television and in the newspapers to educate and advise. Prevention is better than cure and efforts at preventions are very important must be very seriously pursued as the rehabilitation of drug users is costly to a Country and causes a wastage of manpower with subsequent miserable effects on families. Every country owes a responsibility to the innocent victims in searching for effective solutions to the drug problems. Our Criminal Law merely punishes drug users but this is not enough. There should be provision for rehabilitation orders to be made under the Pharmacy and Drugs Act 1961 and not merely punitive orders. An innocent youth addict is a sick person who needs to be cured and rehabilitated more than punished. It is the big time Drug pedlers who should be punished severely to deter them from their nefarious activities. Outside the Criminal law it is important that there should be an increase in activities to enlist the participation of the news media, parents, teachers, doctors, police and social workers in an effort to eradicate drug abuse from the society as Drug abuse is the greatest evil of contemporary society.

THE INTERNATIONAL PERSPECTIVE

10. There is no doubt that there is need for further cooperation amongst law enforcement and other governmental agencies to enhance existing levels of cooperation in order to combat the international trade in illicit drugs. There should be a Computerised Intelligence System and specialised training in investigation. Interpol should also be encouraged to compile a list of all known big time dealers in illicit drug trade, and mount surveillance on entry points to check their importation, and effect arrests of persons concerned. This list should be circulated to all countries with a description of the modus operandi of each known trafficker, this would make detection easier. More Police Officers should be trained and fortified in detection duties relevant to this particular problem.

11. Another deterrent is to give out to offenders stiff penalties. In some countries even the death penalty is used, but other severe punishment, like life imprisonment should be introduced in cases of the drug importers and exporters as without these criminals there would be no users. They are the ones who actually introduce and induce young persons to indulge in drug use for their own selfish ends.

12. In Ghana even though there is provision for punishment and forfeiture of the drugs there is no provision for forfeiture of monies derived from illegal drug trade. This should be seriously considered as forfeiture of such monies or of properties into which such monies have been converted would serve as a further deterrent to traffickers.

13. Furthermore, there should be international drug control plan which should include activities aimed at strengthening and developing civil cadres of preventive trainers in health, education, youth matters and law enforcement and detection matters in the various member countries. This would supplement the efforts of Police in curbing the use of drugs. There should be frequent international seminars by medical and other organisations on effects of drug abuse, and tighter control should be exercised by pharmacists on the supply of dangerous drugs. Children frequenting drinking bars, discotheques and importuning for immoral purposes should be strictly checked by police so as to protect them from contamination and introduction to the use of Drugs.

14. There are disastrous effects of drug abuse on citizens of any country especially the youth who are the future citizens, and problems associated with drug use is assuming alarming proportions. The detrimental effect on manpower, on families and the countries at large should as quickly as possible be effectively halted by international action and cooperation as the problem has now assumed international proportions. Member states ought therefore to come together and find solutions by mounting massive frontal attack to combat the pervasive problems of drug abuse. Cooperation is needed because the menace of drug abuse and illicit trafficking confronts us all with increasing serious problems which no nation can solve alone. We all owe a responsibility to the innocent victims in searching for effective solutions.

15. There is no doubt that huge financial profits are made by the drug traffickers which monies are channelled into legitimate business, but this is not easy to trace. However, if it can be proved and the monies traced into legitimate business and that business should be confiscated after due prosecution of the persons involved. It might involve asking the offender to declare the source of his business finances which would involve long drawn out enquiry. The easy solution could be the alternative of increase in punishment imposing a huge fine on the offender including the seizure of his properties and business without prior enquiry or tracing of the money used to acquire these properties.

16. In short stiff penalties of death, imprisonment, huge fines coupled with seizure of drugs and properties of offenders would counter the growing infiltration of narcotic profits into legitimate businesses. .

17. In finding solutions to the problem of drug abuse no punishment should be considered too harsh as the problem of drug abuse poses deadly threat on all member countries with the resultant destruction of countless innocent lives and the undermining of the economies, integrity and stability of societies.

DRUG ABUSE AND DRUG TRAFFICKING — THE ZAMBIAN EXPERIENCE

Memorandum by the Government of Zambia

INTRODUCTION

This paper addresses some aspects of the vexing questions of drug abuse and drug trafficking in recent years using Zambia's experience in attempting to combat the problem. The paper will, inter alia, attempt to examine the history and rationale of the legislation that seeks to control drug abuse and illicit trafficking, the escalation of the problem, the inadequacy of the law, the problem confronting law enforcement agencies in combating drug abuse and illicit drug trafficking and finally the paper will suggest possible remedies to the problems raised in the discussion.

I. Historical background and rationale for the legislation on the control of drugs

Almost all countries in the world have, in one way or the other, enacted laws to control the importation, exportation, production, possession, sale, distribution and use of dangerous drugs. In addition, numerous international attempts have been made to stop the scourge and ravages of drug abuse and trafficking such as drug addiction, health and socio-economic hazards. In this direction the international community has and continues to take steps to combat this deadly peril to mankind. As early as 1912 the International Opium Convention was signed at the Hague and was later amplified by the Geneva Conventions of 1925 and 1931. Furthermore, the United Nations set up the Commission on Narcotic Drugs resulting in the Protocols of 1946 and 1948². In 1961 the Single Convention on Narcotic Drugs was signed in New York. This was later amended by the Protocol of 1972. In 1971 the Convention on Psychotropic Substances was signed in Vienna³. The foregoing Conventions on narcotic drugs and psychotropic substances, only to mention a few, demonstrate the great concern with which individual nations and the international community view the problems of drug abuse and drug trafficking.

In Zambia, legislation on the control of importation, exportation, manufacture, production, use, sale, etc, of dangerous drugs may be traced back to as early as 1923 when the colonial authorities promulgated the Opium and Habit-forming Drugs Regulations Proclamation which was repealed and replaced by the Opium and Habit-forming Drugs Regulation Ordinance⁴. Further development of the law in this area is reflected in the Dangerous Drugs Acts of 1955 and 1956⁵ which were enacted by the now defunct Federation of Rhodesia and Nyasaland. The 1956 Act was designed to conform with the requirements of the various international conventions. The Act continued to apply to Zambia until in 1967 when the National Assembly passed the Dangerous Drugs Act⁶ in conformity with the Single Convention on Narcotic Drugs 1961 of which Zambia is a signatory. The Convention requires, inter-alia, that member states should control the manufacture, import, export, sale, production, distribution and use of narcotic drugs⁷.

In to the Dangerous Drugs Act, 1967, other laws governing drugs and other psychoactive substances are the following:

- (i) Penal Code Act, 146 (some provisions);

- (ii) Pharmacy and Poisons Act, Cap. 536;
- (iii) Food and Drugs Act, Cap. 553; and
- (iv) Customs and Excise Act, Cap. 662

All these laws provide penalties for offences committed under their provisions. An examination of the provisions relating to penalties under these laws, especially the Dangerous Drugs Act and the Pharmacy and Poisons Act, to mention a few, are too lenient for an effective deterrence to offenders or would-be -offenders. For instance, Section 19(1) of the Dangerous Drugs Act 1967 imposed, upon conviction of an offender, a fine not exceeding five hundred kwacha (K500.00) or imprisonment for a period not exceeding three years or both such fine and imprisonment. Under Section 27 of the Pharmacy and Poisons Act, Cap. 536 a fine of one hundred kwacha or imprisonment for six months or both such fine and imprisonment were prescribed. Both provisions provide for the forfeiture of any articles in respect of which such offence had been committed.

II. Escalation of the problem of illegal trafficking in drugs

It will be observed that since 1968 and especially in the seventies, the volume of illicit traffic in drugs has been on the increase, whereas the penalties prescribed remained lenient and grossly inadequate to curb or combat drug abuse or drug trafficking. However, it will be noted that drug abuse is to a great extent a developing problem as compared to drug trafficking in which Zambia is mainly used as a transit country or route. Statistics available will, later on in the discussion, illustrate this assertion.

Concerned with the upsurge of illicit drug trafficking in which both local and foreign traffickers were involved, the Party and its Government sought to amend the laws governing drug abuse and illicit drug trafficking in 1984 and 1985 in order to provide stiffer penalties for offences relating to dangerous Drugs. This resulted in the enactment of the Dangerous Drugs (Amendment) Act 1985⁸ by the National Assembly. Expression of Government concern for illicit drug trafficking may be found in the words of the Minister of Health when he introduced the Second Reading of the Dangerous Drugs (Amendment) Bill where, among other things, he said:

".....the volume of illicit traffic in drugs has increased tremendously since 1968, when the Act was passed. This increase presents a serious threat to the social well-being of the Republic. As the Secretary-General of the United Nations Organisation has pointed out, illicit drugs contaminate, corrupt and weaken the very fabric of society wherever they are produced or used. The abuse of drugs often leads to disastrous effects on political, social, cultural and economic life of the community. The effect on individual users and their families is well known to Hon. Members and does not require any elucidation at all"⁹.

The 1985 Amendment brought in stiffer penalties. Section 19 of the principal Act was amended. A convicted offender is now liable to a fine not exceeding two thousand kwacha (K2,000.00) instead of the original five hundred kwacha (K500.00). The term of imprisonment which may be imposed has been increased from a period not exceeding three (3) years to a period not exceeding fifteen (15) years. A combination of a sentence of both a fine and imprisonment is provided for.

It is hoped that these stiffer penalties will achieve the desired effect of reducing drug trafficking and their associated problems.

It is worth noting that prior to the foregoing legislative action to curb the escalating problem of drug trafficking other measures were taken by the Party and its Government. For example, a Methaqualone (Mandrax) Technical Committee was appointed by the Permanent Secretary and Director of Medical Services in November, 1982 within the Ministry of Health to examine, inter-alia, the extent of use and abuse of the methaqualone drug in Zambia and to advise the Ministry of Health on the need to ban or otherwise impose stricter control on the importation of the drug into Zambia and so on. Information received by the Committee revealed inter-alia that:

- (i) there were no reported cases of abuse of methaqualone in Zambia;
- (ii) the drug was not used by any health or medical institution in Zambia;
- (iii) the pharmaceutical wholesalers did not import the drug;
- (iv) there was no prescription demand on the private pharmacies for the drug;
- (v) there was considerable illicit importation in which Zambia was being used as a transit route for the illegal trade in Southern African countries.¹⁰

The Committee's opinion was that the drug was not needed in Zambia, more so that there were equally effective hypnotics available which did not have the potential for abuse. The Committee recommended that the drug (Mandrax) and the importation of amphetamines should be banned and that the legislation should be introduced to implement the United Nations Convention on Psychotropic Substances of 1971.

As a result of the escalation of the problem of drug trafficking steps have been taken to train police and customs officers in identifying various drugs that are imported into Zambia by traffickers. In 1979, the School of Medicine of the University of Zambia, in conjunction with the Department of Customs and Excise and the Police organised an intensive course on Drugs and Related Substances (legal and illegal issues)¹¹. Subjects of instruction included, among others:

- (a) Natural occurring Narcotics and their use;
- (b) Laboratory Sessions;
- (c) Drugs, Narcotics and their effects on the mind and body;
- (d) Aspects of law and legislation in Zambia;
- (e) Narcotics and Police involvement;
- (f) Narcotics and Customs involvement; and
- (g) Methods of surveillance and investigation and International Control.

All the foregoing events show the concern with which the Party and its Government views the escalation of the problem of drug trafficking in which Zambians and foreigners were engaged in trafficking various drugs especially methaqualone (Mandrax). Zambia has become one of the transit routes in this illicit drug trade in Southern Africa.

Arrests and seizure data show that vast amounts of methaqualone are smuggled into Zambia from Asia and certain Western European countries and that the contraband is mainly

destined for South Africa. Statistics have revealed that more than eight million (8,000,000) methaqualone tablets have passed through Zambia from Europe¹². Evidence from Police reports shows that Zambian traffickers, mainly couriers, have been arrested (in 1983-1984) at airports in various countries (United Kingdom, Botswana, West Germany, Holland, India, etc) for possession or importation of drugs such as cannabis, methaqualone (Mandrax) tablets and heroin.

As indicated earlier in this paper, stricter controls introduced by legislative and administrative measures to curb the influx of methaqualone has caused traffickers to change tactics and routes. Tight security at airports especially restrictions on access to VIP lounges have prevented the misuse of these facilities by traffickers. However, evidence shows that methaqualone (Mandrax) has also been trafficked through the mail, to post office boxes and also that the form of the drug is being varied to avoid easy detection and identification. For instance, there are liquid or powdered forms of the drug. This shows how difficult it is to stamp out the scourge of drug trafficking and drug abuse. All this means more problems for the law enforcement agencies, a problem that this paper now attempts to address.

III. Law Enforcement Agencies

The police and customs officers are in the forefront of the fight to curb drug trafficking and drug abuse. Their activities include arrest of drug traffickers and drug abusing suspects, drug seizures and prosecuting offenders. While the police, customs officers and other law enforcement agencies are doing a commendable job to combat drug trafficking and drug abuse, the problem continues to plague us. Statistics in the table below show a decrease in the number of persons apprehended for drug abuse and trafficking but this should not lead to the drawing of the conclusion that police and customs officers have succeeded in eradicating the problem:

DRUG CASES REPORTED TO POLICE IN ZAMBIA 1975 TO 1985¹³

YEAR	REPORTED	NO.OF PERSONS ARRESTED	CONVICTIONS	ACQUITTALS	MALES	FEMALES	JUVENILE
1975	675	595	540	30	496	18	23
1976	529	458	393	45	350	29	31
1977	490	388	320	39	284	16	21
1978	558	497	422	19	367	36	20
1979	700	628	530	39	519	10	19
1980	416	366	302	37	279	14	19
1981	411	338	282	33	185	40	57
1982	491	413	340	41	290	23	35
1983	414	381	304	41	244	19	11
1984	358	311	253	22	243	8	14
1985	396	345	280	41	228	39	19
TOTAL	5,438	4,720	3,966	387	3,485	252	269

From the 675 cases reported to the police in 1975 the number rose to 700 in 1979 and then dropped progressively to 396 in 1985. The number of arrests also rose from 595 in 1975 to 628 in 1979 and then dropped progressively to 345 in 1985. The decline in the number of arrests does not necessarily reflect a reduction in drug trafficking and drug abuse. It merely represented a reduction of cases that the law enforcement agencies succeeded in laying their hands on. This may also be attributed to the fact that drug traffickers might have become sophisticated in evading law enforcement agencies or that the agencies might not have sophisticated equipment and other methods to combat the problem.

Furthermore, statistics may not be the best method of judging changing trends in the rise and fall of drug trafficking and drug abuse. Firstly, official records are not easily available and secondly the available records sometimes do not show the categories of drugs for which the arrests have been made. Police arrests do not mean automatic conviction as shown and some of the acquittals do not signify innocence of the accused as they might have been for technical reasons such as lack of adequate evidence, or poor prosecution. To successfully deal with the situation, law enforcement agencies need to be strengthened and well equipped with sophisticated gadgets or devices and laboratories for their operations. Police and customs officers have to fully co-operate in preventing and detecting the illegal importation and export of drugs. There should be adequate gathering of intelligence about trafficking routes and techniques used by traffickers. To control entry points such as airports, ports and border posts they need to be provided with well-trained preventive staff and specialist investigators who should provide support for each other's operations.

All these efforts are required to combat smuggling which is by nature difficult to control because of the great volume of passenger and freight traffic which almost make it impracticable, for instance, to carry out physical searches on every occasion.

The foregoing discussion shows that the drug trafficking problem is international in character and therefore it requires both domestic and international co-operation. The problem requires international co-operation between governments, law enforcement agencies, professionals, etc. In this regard, countries that produce certain drugs and those that are used as transit routes require international co-operation and support from the international community to stop illicit production, to prevent international trafficking and to exchange information on means of preventing and reducing drug abuse and trafficking. Where raw materials are grown, people should be prevented from growing such crops and be encouraged to grow other new crops in place of illicit crops.

There are several U.N. Conventions aimed at eradicating drug trafficking and drug abuse, some of which have been alluded to at the opening of this discussion. There are also agencies that oversee the effectiveness of the conventions, for example, the United Nations Commission on Narcotic Drugs, the International Narcotics Control Board, etc, form part of the International co-operation to promote co-operation in combating drug abuse and drug trafficking and thus making efforts to save mankind from the scourge and ravages of dangerous drugs.

IV. Inadequacy of the Law

Our law on drug abuse and drug trafficking was enacted at the time when this problem was almost non-existent in the country and as such the present law cannot adequately meet all the exigencies of drug abuse and drug trafficking. The penalties under the law, as already pointed out earlier in the discussion, were lenient to deter traffickers. Certain drugs were also not covered by the law. The problem of drug abuse and drug trafficking at one time escalated to such an extent that the Party and its Government found it necessary to detain a large number of alleged traffickers under the Preservation of Public Security Regulations in order to curb the incidence of trafficking drugs.

However, in October, 1985, His Excellency the President, Dr K D Kaunda set up a tribunal to review cases of people detained for their alleged involvement in Mandrax (methaqualone) trafficking. The tribunal was chaired by a High Court Judge who sat with four members who consisted of one lawyer and three educationists. The tribunal has since submitted its report to the President and at the time of writing this paper the detainees had been released.

This goes further to show how vexing the problem of drug trafficking and abuse is to almost all countries of the world. In Zambia, the relevant Ministries are co-operating and co-ordinating efforts to come out with legislation that would cover all conceivable aspects of drug abuse and drug trafficking.

V. Suggestions on how the problem may be tackled

All countries and their governments are faced with the problem of drug abuse and drug trafficking and how to combat this deadly peril. There are several approaches that may be taken in attempting to combat drug abuse and drug trafficking. Some of these approaches may be to -

- (i) strengthen deterrence (by increasing penalties and forfeitures);
- (ii) improve prevention;
- (iii) reduce supplies from abroad;
- (iv) tighten controls on illicit drugs prescribed in a country;
- (v) eradicate cultivation of drug crops such as cannabis.

In addition to the foregoing, international co-operation between governments, law enforcement agencies and many other institutions is of paramount importance in the fight against drug abuse and drug trafficking. For co-operation to succeed, it will require individual countries to -

- (i) adhere to and implement United Nations Conventions on drug and other psychotropic substances;
- (ii) co-ordinate and share intelligence on illicit drug trafficking and abuse;
- (iii) collect and process data on various dangerous drugs;
- (iv) co-ordinate training of law enforcement personnel;
- (v) conduct regional seminars, workshops, etc to exchange experience and ideas on how to combat drug abuse and drug trafficking; and
- (vi) strengthen and utilise the already existing bilateral relations between countries and extend that co-operation to other countries.

There is no doubt that these proposals, though not exhaustive, and others that shall be brought forward during the deliberations of the Law Ministers, will go a long way to ensure that we succeed because failure in combating drug abuse and trafficking would be calamitous to the entire international community. No country is immune from the scourge or ravages of dangerous drugs.

FOOTNOTES

1. Report of the International Narcotics Control Board for 1985, United Nations, New York, 1985 Appendix III.
2. Ibid
3. Ibid
4. Northern Rhodesia Gazette, for the year 1926, Vol. XVI, Government Printer, Livingstone, 1926 pp. 146-150
5. Acts 28 of 1955 and 25 of 1956, Cap. A.L. 28 of Applied Laws, Government Printer, Lusaka, 1965.
6. Parliamentary Debates, No. 10 of 1967, Col. 73, Government Printer, Lusaka
7. Ibid.
8. Dangerous Drugs (Amendment) Act No. 19 of 1985, Government Printer, Lusaka.
9. Parliamentary Debates, No. 68 of 1985, Government Printer, Lusaka, Co. 314.
10. Methaqualone Technical Committee appointed by the Permanent Secretary and Director of Medical Services, Ministry of Health in 1982, chaired by Dr C C Mambwe.
11. Interview with Professor D C Morgan, Head of the Department of Biology, University of Zambia, Lusaka.
12. Report on the International Narcotics Control Board for 1985, pages 48-49, paragraph 247 - see footnote 1.
13. Zambia Police Force Annual Reports, 1975-1985, Government Printer, Lusaka.

Violence against Women

VIOLENCE AGAINST WOMEN

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DISCUSSION PAPER

PART A: DOMESTIC VIOLENCE

The problem of domestic violence has been seen primarily as a problem requiring legal solutions, thus response throughout the Commonwealth has tended to be legislative. The legal response to wife abuse varies from country to country. Nonetheless, a common pattern can be discerned:

- (i) Most countries allow for divorce and judicial separation, remedies which may well be the principal responses to domestic violence, but which are, of course, applicable to married spouses only.
- (ii) All countries in the Commonwealth render physical assault between spouses as criminal as if such activity had occurred between strangers. In all countries, criminal prosecutions may be brought by the state or by the victim as a private prosecution.
- (iii) Quasi-criminal remedies derived from breach of the peace provisions exist in most Commonwealth jurisdictions. Their potential as a remedy for domestic violence has only recently been recognised.
- (iv) Injunctions are available in all Commonwealth countries as ancillary proceedings to a matrimonial cause or a civil action. A number of countries have, however, gone further and enacted special legislation to provide protection for women who are the subject of domestic abuse, while others are contemplating such a step.

Divorce and judicial separation

2. Ending a marriage through divorce or judicial separation is the most basic remedy for domestic violence. It is impossible, however, to provide a short description of the divorce laws which exist throughout the Commonwealth, both because of the legal pluralism in marriage and divorce which exists in a number of Commonwealth countries and because of the differences of approach to the general law they exhibit. In a significant number of Commonwealth territories customary marriage and divorce principles, consisting not of a single uniform set of laws, govern the lives of many groups.¹ Very often, at the same time, a system based on English matrimonial law exists in each country.² In other Commonwealth countries, divorce is provided by religious laws which apply to those professing the particular religion, while, again, at the same time, a system based on the English law, runs in parallel.³

3. In very simple terms, it would appear that in those Commonwealth countries where the couple's marriage is governed by customary principles, such marriages may be dissolved, but

such dissolution is discouraged and is a matter between the families of the couple who will first attempt to reconcile them. Certainly, cruelty on the part of the husband will be accepted as grounds for the dissolution of a customary marriage.⁴ Similarly, in those jurisdictions where marriages are governed by religious law, a woman who is treated with cruelty by her husband can divorce him.⁵

4. The general law governing divorce and judicial separation in most Commonwealth countries is based on the English law in its various stages from 1857 to 1969. As English law has travelled through various stages of development since 1857, again it is difficult to make a concise statement of the principles governing divorce and judicial separation throughout the jurisdictions. Suffice it to say, insofar as the general law is concerned, with some exceptions, divorce is available where the woman has been subjected to persistent cruelty.⁶

5. In a few jurisdictions, however, the legislation allows a woman to divorce her husband only where he has changed his religion to that of Christianity and gone through a form of marriage with another woman; where he has been guilty of incestuous adultery, bigamy with adultery; marriage with another woman with adultery, rape, sodomy and bestiality or adultery coupled with desertion for two years without reasonable excuse.⁷ A man on the other hand, need only prove that his wife is guilty of adultery.

6. Most Commonwealth countries retain the decree of judicial separation, which relieves the petitioner of the duty to cohabit with her husband.⁸ Such separation is normally allowed on the same grounds which support divorce.⁹ Thus, judicial separation would be available to a spouse who was the subject of domestic assault.¹⁰

7. The fact that a woman who the subject of domestic violence may be able to proceed for matrimonial relief may provide a hollow solution to the victim. First, many women who are the subject of domestic violence are not prepared to separate from or divorce their husbands. Their priority is to end the violence in their relationship, rather than the relationship itself. Further, a victim may shun such relief in order to keep her family together or maintain her standard of living. Second, even where she wants to end her marriage, except in those jurisdictions where the sole evidence of breakdown is separation,¹¹ she will have to show that grounds for divorce exist. The burden of proof here is on the petitioner and she may be unfortunate to meet a judge who is of the opinion that her circumstance do not provide such grounds.¹²

8. Further, in most jurisdictions she may have to await the elapse of a time bar before she can proceed to divorce her husband.¹³

Criminal Proceedings

9. It is well settled throughout all Commonwealth jurisdictions, except insofar as sexual crimes are concerned, that a spouse is not entitled by reason of marriage or cohabitation to inflict violence on the other. In principle, therefore, the criminal law may be invoked against the violent spouse for common assault, aggravated assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm, unlawful wounding, manslaughter, murder or any other criminal act.¹⁴

10. In most Commonwealth jurisdictions, however, it is not a crime to rape or sexually assault a woman to whom one is married and from whom one is not legally separated. (See the discussion under Part B on Sexual Assault: Rape).

11. In practice the criminal law has proved to be of little assistance to the victim of domestic violence. Traditionally, the police have been blamed for the gap between abstract rights and actual remedies which the situation reveals. Throughout the Commonwealth, evidence

exists that the police, who have the potential for being the most important agency in any pattern of services for abused women, often exhibit an unwillingness to act.¹⁵

12. A number of reasons can be isolated to explain this reluctance. The most cynical explanation is that the police, like others in the community, are not interested in wife abuse, seeing it as a normal feature of domestic life. The second explanation is that while the police are interested in wife abuse, they see it as a non-criminal, social problem and thus not a police issue.¹⁶

13. The third explanation recognises that the police, in common with the rest of society, are deeply affected by the twin concepts of the privacy and autonomy of the family. They are dealing with people who, if not bound in matrimony, are living in a state which is almost indistinguishable from it.¹⁷ They fear, also, that precipitate police action could exacerbate the situation.¹⁸

14. Other factors make the police reluctant to act. In many jurisdictions they lack clear legal authority to enter premises and investigate suspected offences and they are unclear as to the appropriate response they should make once they are in a situation of abuse.¹⁹ 19

15. Moreover, police are disillusioned by the fact that a significant number of victims of family violence withdraw their complaints or fail to give evidence against their abuser when the incident comes before the courts.²⁰ This is exacerbated by the fact that in most Commonwealth jurisdictions the wife is a competent witness for the prosecution, but it is impossible for her to be compelled to give evidence. This legal rule allows a woman to be influenced by her abuser and others so that vital prosecution evidence is suppressed.²¹

16. Perhaps the most basic reason for police failure is that the police are but one element in a legal system which relegates domestic violence to a relatively unimportant status. Police response must be seen in the context of judicial response and evidence exists which suggests that the courts impose lighter sentences in cases of domestic assault than in cases of other assault.²²

17. Certainly, no comprehensive study of differential sentencing practice in domestic cases has emerged from any Commonwealth country, and such research is important, but cases indicate that provocation is cited as a defence more frequently in a case in domestic circumstances than in other situations, and the behaviour which is viewed as provocation in the domestic context is much wider than in others. In the end analysis, police response is perhaps best seen as a reflection of societal attitudes towards wife abuse. Frequently, the issue is trivialised or at most viewed as a 'social problem' wherein the criminal law should have no part.

18. The fundamental issue becomes the appropriateness of the criminal law as a tool in domestic violence. Forceful arguments can be raised against its use in the domestic context:

- (i) Treatment facilities are rarely available to help the accused control his aggression.
- (ii) There are serious difficulties in gaining a conviction because the facts must be proven beyond all reasonable doubt.
- (iii) If the husband is acquitted, albeit on a technicality, he will return to his family angry and vindicated and will almost certainly continue to abuse.
- (iv) Even if he is convicted and sentenced, this is likely to be counter-productive for his victim in other ways. At most he will receive a fine or a short custodial sentence.

- (v) If he is fined, the fine is likely to be paid out of the joint family finances, while if he is imprisoned, she may suffer financial disadvantage through the loss of a breadwinner.
- (vi) Imprisonment will only temporarily relieve her situation. She may be confronted with a monster on his release.

19. On the other hand very forceful arguments can be raised to preserve and, indeed, strengthen the role of the criminal law in the domestic context. A criminal conviction carries with it a clear statement of the personal responsibility of the offender and the condemnation of society. Perhaps, most compellingly, it could be argued that decriminalisation of domestic assault would indicate that the issue had been relegated to the level of a social problem which in turn carries with it a societal acceptance of a certain level of violence in the family.

20. A number of Commonwealth jurisdictions have concluded that domestic violence must be viewed as a crime and have thus enacted specific legal provisions which guarantee this commitment. These jurisdictions have appreciated the potential of the police as the most essential facet of the legal system in the context of domestic violence. The police is the sole agency open 24 hours a day providing a comprehensive geographical coverage and which is invested with the legal authority to investigate and process complaints.

21. Thus, Canada has increased penalties for crimes of violence in all circumstances. In most provinces the police have been advised that they must proceed in all cases of spouse assault to lay a criminal charge even where the victim would prefer not to proceed with the complaint. This removes the element of choice which can put the victim under considerable pressure. In some provinces such causes may be heard by the Family Court. This trend should be carefully monitored as the Family Court setting may tend to decriminalise the issue of domestic violence and work against the stated policy of the Canadian Government.

22. Wives have been made compellable witnesses, unless exceptional circumstances can be made out:²³ Evidence Act, RSC 1970, Ch E-10, s.4. Again, this strategy has been introduced to remove the issue of choice from the victim and render her invulnerable to requests to withdraw her evidence. Finally, extensive training programmes have been established to sensitise the police and make them aware of their new responsibilities.

23. In New South Wales, one of the State jurisdictions of Australia, the Crimes (Domestic Violence) Amendment Act, 1982 was introduced to clarify police powers to enter and remain on premises in order to investigate complaints of domestic violence. The provisions of the Act, which were extended in 1983, empower a member of the police force to enter and remain in a dwelling house where he or she believes, on reasonable grounds, that a domestic violence has recently been, or is being or is likely to be committed or is imminent if he or she is invited to do so by a person who apparently lives in the dwelling house, whether or not that person is an adult. The police officer may remain if he or she has been invited on to the premises by the victim of a domestic violence offence, notwithstanding that the occupier has refused the officer authority to remain. If, however, the alleged victim of domestic violence does not give the officer authority to remain or if the officer is not given such power by common law, the officer must leave the premises.

24. New South Wales further introduced the novel concept of the issue of warrant by telephone. Where the police suspect that a domestic violence offence, a term which is widely defined, (s.4(1) Crimes Act, as amended by the Crimes (Domestic Violence) Act 1982 and the Crimes (Domestic Violence) Amendment Act 1983), has been or is likely to be committed and they have been denied entry into the premises and they believe that it is necessary for them to enter premises for investigation or to prevent further offences, they may apply for a telephone warrant. Such a warrant can only be issued by a magistrate who may issue the warrant by telephone either directly or indirectly.

25. As such a warrant could amount to a serious violation of civil liberties, safeguards have been incorporated into the legislation. Thus, proper records of such warrants must be kept, which include the address of the house, the name of the person who informed the police of the domestic violence and details as to whether and when the house was entered pursuant to the warrant.

26. As in Canada, New South Wales has introduced provisions to render married and unmarried spouses compellable witnesses, except in very limited circumstances, in domestic violence cases (Crimes (Domestic Violence) Amendment Act 1982 inserting s. 407AA into the Crimes Act 1900.)

27. The provisions introduced in Canada and New South Wales are very recent and there has thus been only a short period of time in which to evaluate the amendments. Clearly, it is essential that initiatives such as the mandatory laying of charges, compellability of spouses, increased police power to enter and remain on domestic premises, and telephone warrants must be carefully monitored, particularly in view of the fact that other countries may seek to use such provisions as a model for new legislative initiatives.

28. Although the provisions are new, a report from New South Wales (Domestic Violence Committee Report) published in June 1985 assesses the progress of its new provisions. The report indicates that although the legislation in New South Wales has adopted a criminal model requiring a commitment to the enforcement role of the police, arrests by police in domestic violence cases, indicated by bail returns has not shown a marked increase (page 20 of the report) and little use has been made of the telephone warrant system. Moreover, the number of spouses who have been excused from giving evidence in domestic violence cases is disturbingly high. (Report p.12ff and 31ff.)

29. Although the results of the report are disappointing, it must be reiterated that the change of governmental policy to a criminal justice approach to the issue is very new. It well may be that the continued police reluctance to prosecute is a relic of the past philosophy which stressed mediation and saw prosecution as a last resort. It is essential that the legislation continue to be monitored and assessed and special training for police be maintained and extended.

30. In all Commonwealth jurisdictions a woman who has been the subject of domestic assault has the option of pursuing a private prosecution where the police or state prosecutors²⁴ fail to prosecute²⁵.

31. In practical terms, the existence of such an option is of little value to such a victim. She must gather the evidence herself and be in charge of the conduct of the case. In most Commonwealth countries, legal aid is not available to bring a private prosecution. In sum, therefore, the procedure will be costly, emotionally taxing and it is fraught with the same difficulties which apply in public prosecutions. Hence, while no recommendation is made to remove the availability of private prosecutions, it must be admitted that the existence of such an action is of little help to a victim.

Quasi criminal remedies

32. In most Commonwealth jurisdictions, summary courts are given the power to bind over any person to keep the peace or to be of good behaviour towards a particular person. Such a remedy is usually awardable in proceedings commenced by a complainant who has²⁶ just "cause or fear that another will...do him some corporeal hurt."²⁷ After the complaint is made, the court may order the taking of recognisances without hearing any evidence, but if the defendant does not agree to this, the court must call for evidence on which to decide the issue. Where a bind over is breached, the defendant forfeits a specified sum of money.

33. Essentially this remedy lies between the criminal and the civil law. It is a criminal process, but involves a lower standard of proof. Binding over can occur before any actual violence has occurred which makes it particularly useful in the domestic context.

34. In most Commonwealth countries, the potential of the remedy in relation to spouse abuse has not been exploited. It has remained limited in usefulness in its current form because the defendant cannot be excluded from the home, nor can the court attach any particular conditions to regulate the conduct of the perpetrator. However, if the order is breached the defendant may face imprisonment. Law reformers in Australia recognised the potential of the breach of the peace provision and a number of Australian jurisdictions have recently amended provisions in their legislation pertaining to breach of the peace in order to make proceedings more useful in the domestic context²⁸. The approaches taken vary from state to state. Because of their novelty and potential they are described in detail below.

South Australia and Western Australia

35. Legislation in South Australia (s.99 Justices Act 1921, as inserted in 1982) and Western Australia (ss. 172-174 Justices Act 1902, as inserted in 1982) now allows a magistrates' court to make an order imposing any restraints on a defendant that are necessary or desirable where he has caused or threatened to cause personal injury or damage to property and unless restrained is likely to do so again.

36. Complaints may be made by the victim of the violence or threats or by a member of the police force. In both cases, the onus of proof is on the balance of probabilities. Orders may be made in the absence of the defendant and on an interim basis. The court has been given power to limit the defendant's access to premises even where he has a legal or equitable right to such premises. Breach of such an order renders a person liable to imprisonment up to a maximum of six months and where any member of the police has reasonable cause to believe there has been a breach of such an order, he or she may arrest without warrant and detain the person suspected of the breach.

Queensland

37. Queensland provisions (Peace and Good Behaviour Act 1982) allow a person to make a complaint on oath and in writing to a justice of the peace to the effect that another person has threatened to assault or to do bodily injury to the complainant or someone under his or her care, or has threatened to get someone to assault or to do bodily injury to the complainant or a person under his or her care or to get someone to damage or destroy the property of the complainant. The complainant must also prove that he or she is in fear of the defendant. If the justice is satisfied that the facts have been substantiated and it is reasonable for the complainant to be in fear of the defendant, he or she may issue a summons or a warrant.

38. The justice may make his or her own inquiries or seek evidence from other persons as to whether the complaint is made in good faith and the court may hear the complaint whether the defendant is present or not. If the defendant does not appear in obedience to a summons, the court may issue a warrant, but if the defendant is present at the hearing, he will be given the opportunity to show that the order should not be made. Such evidence could include evidence that the complaint was made vexatiously or maliciously. The claimant may be dismissed or the defendant ordered to keep the peace and be of good behaviours for such period as the court thinks fit. Any stipulations or conditions may be attached to such an order. If the order is breached, the defendant will be prosecuted under the Act and if convicted is liable to a fine of \$1,000 or imprisonment for one year. Unlike South Australia and Western Australia, there is no power for arrest without warrant for a suspected breach of the order.

New South Wales

39. It has been in New South Wales where the potential of the quasi-criminal action has been most recognised. Here a recent enactment (s.547AA Crimes (Domestic Violence) Amendment Act 1982, as amended in 1983) introduces "apprehended domestic violence orders", which attach a power of arrest for breach of the conditions of specialised "keep the peace" orders.

40. These orders may be sought either by an aggrieved spouse, defined as a person with whom the other person is living or has lived with on a bona fide domestic basis or a police officer. The order, which is issued by a court of summary jurisdiction, restricts the behaviour of the offending spouse for up to six months. Specifically, the court is empowered to prohibit or restrict approaches by the defendant spouse to the aggrieved spouse, prohibit or restrict access to any premises by the defendant spouse and prohibit or restrict specified behaviour.

41. Before a court makes an order to restrict access by a person to premises in which he resides, the court is instructed to consider the accommodation needs of the parties and the effect of any order upon any children. Orders may be made interim and ex parte and breach of any order is an offence punishable by imprisonment not exceeding 6 months. Where a member of the police force believes on reasonable grounds that a person has breached an order that person may be arrested without warrant and detained.

42. On its face, the quasi-criminal remedy would seem to have important potential in domestic violence cases. As previously stated, the standard of proof the complainant must reach is lower than in a criminal action, the remedy can be resorted to before the violence occurs and the remedy is simple and swift. However, although the quasi-criminal remedy has been available in general for some time, the remedies specifically aimed at domestic violence are new. Close attention to whether the remedies are as affective as they appear is essential. New South Wales has produced a report on the working of the remedy which, unfortunately, is disappointing.²⁹ Perhaps this is due to the newness of the remedy and general teething problems. It is clear that further close monitoring is a priority here.

Civil remedies: Injunctions

43. Throughout the Commonwealth, injunctions are available as a remedy for domestic violence. However, in most jurisdictions, such a remedy can only be granted as ancillary to a primary cause of action, such as divorce or judicial separation or a civil action for assault and battery.

44. The use of the injunction as an ancillary cause of action has its limitations. The spouse may not wish to proceed for matrimonial relief nor may she wish to bring a civil action against her husband or cohabitee. Further, in a number of jurisdictions, a married spouse is not competent to bring a civil action against her husband.³⁰

45. Nonetheless, the injunction does have its advantages in the context of spouse abuse. It can be invoked speedily and often in the absence of the defendant and effective sanctions for breach of injunction exist.

46. Eleven Commonwealth jurisdictions have explored the potential of this remedy and have enacted specific legislation. Of these, several Canadian provinces, Singapore, Malaysia and the Australian federal legislature have taken a conservative approach, insisting that injunction proceedings be brought in association with a substantial claim, such as matrimonial relief or a tort action, a philosophy rooted in the traditional concept of the injunction. These countries usually grant relief to married spouses only and rarely allow for the attachment of an arrest power as a tool for enforcement.

47. England and Wales has totally abandoned the traditional concept of the injunction as ancillary relief. Here, legislation allows remedies for married and unmarried spouses and provides for the attachment of arrest powers to such relief. The other jurisdictions of the United Kingdom, Scotland and Northern Ireland, New Zealand and St. Vincent and the Grenadines have drawn on the example of England and Wales, but have added significantly different features.

48. As other Commonwealth countries are considering specific legislation of this nature, a comprehensive survey of the strengths and weaknesses of the current provisions follows.

Canada, Malaysia, Singapore and Australia

49. Canadian Provincial legislation in Ontario, Nova Scotia and Prince Edward Island (respectively, s.45 Family Law Reform Act 1980, s.12 Matrimonial Property Act 1980 and s.45 Family Law Reform Act 1978) allows exclusive possession of the matrimonial home to be granted to a spouse where, in the opinion of the court, other provision for shelter is inadequate or it is in the best interests of a child to make such an order. Such an order may be made irrespective of the legal ownership of the home. In addition, in Ontario and Prince Edward Island orders are available to restrain a spouse from molesting or harassing another spouse (respectively, s.34 of the 1980 Act and s.34 of the 1978 Act).

50. There are three limitations to the effectiveness of these provisions. First, exclusion orders are available to married persons only and thus provide no relief for unmarried cohabitants.³¹ While the non-molestation orders in Ontario and Prince Edward Island extend to the unmarried, they are only available if couples have been living together for 5 years or if they have a child and have been living together for at least one year (respectively, s.14 of the 1980 Act and s.14 of the 1978 Act). Second, exclusion orders appear to be made in extreme circumstances only (Miller v Miller (1978) 2 RFL (2d) 129 (Ontario Provincial Court)).

51. Third, enforcement provisions are inadequate. In Ontario and Prince Edward Island there is no provision for the attachment of an arrest power. In Nova Scotia, although an order may be enforced by a police or peace officer, the jurisdiction is only available where the victim petitions for divorce or it is shown that the parties are living separately and apart and there is no reasonable prospect of the resumption of their cohabitation (s.12 Matrimonial Property Act 1980). Hence, a wife who does not wish to divorce her husband and remains in cohabitation with him cannot invoke the provisions.

52. In both Singapore (s.65A Women's Charter) and Malaysia (s.103 Law Reform (Marriage and Divorce Act 1976) protection orders are again available to married women only. In Malaysia a protection order is only available after a woman has filed for divorce or judicial separation. This is unfortunate as any application for matrimonial relief requires compulsory counselling³² thus forcing a perhaps terrified wife to meet her husband. A problem in both countries is that such orders are unavailable to Muslim women and, in Malaysia, to native women from Sabah and Sarawak. Such women must depend on their religious or customary law for protection³³.

53. The Australian Federal legislation, similarly, limits its protection to married victims of domestic violence (s.114 Family Law Act 1975 (Cth)). Breach of the injunction amounts to contempt of court and the offender can be punished with a jail sentence. The orders that can be made under the Act include granting one party exclusive occupation of the home, restraining one party from coming into the vicinity of the other's place of residence or employment, restraining a party from assaulting, molesting or harassing the other party or a child of the marriage.³⁴ Orders can be obtained on an interim ex parte basis in an emergency. Moreover, the Family Court Counselling Service is available to the victim and her spouse.

54. The major limitations of the injunction under the Family Law Act are that they do not apply unless the parties are, or have been, married to each other and in cases where a party ignores an injunction, the contempt procedure is complex, costly and protracted. The victim must contact a solicitor to arrange for a fresh application to be made to the Family Court requesting that the respondent be dealt with for contempt.

55. This requires preparation of affidavit material and a court appearance. A full hearing into the matter takes a considerable time and may require more than one court appearance. Even where a finding of contempt is made, the Court is more likely to give a suspended sentence or a reprimand than to use its powers to fine or imprison.

56. In response to mounting criticism of the ineffectiveness of Family Court injunctions, the Act was amended in 1983, so that a court could attach a power of arrest to the injunction, but only if it was asked to do so by the victim (s.114AA Family Law Act 1975 (Cth)). Where an arrest power is attached and the injunction is breached, a police officer can immediately arrest without warrant, the offender having to be brought before the court within 24 hours. The court will only punish the offender if the victim applies to the court for the offender to be dealt with for breach of the injunction. If the victim does not, the offender must be released. Clearly, an important limitation of this procedure is the burden that is placed on the victim.³⁵

England and Wales

57. All jurisdictions of the United Kingdom, New Zealand and St Vincent and the Grenadines have introduced more sophisticated legislation based on the injunction.

58. The most complicated scheme of such legislation exists in England where several acts combine to provide what has been called an "elaborate code regulating the rights inter se in relation to the matrimonial home" (B v B [1978] Fam 26, 36 per Bridge LJ).

59. The scheme attempts to provide a comprehensive coverage for the victim of domestic violence, but it suffers from the fact that three separate statutes enact remedies which apply in different situations. This is further complicated by the fact that the traditional power to grant an injunction as ancillary to a primary cause of action remains in the High Court. As far as the enacted legislation is concerned, the appropriate Act to use if the victim is married and if she wishes to have exclusive possession of the matrimonial home is the Matrimonial Homes Act 1983, while if she is unmarried and wishes to have exclusive possession of the home or if she is either married or unmarried and wishes to prevent her partner from molesting or harassing her she must apply under the Domestic Violence and Matrimonial Proceedings Act 1976. These proceedings may occur in different courts. At the same time the Domestic Proceedings and Magistrates' Courts Act 1978 provides in the Magistrates' Court parallel remedies to those provided in the higher courts, but these are only available to married victims. The scheme so presented is unnecessarily complicated, particularly in view of the fact that the victim may not have sufficient access to legal advice. Finally, it is apparent that certain victims fall outside the protection of the statutes. Thus, parties who are not or have never lived together either within or outside matrimony are outside the protection of the legislation, as are couples who are divorced.³⁶ The only possibility for injunctive relief for victims in these circumstances is as ancillary injunctive relief to a primary action, such as a tortious claim.

60. For some time injunctions had been available as ancillary to a substantial claim, for example, divorce or judicial separation or a claim for damages in tort, but the injunction was not pursuable as a primary cause. In 1976, the Domestic Violence and Matrimonial Proceedings Act, the result of a private member's bill, cured this defect and provided that a victim of domestic violence could apply to the county court for an injunction without taking other proceedings.³⁷

61. The Act, which at one time was seen as a comprehensive code to deal with domestic violence, gives protection to cohabitants as well as married spouses, but it protects only those couples who are living together or those who have at least only recently separated.³⁸ Recently, however, the Act's claim to comprehension has been destroyed by the House of Lords decision in Richards v Richards [1984] AC 174 wherein it was decided that any orders concerning occupation of the matrimonial home between married spouses are governed by the principles of the Matrimonial Homes Act 1983. This Act, originally passed in 1967, was unconnected with domestic violence, but was enacted, rather, to protect the rights of a non-owning spouse whose spouse had transferred the matrimonial home to a third party.³⁹ In its current form, however, the Act gives the court power to prohibit either spouse from exercising his or her right to occupy the house, even where that spouse is the sole owner and it would appear that the Act gives the court the power to make permanent exclusion orders. The effect of the decision in Richards v Richards is that in situations where a woman is married and she wishes to have her husband excluded from the home, she must apply by originating summons in the High Court or the county under this Act (see Practice Direction (Matrimonial Home: Rights of Occupation) [1985] 2 All ER 1088).

62. The decision of Richards v Richards adds complications to this area of the law. There is, first, no jurisdiction under the Act to grant a non-molestation order, which must be applied for under the Domestic Violence and Matrimonial Proceedings Act 1976 in a different court. Second, unlike under the Domestic Violence and Matrimonial Proceedings Act, it appears that there is no jurisdiction under the Matrimonial Homes Act to prohibit the spouse from entering the neighbourhood. Finally, questions have been asked as to whether the order under the Act is properly classed as an injunction, an important issue as it is only to an arrest power that an injunction can be appended.⁴⁰

63. In order to acquire relief under the Domestic Violence and Matrimonial Proceedings Act it is unnecessary to prove specific grounds. The court need only be persuaded that in the circumstances of the case an injunction is necessary. The application is by affidavit, although in urgent cases oral evidence may be heard by the judge who will require the applicant to file the affidavit within 24 hours or less. In the usual course of events the affidavit will be served on the other party at least four clear days before the hearing. In urgent and dangerous cases an application may be made *ex parte*. Both the fact that the application is by affidavit and may be made *ex parte* where necessary provide essential protection to battered wives where the situation is particularly dangerous.

64. The court has the power to make both non-molestation orders and exclusion orders under the Act. An arrest power may be attached to either order.

65. A non-molestation order will enjoin the person named in the injunction from molesting the victim or any children, not necessarily her own, who may be living with her (s.1(1)a). Molestation has a wide meaning and includes not only violence, but harassment.⁴¹

66. The court is given the power to exclude the man from the joint home entirely, regulate the use of the home, stop a man from coming into a specified area or allow the victim to re-enter the home (s.1(1)c). Controversy has been caused by orders which exclude a man from a home in which he has an 'interest', whether as an owner or a protected tenant. Hence, a practice direction of 1978 (see [1978] 2 All E.R. 1056), advises the court to exclude owners or protected tenants for three months only in the first instance. This does not, however, prevent the court granting an injunction for a much longer period if the circumstances warrant it. As exclusion orders have extreme results, in some instances almost amounting to property transfers, courts exercise their discretion in giving the remedy carefully: Richards v Richards [1984] 1 AC 174, 215.

67. If the spouses are married, exclusion orders are governed by the principles of the Matrimonial Homes Act 1983 and the case of Richards v Richards. The Act makes clear that the

conduct of the spouses, their needs and resources and the needs of any children are the relevant considerations. The needs and welfare of the children are not the first consideration, except in cases where the child's custody or related matters are directly in point: Richards v Richards (supra) at 204 per Lord Hailsham, 222 per Lord Brandon. Unless a spouse has a joint interest in the property with her husband, her right of occupation will cease on the pronouncement of the decree absolute of divorce, unless the court has made an order under the Act directing otherwise during the course of the marriage. In order for the wife to retain an interest in the home after decree absolute, she must proceed in the divorce jurisdiction for ancillary relief.⁴² Where they are unmarried, the principles are less clear. It is likely, however, that the same tests will apply.

68. While it appears that the Domestic Violence and Matrimonial Proceedings Act confers extensive property rights on unmarried spouses, it is clear that in practice such are not afforded. Any exclusion order is likely to be of short duration, not depriving the owner of property rights, but giving the parties breathing space and perhaps allowing the other party to acquire alternative accommodation⁴³. Certainly, no order under the Act will prevent the owner dealing with his property and such an order will not bind third parties.⁴⁴

69. The Domestic Violence and Matrimonial Proceedings Act contains provisions which seek to provide non-molestation and exclusion orders with 'teeth', so the woman does not find herself in the situation of protecting herself with a piece of judicial paper, which may not be worth the paper it is written on.⁴⁵ The Act provides that a power of arrest may be attached to certain injunctions specified in the Act. Such power enables the police to arrest, without warrant, anyone that they have reasonable cause to suspect is in breach of an injunction (s.2(1)).

70. The Act states that where a judge grants an injunction which restrains the other party from using violence against the applicant or a child living with the applicant or which excludes the other party from the matrimonial home or from a specified area in which the matrimonial home is situated, an arrest power may be attached (s.2(1)). The power to arrest may only be attached where two preconditions are fulfilled it must be proved by evidence that the respondent has caused actual bodily harm to the applicant or child and there must be a likelihood of further harm (s.2(1)). Actual bodily harm for this purpose is defined as any hurt or injury calculated to interfere with the health or comfort of the victim and is not confined to physical harm.⁴⁶

71. It appears that as long as an injunction contains a provision as specified in the Act a power to arrest may be attached. It would seem, therefore, that it does not matter whether the injunction is conferred under the Domestic Violence and Matrimonial Proceedings Act 1976, the Supreme Court Act 1981 or the Matrimonial Homes Act 1983⁴⁷, such a power should be attachable.⁴⁸

72. The power of arrest will be granted on the application of a married or unmarried spouse. However, where the parties are married there is no power to attach an arrest power to an injunction after the decree absolute of divorce.⁴⁹ Where the parties are unmarried the court may be more liberal and attach such a power even though the relationship has ended (Adeoso v Adeoso [1980] 1 WLR 1535). A power of arrest will not be attached to the injunction lightly and judges have considerable discretion in this area.⁵⁰

73. Where such a power is attached, it is registered at the applicant's local police station. A constable will be empowered to arrest without warrant a person he suspects reasonably of being in breach of the injunction "by reason of that person's use of violence or, as the case may be, of his entry into any premises or area" (s.2(3) Domestic Violence and Matrimonial Proceedings Act 1976). If arrested, the man must be brought before a judge within 24 hours of his arrest and during that 24 hours he may not be released except on direction of a judge.

74. The ultimate sanction for breach of an injunction is committal to prison. In practice, however, courts are reluctant to commit for breaches of an injunction, except where there is serious violence or repeated breaches of the order. Usually the court deals with the matter by warning and where no power of arrest was attached to the original injunction, by adding such a power (Ansah v Ansah [1977] 2 AllER 638, 643 per Ormrod LJ).

75. The final piece of legislative help available to a victim of domestic violence is the Domestic Proceedings and Magistrates' Courts Act 1978, which is available to married spouses only. The Act empowers the magistrates' court to make protection orders which are analogous to non-molestation orders. Such orders will enjoin the respondent from using or threatening to use violence against the person of the applicant or a child of the family, or indeed not to incite or assist anyone to use or threaten violence (s.16). Such an order will only be made where it is proved that the husband has used or has threatened to use violence against his wife or any of the children and the court feels that because of the likely repetition of such conduct, an order is necessary. The jurisdiction of the magistrates is less extensive than the superior courts, there being, in particular, no jurisdiction to grant an order against molestation short of violence.

76. If the husband has actually used violence against the wife or the children of the family, or threatened them and used violence against a third party, such as the wife's boy friend, or has contravened a protection order by making further threats, the court has the power to order him to leave the matrimonial home or prohibit him entering it.⁵¹ Again, the magistrates' jurisdiction is narrower than the superior courts in that they have no power to keep him away from the area in which the home is situated.

77. An application for a protection or exclusion order can be made at the same time that a summons is issued for a maintenance or custody order or independently. Where the case is urgent, an application may be made to a single magistrate or bench without notice to the husband for an 'expedited order'. Such an order requires the husband not to use or threaten violence to the complainant or the children of the family, but it cannot contain a provision that the husband leave the home.

78. An expedited order is designed to last only so long as it may be necessary and the matter to be brought before the court. Such an order will not be made unless there is imminent danger and it will not last more than 28 days at the longest (s.16 Domestic Proceedings and Magistrates' Courts Act 1978).

79. Two procedures are provided in the Act to secure enforcement of the orders. First, the wife can apply to a justice of the peace for a warrant to be issued directing the police to arrest the respondent for disobeying the order. It is to be noted that the wife must take the initiative of applying for the warrant.

80. On arrest and court appearance, the magistrates may order the defaulting husband to pay a fine, which has a maximum of £1,000, or commit him to prison for a period not exceeding two months (s.63(3) Magistrates' Courts Act 1980).

81. The second method to secure enforcement is for the court to attach an arrest power to the order. This can only be attached where the respondent has physically injured the applicant or a child of the family and the magistrates are of the opinion that he is likely to repeat his behaviour (s.18(1) of the 1978 Act). The attachment of such a power is not the rule and magistrates must give reasons for the attachment of such a power: Widdowson v Widdowson (1982) 4 FLR 121. Where such is attached the police are given the same power to arrest for suspected breach as under the Domestic Violence and Matrimonial Proceedings Act 1976.

82. The magistrates' court is not a popular forum for domestic violence disputes. The jurisdiction is narrower than the higher courts: there is no power to make orders to prevent

molestation and the emergency proceedings are restricted. Further, the legislative provisions granting jurisdiction appear unnecessarily complex. In numerical terms, however, a significant number of applications for relief are made to the magistrates. One reason for this is that legal aid may not be available to bring higher court proceedings where magistrates' court proceedings would provide appropriate relief.⁵²

Scotland, Northern Ireland, New Zealand, St. Vincent & The Grenadines

83. Notwithstanding the difficulties that the English legislation indicates, a number of jurisdictions have followed its English lead in the drafting of their legislation. Few, however, exhibit the complexity and the difficulties of the English scheme.

84. In Scotland, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 was introduced to remedy the fact that Scots law gave no occupancy rights in the matrimonial home to the spouse who was not the owner or tenant of it and that Scots law gave inadequate protection to the victim of domestic violence.

85. The Act creates an exclusion order (s.4), whereby one spouse (a term which includes persons living together as husband and wife)⁵³ may obtain an order suspending the occupancy rights of the other spouse in the matrimonial home. The court has the power, in making the exclusion order, to grant an order prohibiting the excluded spouse from entering the matrimonial home, removing furnishings and plenishings or approaching the matrimonial home (s.4).

86. Such an order must be made if it appears to the court (Court of Session or the sheriff) that the order is necessary for the protection of the applicant or of any child of the family⁵⁴ from any conduct or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.⁵⁵

87. The Act also specifies that an exclusion order ought not be made if it appears to the court unjust or unreasonable to do so, having regard to the conduct of the spouses, their respective needs and financial resources, the needs of any child of the family, the extent to which the home is used in connection with a spouse's trade, business or profession and whether the spouse legally entitled to the legal use of the home offers or has offered to provide the other spouse with alternative accommodation (ss.3(3) and 4(3)). This list is not exhaustive.

88. Interdicts may be awarded independently of exclusion orders. Such interdicts are aimed to prevent the conduct of one spouse towards the other or towards a child of the family. They may also prohibit the interdicted spouse from approaching the matrimonial home or the area surrounding the home (s.14).

89. Unlike the English Act, the Scottish Act requires that a power of arrest be attached to certain matrimonial interdicts. This requirement was inserted into the Act to avoid the experience in England, where such an attachment is discretionary, of the courts being reluctant to impose the power.⁵⁶ Accordingly, under s. 15 the court is given the duty to attach an arrest power to interdicts which are ancillary to exclusion orders, even where such orders are interim only and to any other interdict where the non applicant spouse has had the opportunity of being heard or represented before the court, unless it appears in all the circumstances to the court that the attachment of such an order is unnecessary. The court has no discretion to refuse to attach an arrest power to an interdict which is ancillary to an arrest power where the spouse requests it.

90. The arrest power does not become effective until the interdict is served on the non applicant spouse and it ceases to have effect on the termination of the marriage (s.15(2)).

91. Where a power of an arrest is attached, a constable may arrest without warrant any person who he has reasonable cause to suspect is in breach of an interdict (s.15(3)). The Act contains detailed provisions on the procedure to be followed when a person has been arrested for breach of an interdict to which an arrest power has been attached.

92. In short, after arrest, the officer in charge of the police station may liberate the arrestee unconditionally if he is satisfied that there is no likelihood of violence to the applicant spouse or a child of the family, or refuse to liberate him. Where the spouse is liberated, the facts and circumstances giving rise to the arrest must be reported to the procurator fiscal who may choose to take criminal proceedings. If the procurator fiscal chooses not to take such proceedings he will take all reasonable steps to inform the other spouse and her solicitor. If the arrestee is not liberated and the procurator fiscal chooses not to take criminal proceedings, the arrestee must be brought before the sheriff not later than during the day after the arrest. At this proceeding the procurator fiscal presents a petition containing a statement of the non-applicant spouse and a request that detention occur for a further period not exceeding two days. If it appears to the sheriff that (a) the statement of the facts discloses a prima facie breach of interdict, (b) that proceedings for breach of interdict will be taken, and (c) that there is substantial risk of violence by the arrested spouse against the other spouse or any child of the family, then he may order detention for a further period of two days.

93. All three requirements must be fulfilled or the arrestee must be released (ss.16,17). After this detention proceedings for breach of interdict will be taken.

94. The court also has power to make an interim exclusion order. Such an order can only be made if the non applicant spouse has been given an opportunity to be heard by or represented before the court (s.4(6)).

95. As in England, interdicts are available as ancillary relief. Thus, interim and full interdicts against molestation of a wife by her husband are obtainable as ancillary relief in divorce and other proceedings.⁵⁷

96. Further, as in England and Wales, a Scottish spouse is able to sue her husband for any delict. Again this is subject to the qualification that such an action may be dismissed by the court if it appears that no substantial benefit would accrue to either party in the continuation of the proceedings (Law Reform (Husband and Wife) Act 1962).

97. An interdict of this nature could not prevent the husband entering the matrimonial home if he was the tenant or owner of the house. Further, at least one witness is necessary to prove that the spouse had been violent and was likely to be so again. No arrest power is attachable to the interdict.

98. Provisions in Northern Ireland are similar to the Scots interdict. Hence, the Domestic Proceedings (Northern Ireland) Order 1980 allows a magistrates' court to award a personal protection order to a married or unmarried spouse⁵⁸ where it is satisfied that the respondent has used or threatened to use violence against the applicant or a child of the family and it is necessary for the protection of the applicant or a child of the family that an order should be made (Art. 18(1)). The order restrains molestation of the applicant or the child of the family.

99. The court is also empowered to make exclusion orders where molestation has occurred in contravention of a personal protection order and such an order is necessary for the protection of the applicant or a child of the family (Art. 18(4)). An exclusion order will operate to exclude the respondent from the matrimonial home and the area in which it is situated (Art.18 (4)). The order may also forbid the respondent to enter in or in the vicinity of any other place, for example, the refuge where the victim has gone.

100. The exclusion order will require the spouse to leave the matrimonial home, forbid him from entering it, restrain him from disposing of the estate in it, prohibit him from damaging it and prohibit him from removing goods from it (Art. 18(4)). The order is a temporary measure, the maximum period of its duration being six months (Art. 18(9)).

101. A power of arrest may be attached to such exclusion orders. The attachment of such a power is discretionary, being attached when a court is satisfied that violence or the threat of violence has been used and there is a continuing threat that it may occur again. Such a power allows the police to arrest without warrant any person they have reasonable grounds to believe is in breach of such an order. An arrest may be made with reasonable force and the police are granted reasonable entry rights to affect the arrest (Art.19).

102. On arrest the police have the power to release the offender unconditionally, release him on condition he reports to a police station or appears in court or keep him in custody. Where the police select the latter option, the offender must be brought before a court within 24 hours of his arrest or release.

103. The Order provides for interim orders where such are appropriate as for example, where there is imminent danger. These become effective when they are served on the respondent and can last up to 5 weeks during which time a full order can be applied for (Art.21).

104. The St Vincent and the Grenadines' legislation is very close to the Scottish protective legislation. Power is given to judges of the High Court to grant injunctions to a woman, who may or may not be a married spouse to restrain the man from using violence against her, restrain the man from using violence against any child who is living with her and to exclude the man from the matrimonial home or from a specified area, including the matrimonial home (s.3(1)). In cases where such an injunction exists and actual bodily harm has been caused to the applicant or child and it is likely there will be a repetition of such violence, one may attach a power of arrest to the injunction. This allows the police to arrest any person who is believed, on reasonable grounds, to be breaching the injunction (s.3(3)). Provision exists in the Act to exclude a man from the matrimonial home where the court believes such a course to be reasonable, bearing in mind the conduct of the parties, their respective needs and financial resources and the needs of any relevant children (s.4).

105. Currently, the only other Commonwealth jurisdiction which has enacted injunctive proceedings for domestic violence is New Zealand which, in the Domestic Protection Act 1982 brings together all the rules relating to domestic violence, untying them from the law relating to matrimonial causes and the dissolution of marriage. Clearly, this indicates that the New Zealand Parliament has concluded that domestic violence should be separate from the rest of family law and that the general criminal law has been conceived of as inadequate to deal with the problem of violence in the home.

106. The legislation itself extends protection to those "living together in the same household" as well as to those that are married (ss.4, 13, 19, 24). Further, those who have been married, but whose marriages have been dissolved fall under the umbrella of the Act. The law applies only to persons of the opposite sex, the Act expressly referring to "a man and a woman living together in the same household". Hence parties living together in a homosexual domestic relationship are not covered by the Act. While the Act is clearly designed to cover those who are living in heterosexual de facto relationships, the Act is not limited in this way. The Act applies to a man and a woman living in the same household, but does not require any element of conjugality.

107. Thus the Act will cover relationships with no sexual overtones, as for example a brother and a sister living together. The Act, however, is of no assistance to unmarried couples where there is no element of cohabitation. Hence, in situations where lovers are living apart the Act will be irrelevant. Finally, the Act is of no assistance to a minor,

even in those cases where he or she is affected by the violence occurring between his or her parents. However, the Act does give some protection to a "child of the family" upon the application of an adult (ss. 5(1) a, 7, 20(1), 21(2)b, 25(1), 26(2)b, 30(2)).

108. The orders available under the Act are similar to orders available in the other Commonwealth jurisdictions.⁵⁹ First, occupation orders and tenancy orders are available in order to exclude the violent partner from the family home. Both of the orders are available *ex parte* only in situations where violence has occurred and where delay caused by proceeding on notice would be dangerous (ss.20, 25). The court has power to make a final order if it is satisfied that such an order is necessary for the protection of the applicant or in the best interests of a child of the family. An occupation order remains in force until the period of the order expires or either party makes a further application to the court (s.23), while a tenancy order has the effect of transferring the tenancy to the applicant until the tenancy itself expires or the court orders that the tenancy revert in the respondent on the application of the respondent (s.28).

109. These orders have been attacked because they may result in a being deprived of his property rights. Certainly, a valid objection could be taken to the legislation in situations where the violent partner has a legal or equitable estate in the property. No guidance is given to the court in the Act as to how long the period of exclusion of the violent partner should be. In the case of married or formerly married partners, ultimate recourse may be made for the reallocation of property rights under the Matrimonial Property Act 1976, but no such relief is available to unmarried parties. Clearly more guidance on this issue from the legislature would have been helpful. If the period of exclusion is short it may be of little help to the victim, while if the period is long, an estate holder may have valid objections.

110. Second, furniture orders grant to the applicant, for such period and on such terms and subject to such conditions as the court thinks fit, the use of all or any of the furniture, household appliances and household effects in the premises to which the occupation order or tenancy order relates. The order is only available as ancillary to the grant of an occupation or tenancy order and will only be made if there is a child living on the premises. It expires after three months or when the order lapses, whichever is the sooner (s.30).

111. Third, non-molestation orders are available to persons who are already living apart or for whom living apart is a possibility by virtue of some other proceedings, such as separation proceedings (s.13). The orders cease to have effect if the persons concerned resume living together (s.17). The orders are aimed to stop actions of harassment such as entering and remaining on land or in buildings occupied or used by persons in whose favour orders, for example, occupation orders are in force, waylaying people in public places or persistent telephone calls. Breach of a non-molestation order is an offence punishable by imprisonment (s.18). Under the previous legislation, it had been the practice of the courts to grant these orders only on evidence of the likelihood of future violence and only on such evidence which was accompanied by evidence of actual violence. Suggestions have been made that because non-violence orders are available under the Act, the courts may be more likely to issue non-molestation orders in situations which fall short of actual violence, but which may be aptly characterised as psychological or emotional violence.⁶⁰

112. Fourth, the Act provides that the courts may issue non-violence orders against persons who have already engaged in physically violent activities and who are likely to do so again (s.6). The orders prohibit the use of violence and threats of violence (s.7), and are available to persons who are living together or living apart (s.4).

113. The unusual feature of non-violence orders is that breach of such an order is not an offence, but is sanctionable by detention (ss.9, 12). The police are empowered to arrest without warrant, any person who they have good cause to suspect of having committed a breach

of a non violence order, if they believe that the arrest is reasonably necessary for the protection of the person in whose favour the order is made (ss.9, 10). Once the person has been arrested, he must be detained in police custody for a mandatory period of 24 hours unless that person or the police decide to initiate an appearance before a judge or a justice, who may then direct an earlier release from custody (s.12) No detention is allowed beyond the 24 hour period and no charge may be laid for the breach of the order as that breach is not an offence *per se*.

114. The non-violence order has proved controversial. First, the unusual power given to the police of arresting and detaining without warrant for a period of 24 hours is believed by some to be a breach of natural justice. It is argued that due process requires that the detainee be brought before an adjudicatory body as soon as possible to determine whether detention is necessary. In the case of the non-violence order, adjudication will be available only if the police or the detainee decide to initiate an appearance before a court or a Justice. By contrast, if the perpetrator had been arrested under the ordinary criminal law for assault, there would be an automatic right to a hearing. Second, the Act lacks a charge for a breach *per se*. This means that persons who are arrested for the breach of such an order are liable to be branded with guilt without any hearing because no charge follows from a breach *per se*. Arrest gives them no opportunity for acquittal or even for dropping of a charge.

115. On the other hand, proponents of the Act argue that the order is particularly useful in the context of domestic violence because it allows the police a freedom of action to which they have been unused. Previously, they had to choose between arrest and attempting to calm the situation, but here they are given an opportunity to follow a middle path. The victim is given 24 hours in which to consider her situation, while the perpetrator is given a necessary 'cooling off' period. Abuse of the order is unlikely, it is argued, as police detention cannot occur unless there is already a court decided order in force. Moreover, the detainee has a right to be brought before a judge for an individual determination as soon as practicable and in any event any abuse would only result in detention for 24 hours.⁶¹

116. Atkin, Sleek and Ullrich in their 1984 comment on the Act⁶² conclude that the non-violence order, carrying with it the possibility of violation of rights, may prove less useful for victims of domestic violence than had been hoped. They argue that the main purpose behind the Act's power of detention without charge is to provide the victim of domestic violence who is not willing to see legal proceedings of assault through, for whatever reason, with a remedy. They believe that there will be few victims of domestic violence who will have the courage to use the non-violence order and not have the courage to use the criminal process. Further, they believe 24 hours is not long enough for a perpetrator to cool off, but it is long enough for him to become increasingly hostile towards his victim and plan means of retaliation. Moreover, they are of the opinion that the police will be no more willing to enforce these orders than they are to pursue other cases of domestic violence. Their net conclusion is that it would have been better for the legislature to have made breach of non-violence orders an offence and have enacted a provision forbidding the granting of police bail to persons arrested for such a breach and directing that a court fail to award bail unless it was shown that further violence was not likely. This would mean that all persons who were arrested for a breach of a non-violence order would have to be brought before a court as soon as possible to decide the need for continued detention, a decision that would be based on the application of general principle to individual circumstances, including the important issue of the protection of victims from violence. If no continued detention were necessary, the arrestee would be released, while if the reverse were the case the arrestee could be detained for a longer period of time. This would mean that the victim would be given a longer period of time in which to determine how to achieve more permanent protection.

117. Finally, section 37 of the Act allows the court to recommend that either or both parties participate in counselling that the court specifies. this raises the issue of

training for counsellors dealing with this area of family law. At present it would appear that there is a need for specialised training for not only counsellors, but judges, lawyers and the police who administer the Act.

Comment

118. It is clear that the aim of the injunctive procedures described above is to provide a wife with a short term measure, falling short of a criminal sanction, where she is the victim or potential victim of domestic violence.

119. While this aim is laudable, it is apparent that much of this legislation is technical and complex. Certainly, most jurisdictions avoid the overcomplex pattern of the English scheme, but in most jurisdictions the remedies require a degree of legal literacy, awareness and expertise not possessed by most laypeople and indeed, often possessed only by specialised lawyers. Further, most injunctive procedures rely upon a co-operative and understanding police force, and thus the same difficulties which confront women in the criminal context exist in the context of the injunction.

120. Despite these criticisms, it is not suggested that such procedures be dismantled or that Commonwealth countries contemplating the passage of such legislation⁶³ should reconsider. What is suggested, is that such legislation should be rendered less complex, more accessible and that a sufficient social context for the legislation, including, for example, police training and short term shelters be established.

PART B: SEXUAL ASSAULT: RAPE

121. All Commonwealth countries provide criminal sanctions for sexual offences against women, such offences being variously described as abduction, defilement, indecent assault, procuration, unlawful detention for immoral purposes, unlawful carnal knowledge and rape. Rape, which is most commonly defined in the jurisdictions as the penetration of a vagina with a penis without the consent of the woman concerned is the most important and serious of such crimes.

122. Considerable agitation for the reform of the law relating to sexual offences and in particular, the crime of rape, exists in a number of Commonwealth countries. Some of these countries have embarked upon comprehensive reforms of both a substantive and procedural nature, but, more commonly, the crimes are defined and the procedural rules remain in the same form as last century.

123. Two basic objectives are behind the current move for legal reform in the area. First, it is hoped that reforms will lead to the improvement of reporting, prosecuting and conviction rates for sexual assault. Second, reformers hope to minimise the victimisation of the complainant by the legal system itself.

124. A number of common questions confront Commonwealth jurisdictions in their attempt to realise these objectives and to introduce appropriate strategies to confront the problem of sexual assault of women.

They are:

1. The definition of rape.
2. Whether sexual assault within marriage should be criminalised.
3. The issue of the consent of the victim and the related question of the belief of the accused as to the alleged victim's consent.
4. Whether procedural reforms are necessary to ameliorate the alleged victim's ordeal at trial. Here it is important to consider evidentiary requirements such as that of corroboration and evidence of the woman's past sexual history.
5. Whether systems can be established to make the treatment of the alleged victim less victimising.

The definition of rape

125. Most Commonwealth jurisdictions model their definition of rape upon that of the English law. Hence rape is defined as unlawful intercourse by a man with a woman who is not consenting to the act and who is not the man's wife.⁶⁴ Sexual intercourse is defined as existing on proof of the slightest penetration by the penis of the vagina, ejaculation being unnecessary: Hughes (1941) 9 C & P 752.

126. A number of jurisdictions have widened the definition of sexual intercourse required for rape beyond penile penetration of a vagina to include other sexual assaults.. Thus, South Australia defines sexual intercourse to include the introduction of the penis of one person into the mouth of another (s.5 Criminal Law Consolidation Act). Victoria goes further and defines "sexual penetration" as the introduction of the penis into the vagina, anus or

mouth of a person irrespective of their sex and the non-consensual introduction of an object into the vagina or anus of a person, whatever their sex, otherwise than as part of some accepted medical treatment.⁶⁵ New Zealand, similarly, introduces the concept of "sexual violation". This is defined as (a) the act of a male who rapes a female, which is defined in traditional terms and (b) "unlawful sexual connection" which is defined as penetration of the vagina or anus of any person by any part of the body of another person or by an object otherwise than for bona fide medical purposes and any connection between the mouth or the tongue of any person and any part of the genitalia of any other person (s.128 Crimes Act 1961). Again, New South Wales redefines sexual intercourse to include penetration of the vagina or anus of any person by any part of the body of another or by an object, sexual connection occasioned by the introduction of the penis of a person into the mouth of another and cunnilingus.⁶⁶

127. Canada also widens the definition of sexual conduct for the purposes of sexual offences, but its definition is not specific, being tied to a definition of assault ⁶⁷ which covers the intentional application of direct or indirect force in the absence of consent, the threatened use of force and also accosting, impeding or begging, while openly in possession of a real or imitation weapon (s.244 (1) Criminal Code, RSC, 1970). Consent for these purposes will not exist if it is obtained by force, threats, fraud or exercise of authority (s. 244 (3) Criminal Code). No clarification exists in the legislation to indicate the factors which will transform the assault into sexual assault and it is clear that this has already presented the courts with difficulty. Thus, the New Brunswick Court of Appeal has decided that assault to the breasts is not sexual as it took the view that secondary sexual characteristics must be excluded as otherwise touching a man's beard would be a sexual assault: Chase v The Queen (1984) 40CR (3d) 282, 13 CCC (3d) 187. Other Canadian courts have refused to follow this narrow approach and have concluded that assault with intent to have sexual intercourse without consent, assault for the purposes of sexual gratification (R v Alderton (1985) 44CR (3d) 254 (Ont)), an act of force including an act intended to degrade and to demean for sexual gratification (R v Taylor (1985) 44 CR (3d) 263 (Atla)), assault with a sexual motivation⁶⁸ and assault in an "aura of sexuality"⁶⁹ as coming within the definition.

128. It is clear that the definition of proscribed activity lends itself to a narrow approach, perhaps limiting it to the traditional definition of rape, but at the same time a liberal approach is equally possible, allowing the legislation to condemn a wide variety of unwanted sexual activity.⁷⁰ The interpretation of the legislation has been left to the judiciary. It is hoped that judges will exercise their discretion with some knowledge of women's perspectives of sexual conduct.⁷¹

129. Beyond redefining sexual intercourse in terms which are gender-neutral and encompass a wide range of sexual assault, New South Wales and Canada also introduce categories of sexual assault ranging from what would have been deemed aggravated rape in their previous legislation and will still be deemed as such in most jurisdictions, to indecent assault. Penalties escalate in accordance with the seriousness of the offence, such seriousness being judged in the light of the violence or any other act used to gain submission and which accompanies the unwanted sexual connection.

130. Hence, in New South Wales, sexual assault category 1, which is defined as "sexual connection" involving malicious infliction of grievous bodily harm and malicious infliction of actual bodily harm, carries the highest criminal penalty;⁷² while sexual assault category 2 is defined as sexual connection by means of the threat of or infliction of harm by an offensive weapon; sexual assault category 3 is defined as sexual connection with another knowing that the other person does not consent or with reckless indifference as to whether the other consented; and, finally, sexual assault category 4 is defined as an assault with indecency with or towards a person under 16. Canada, similarly, creates three degrees or tiers of sexual assault. Grade 1 penalises simple sexual assault; grade 2, sexual assault,

accompanied with the possession, use of or threatened use of a weapon, threats to a third party or the causing of bodily harm; and grade 3, aggravated sexual assault (Bill C-127).

131. A number of other jurisdictions are considering amendments to their rape laws based on the models provided by the Australian states and Canada.⁷³ South Australia is considering proposals sufficiently different from the current legislation that scrutiny of them is warranted here.⁷⁴ As in the other jurisdictions, sexual assault is widened from penile penetration of a vagina and the crimes are gender neutral,⁷⁵ but the degrees of sexual assault sanctioned differ. Sexual assault grade 1 is defined as sexual penetration of another without consent where that person is under 17 or over 65, where more than one person is involved in the offence and where sexual penetration was preceded, accompanied or followed by the abduction of the victim, the accused forcibly gaining access to the place where the victim was present, an attempt or threat to render the victim insensible, unconscious or incapable of resistance, an act of gross indecency performed on the victim, an act calculated to humiliate the victim substantially (or the threat of such an act), the intimidation of the victim with an offensive weapon, the assault of any person or the threat or commission of a criminal act against any person. Sexual assault grade 2, which is recognisable as the traditional crime of rape, is sexual penetration by another without consent. Sexual assault grade 3 is indecent assault in the circumstances of sexual assault grade 1, but sexual penetration is not required. Sexual assault grade 4 is indecent assault.

132. The clear intention behind the redefinition of the crime of rape to include gender-neutral acts is to stress the violent aspects of the act of rape, rather than its sexual nature, a philosophy which is taken even further in those jurisdictions where sexual assaults are graded. The new definitions acknowledge that violation may occur in the absence of penile penetration. Forcible penetration by a foreign object is as violating as forcible sexual intercourse. Likewise forced oral sex and sodomy often accompany forced intercourse. Widening of the definition is thus in line with the understanding of rape as a means of humiliation, degradation and violence through sexual means.⁷⁶

133. Such redefinition does not receive unanimous support. The English Criminal Law Revision Committee⁷⁷ for example, argues strenuously for the retention of rape in its present definition, recommending that penalties for indecent assault, which encompasses other penetrations and oral intercourse should be raised.⁷⁸ Its view rests on two grounds. First, that "the concept of rape as a distinct form of criminal misconduct is well established in popular thought and corresponds to a distinctive form of wrongdoing".⁷⁹ Second, the risk of pregnancy is an "important distinguishing characteristic of rape".⁸⁰

134. Neither of these reasons are particularly compelling. The first would suggest that reform of any area of the law is impossible where the public has a particular view of the law,⁸¹ while the second ignores the fact that pre-pubertal, menopausal and sterilized women are all covered by the law of rape. Moreover, this is inconsistent with the Committee's view that non-consensual buggery of a man or a woman was similarly an offence deserving special condemnation.⁸²

135. While the views of the English Committee are worthy of serious consideration, it may be that its view of rape is too narrow. Forcible penetration by a penis or a bottle is similarly outrageous and the latter may involve an act of sadism likely to cause the victim greater pain and damage than rape in its traditional definition. Similarly, non-consensual oral sex may well be more disturbing than penile penetration. However, the current redefinitions warrant one serious reservation. In those jurisdictions where tiers of offences have been introduced, such tiers are based in escalating degrees of violence other than the sexual attack itself. Rape, therefore, which is committed in circumstances where the victim submits out of fear or her attacker which does not arise out of actual or threatened violence comes low in the tier. This may lead to the misconception that sexual aggression per se is trivial in comparison with sexual aggression accompanied by violence.

It is essential that jurisdictions wherein redefinition on this model has occurred closely monitor the application of their legislation so that the seriousness of sexual assault simpliciter is not underrated.

136. An issue which is closely associated with the question of whether rape should be redefined is whether the offence should continue to be termed "rape". Certainly, a number of Commonwealth jurisdictions have rejected the word "rape" in favour of a more neutral term which covers all offences, which are distinguished only by a number which indicates a level of seriousness⁸³ and others indicate in their reform proposals that they will shortly follow this lead.⁸⁴ At the same time, the term is specifically maintained in the legislation of other jurisdictions.⁸⁵

137. The principal reason advanced for the maintenance of the term is that it carries with it the special opprobrium and condemnation that should be reserved for the act of forced sexual intercourse. It is suggested that to discard the term would be to "water down" the special character of rape.⁸⁶

138. A number of serious objections can be raised against the continued use of the term. First, juries have preconceived notions of the crime of "rape". They consider it to be a violent and destructive crime and may thus be loathe to convict in circumstances in which their preconceptions are not fulfilled, as for example, where the accused and alleged victim are past lovers and the crime is not violent.⁸⁷ Second, defence counsel may exploit the known preconceptions of the jury, indicating that the events which are under consideration are not particularly bad and that the alleged victim has lost very little. Third, the term carries with it a social stigma for the victim, particularly in view of the current societal attitude that she may have "asked for it".⁸⁸ Finally, "rape" is a fixed term covering a range of violations.⁸⁹

139. The case for abandoning the term "rape" rests in sum on its emotive and stigmatising character. This character may well outweigh the risks of weakening the impact of the law and of causing confusion by rejecting the traditional concept.

Sexual assault within marriage

140. In most Commonwealth jurisdictions, sexual assault by a husband on his own wife is not a crime.

141. The rule is believed to originate in a statement by Sir Matthew Hale, an English judge, in his History of the Pleas of the Crown.⁹⁰ No authority is provided for his statement and it has been suggested that prior to this statement convictions for rape by husbands had occurred.⁹⁰ Nonetheless, Hale's statement has proved critical and since the case of Clarence⁹² in 1888 a wife has been considered to have no right or power to refuse her consent to intercourse with her husband.

142. It is possible, however, for a husband to be convicted of assault upon his wife in those circumstances where violence has been used to gain her submission.⁹³ Furthermore, where the parties are separated by agreement or there is a non-molestation order or an order of judicial separation or divorce a husband can be convicted of rape.⁹⁴ The same would, it would seem, apply to a magistrates' order excluding the husband from the home, but not to a personal protection order which prohibits only violence or the threat of violence.⁹⁵ The marital immunity, as it is called, does, however, apply in circumstances where a husband and wife are living separately without any form of separation order or agreement.

143. A number of arguments are raised by those who favour the retention of the marital immunity. First, it is argued that rape within marriage would face serious difficulties of

proof and the threat of unjustified proceedings could be used by a vindictive wife against her husband. Second, it is argued that the criminal law should not intervene in marital relationships, the wife being, at all times, adequately protected by her matrimonial remedies.⁹⁶ Finally, perhaps the most fundamental plea for the retention can be seen in the conclusion of the English Criminal Law Revision Committee which stated:

"Spouses have responsibilities towards one another and to any children there may be as well as having rights as against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for many children could be grave, and for the wife too."⁹⁷

144. The arguments for the retention of the immunity appear to be based on the view that rape within marriage is infrequent and even if it does occur, such is not as serious as rape where the victim is unrelated to the offender. Whilst there is only little research into the phenomenon, the studies⁹⁸ which exist indicate that such a view is erroneous. Indeed, evidence exists that there is considerable unwilling participation by wives in sexual activity and that the injuries suffered by such women, be they physical or psychological, can be serious.⁹⁹

145. A number of Commonwealth jurisdictions have abolished the immunity entirely or have seriously curtailed it, while still others are in the course of seriously questioning the immunity.

146. It would appear that the exemption does not exist in Scotland where the husband could and still can be convicted of raping his wife.¹⁰⁰ In South Australia a woman will be regarded as a rape victim if she is raped by her spouse and an assault occasioning actual bodily harm is threatened or inflicted, an act calculated to seriously and substantially humiliate the spouse is threatened or inflicted or there is the threat of the commission of a criminal act (s.73(5) Criminal Law Consolidation Act 1976). Victoria (s.62(2) Crimes Act 1958) takes a more conservative view, removing the immunity where the spouses are living separately and apart. The most radical jurisdictions are New South Wales (s.61A(4) Crimes Act 1900) Canada (s.246.8 Criminal Code 1970), New Zealand (s.128 Crimes Act 1961) and Western Australia (Act Amendment (Sexual Assaults) Act 1985) where the marital relationship of the victim and the offender is irrelevant in sexual offences.¹⁰¹

147. The question of rape within marriage is clearly controversial. Unwanted sexual activity is just as offensive to a wife as to any other woman. Indeed, given the breach of trust involved in such conduct, it may well be more offensive. While it is acknowledged that difficulties of proof may confront such a charge, this does not appear to be a valid reason to deny a spouse the ultimate sanction of the criminal law. Many other crimes confront the courts with similar difficulties of proof and others are capable of being used vindictively. Such arguments usually do not provide sufficient reason not to condemn and criminalise objectionable behaviour. It is up to the woman to complain of her husband's activities. As it stands, the immunity may have dubious distinction of preserving the privacy of the family, but it removes from the wife autonomy over her own body and relegates her to the status of a chattel.

Consent

148. Consent is the crux of the definition of the crime of rape in most Commonwealth countries. Rape is defined as sexual intercourse without the consent of the victim. Further, consent, or more properly, the lack of it, determines the guilt of the accused, as not only must he perform the act of penetration, but he must be aware that his victim is not consenting or at least be recklessly indifferent as to whether she is or not. Consent,

therefore, becomes the all important question in the context of the interaction between the accused and the victim. Lack of consent is the only thing which distinguishes rape from the lawful act of sexual intercourse.

149. The issues which arise from the question of whether the victim consented will not be canvassed, followed by the issues which arise from the belief of the accused as to her consent.

The victim's consent

150. In most Commonwealth countries, rape is defined as sexual intercourse against the will of the victim. Originally, the law required that the accused apply or threaten force to the victim. This changed with time, so that intercourse with a sleeping, drunk or drugged woman was deemed rape, as was intercourse which was consensual where such consent was induced by fraud¹⁰² as for example, if the man impersonated the woman's husband.¹⁰³ Further, if the accused deceives the victim as to the nature or quality of the act of sexual intercourse, the act is said to occur without her consent: R v Flattery [(1977)] 2 QBD 410; R v Williams [(1923)] 1 KB 340. In short, there has been a shift from the view that force is required to the view that lack of consent is sufficient. Here, submission is not to be taken to imply consent: R v Olugboja [(1982)] 1 WLR 133. Notwithstanding this, it is clear that severe problems face a victim who wishes to prove that she did not consent, particularly if she shows no overt signs of injury or if she has had a sexual relationship with the accused.¹⁰⁴

151. The reasons for this are varied. Most fundamentally, the victim is fighting traditional stereotypes of how women behave in sexual relations generally and in sexual assault in particular. Women are considered to be passive in sexual relations, requiring seduction. They are believed to feign lack of interest in, or even exhibit aversion to, sex, even when deeply interested.¹⁰⁵ On the other hand, women who are forced to have sexual relations are expected to behave in a conventional fashion: screaming, crying and fighting for their virtue.¹⁰⁶ These stereotypes colour police, jury and judicial reaction to a complainant. A complainant who is uninjured, behaves calmly and rationally will inevitably run the risk of being regarded as a consenting party. Even if the complainant is injured, even seriously, the prosecution will nonetheless suggest that she consented, relying on the jury to conclude that she acted consensually.¹⁰⁷

152. A number of jurisdictions, recognising the difficulties presented by the requirement of lack of consent, have attempted to shift the emphasis of the definition of the crime. Most take as their model the 1974 Michigan Sexual Conduct Statute which introduced a rape law which omitted all references to consent. Prior to this, Michigan had defined rape as sexual intercourse against the will of the victim. The new law focussed upon the prohibited conduct of the offender, rather than the consent of the complainant. Thus, the crime is committed either when sexual intercourse occurs by the use of force or coercion or in circumstances wherein the victim is deemed incapable of giving her consent. Force or coercion includes situations where the accused overcomes the victim through the threatened or actual use of physical force or physical violence, when the accused coerces the victim to consent by threats of future retaliation against the victim or any other person, retaliation being defined to include threats of punishment, kidnapping or extortion, when the offender engages in the medical treatment or examination or the victim in a manner or for purposes which are recognised as medically unethical or unacceptable and when the accused, by concealment or surprise is able to overcome the victim. The situations where the victim is deemed incapable of resistance are where she suffers from a mental disease or defect which renders her temporarily incapable of appraising her conduct because of the influence of anaesthetic or any other substance administered to her without her consent and where the victim is unconscious, asleep or for any other reason physically unable to communicate unwillingness to act.¹⁰⁸

153. The above model has been described in detail because it has been followed, with variations, in a number of Commonwealth jurisdictions. Thus, for example, in New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 replaces the crimes of rape and indecent assault with a ladder of four sexual offences. Where the offender maliciously inflicts grievous bodily harm, actual bodily harm or where he threatens to inflict actual bodily harm with a weapon,¹⁰⁹ all that need be proven is that he intended to have sexual intercourse. In these circumstances it is not necessary to prove either a completed act of non-consensual sexual intercourse or the accused's knowledge of his victim's lack of consent for other incidents of not-consensual intercourse, the law has remained essentially the same and the problems of consent remain.

154. Evidence exists to show that the amendments in Michigan and in New South Wales have had little success in shifting the focus of the crime from the victim's consent. It is clear that except where the rape is particularly brutal, the question of whether the woman has consented or not remains the crux of the crime.¹¹⁰

155. Other attempts to solve the problem of consent involve legislative identification of circumstances where consent will be deemed to be vitiated and legislative definition of consent to provide guidance for the jury. New South Wales, thus, deems consent to be absent where the victim consents under a mistaken belief as to the identity of the other person or under a mistaken belief that she is married to the offender or where submission to the intercourse is gained as a result of threats or terror, whether the threats are against the victim or any other person. It is specifically provided that a victim who does not offer actual physical resistance to the intercourse shall not be regarded by reason only of that fact as consenting.¹¹¹ Tasmania¹¹² provides that consent will exist where given freely by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which she consents. Consent will not be regarded as freely given when procured by force, fraud or threats of whatever character. Canada provides a more specific definition, indicating that consent will not exist where submission results from the application of force or threats of force to the victim or someone else, fraud or the exercise of authority.¹¹³

156. The above provisions attempt to spell out the behaviours the law regards as indicating consent or lack of consent. This to some extent relieves the fact finder of a major decision and must be of assistance in an area which is nebulous and surrounded by prejudice and assumption. Caution must be taken so that provisions of this nature are clear and do not unnecessarily limit the offences by fixing a static definition of consent.

157. The provisions so described and similar provisions under consideration in other jurisdictions¹¹⁴ codify and clarify the current law, but rarely go further. While there is a case for such clarification in that the fact finder is provided with a clear legislative guideline and the provision carries with it condemnation and criminalisation of acts of intercourse submitted to through force or fear, the issue which remains is whether such provisions should go beyond the current law. Reformers in South Australia, for example, advocate a provision which indicates that consent which is grudging or elicited by substantial pressure of the victim should be regarded as inoperative. They suggest that any submission occurring by the imposition of the other person's position of authority over, or position of trust in relation to the victim, by detention, whether lawful or otherwise of the person or by the exertion of the offender's influence over the victim where the victim is under the age of 18 and is living in the family home of the offender who is either a step-parent or parent of the victim should not constitute consent.¹¹⁵

158. A provision of this nature recognises pressure which women may suffer, acknowledging that submission in such circumstances is unlikely to be true consent. A number of countries, while recognising this, have preferred to establish new sexual offences. Hence, India has criminalised intercourse between a public servant and women in his custody, superintendents of jails, remand homes etc. with inmates and members of the management or staff of a hospital

and women in the hospital.¹¹⁶ Similarly, New Zealand had introduced the novel crime of "inducing sexual connection", which criminalises sexual activity where the offender knows that his victim submits because of his position of power. Sexual activity submitted to because of (i) an express or implied threat that the offender or some other person will commit an offence punishable by imprisonment, which does not involve the actual or threatened application of force to any other person, (ii) an express or implied threat that the offender or some other person will make an accusation or disclosure, whether true or false, about the misconduct of any person, living or dead, and the disclosure is likely to damage that person's reputation, and (iii) an express or implied threat by the offender to make improper use of any power or authority arising out of any occupational or vocational post held by the offender to the detriment of the victim, or any commercial relationship existing between the offender and the victim is criminalised and carries a possible penalty of 14 years imprisonment (s.129A Crimes Act 1961). The crime is based on the appreciation of the fact that persons in a position of vulnerability, whether psychologically or commercially, should be protected from sexual exploitation. It will be interesting to monitor the responses of practitioners and judges to this novel crime.

The mental state of the accused

159. For the crime of rape to be established, the Crown must prove that not only did the necessary non-consensual physical penetration occur, but also that the accused had the requisite mental state or mens rea for the crime. The Crown is required to prove, accordingly, beyond all reasonable doubt either that the accused knew that the victim was not consenting or that he was recklessly indifferent as to her consent. Here, except in very few Commonwealth jurisdictions (the Australian Code states and New Zealand), the tribunal of fact is not required to consider whether the accused's belief as to the victim's wishes was reasonable from the point of view of an objective standard,¹¹⁷ although the objective reasonableness of the belief may be considered when the tribunal of fact judges whether the accused actually believed the facts that he is asserting.¹¹⁸ In short, the usual test of whether the accused is guilty depends on his honest and genuine belief, not on what the reasonable person might have believed at the time. Thus if he can show that notwithstanding what a reasonable man would conclude from the behaviour of the victim at the time, he honestly and genuinely believed that she was consenting to his actions he must be acquitted.

160. This mental element has been considered by a number of Commonwealth law reform bodies, who have chosen to retain its current formulation.¹¹⁹ Nonetheless, the mental element continues to be a matter of controversy. Critics raise the fundamental objection that it poses the Crown with too demanding a task in that it must prove two subjective elements: the accused's belief and the state of mind of the complainant. This, it is argued, leads to an unfair weighting of the case in favour of the accused, leading to the acquittal of guilty accuseds and opening the complainant to suggestions, at trial, that notwithstanding evidence which would indicate dissent to most reasonable persons, the accused believed that she was consenting to his actions.¹²⁰

161. Proponents of the current formulation argue from the premise that rape is not a singular crime and that there is little or no evidence to indicate that guilty rapists are unjustly acquitted.¹²¹ They then argue that the formulation is a statement of the general and principled position existing throughout the criminal law which posits a subjective test of intention to allow an accused to be judged according to facts as he believed them to be and not as they really were. Thus, it is merely a particular instance of the general statement that the law should punish what the offender is and not what he or she ought to be.¹²²

162. In essence, opponents suggest three reform proposals.¹²³ The first, which is only a slight variation on the current law,¹²⁴ requires the Crown to prove that the intercourse

took place without the victim's consent. Both then provide that it is a defence for the accused to argue that he honestly believed that the victim was consenting, a fact that he must convince the jury of on the balance of probabilities. One proposal goes further and requires the accused to show not only that he honestly and reasonably believed that the victim was consenting, but he must also persuade the jury on the balance of probabilities of his honest and reasonable belief.

163. Both proposals involve a complete reworking of the mental element of the crime and have serious implications for the burden of proof and thus require close scrutiny.

164. At present, the only jurisdictions where an objective element enters into the assessment of the alleged rapist's mental state are Tasmania, Western Australia, Queensland and New Zealand.¹²⁵ The New Zealand provision, which commenced on 1 February 1986, fixes the Crown with the burden of proving that the accused had sexual connection without the consent of the victim. If, however, the Crown is able to show that there were no reasonable grounds upon which the accused could base a belief of consent its task is fulfilled (s.128). An objective element of this nature should mean that the complainant will cease to run the risk of the accused suggesting that he honestly and genuinely believed in her consent because he thought she enjoyed "kinky sex" or because he honestly and genuinely believed all women fought and screamed when involved in intercourse.¹²⁶

165. The issues of whether the accused's mental state should be judged objectively or whether the accused should be required to give an account of his actions by bearing a burden of proof are in essence political. They become so whether the crime of rape is viewed as a singular crime, deserving of special treatment and whether the rights of the accused in a criminal trial should be modified. Here it may be important to differentiate between classes of offenders. They may, for example, be cogent argument for the reversal of the burden of proof in certain particular cases. Thus, a police officer or jail superintendent accused should perhaps be required to give an account of himself where his victim is in custody.¹²⁷

Procedural reforms

166. The complainant in a rape trial is a singular witness, facing special problems which do not confront other victims of crime. Frequently, she is the sole witness and the success of the Crown's case depends on her evidence, especially as to consent. The events described in the courtroom will be intimate and often, the details humiliating. Defence attempts to discredit her will inevitably touch on her past sexual activity, which she will wish to keep private. It is essential that the trial process, whilst fairly weighted towards the accused, should result in a minimum of distress to an victimisation of the complainant.

167. Traditionally, the testimony of the complainant has been treated with suspicion and reserve. Two aspects of the trial process particularly highlight this. First, the requirement of corroboration of the complainant's evidence which is, in most jurisdictions, essential to conviction and second the fact that the victim's evidence can be impugned by evidence of her past sexual history.

168. In general, persons accused of crime can be convicted on the testimony of one individual, but where the crime is sexual, the evidence of the victim alone is insufficient and must be corroborated in some way. The justification for the rule lies in the fear, often articulated by trial judges that rape and other sexual crimes are easy to allege, but

difficult to disprove. Women are alleged to have a tendency to make false allegation of sexual assault,¹²⁸ perhaps because of inherent biological or psychological factors or because they wish to hide consensual sexual activity of which they are ashamed.¹²⁹

169. Both the justification for and the value of the corroboration requirement are doubtful. First, it is unlikely that sexual assault is ever an easy crime to allege. There are many disincentives to report and evidence shows that the current system deters and weeds out shaky stories.¹³⁰ Moreover, false allegations can be made in any other criminal process, particularly, for example, in crimes wherein insured property is involved. The trial process, with the safeguards of cross-examination and the penalties for perjury should act as sufficient disincentives to false allegation. Finally, there is no evidence beyond received wisdom, that women are particularly prone to hysterical or malicious allegations of sexual interference. On the other hand, evidence exists which indicates that the requirement impedes the conviction of sexual offenders. If the victim has submitted to intercourse through fear or where she is not seriously injured or if she delays in her complaint,¹³¹ the prosecution may be unable to raise sufficient evidence to corroborate her story. This will have a serious effect on the mind of the jury at trial and the absence of corroborative evidence may lead the police to refuse to prosecute at the outset.¹³²

170. A number of Commonwealth jurisdictions have abolished the strict requirement of corroboration, but it remains a rule of law that the judge must direct the jury that it is unwise to convict on the uncorroborated testimony of the complainant.¹³³ In effect, such a rule amount to a requirement of corroboration as it gives judges an opportunity, of which they unfortunately take advantage, of casting aspersions on the veracity of the complainant. The manner in which the warning is given shows wide variation, ranging from complete impartiality to remarks such as: "It is known that women in particular and small boys are liable to be untruthful and to invent stories."¹³⁴

171. Some countries have abolished both the requirement of corroboration and the judge's warning of the danger of conviction on uncorroborated testimony.¹³⁵ Thus, Canada provides that no corroboration is required for conviction and "the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration" (s.246.6 Criminal Code 1970). Such an approach appears to be appropriate. The evidence of the complainant should be assessed in accordance with the usual standard of credibility. Certainly, sufficient safeguards exist within the pre-trial and trial process to safeguard the interests of the accused. Moreover, in the absence of clear evidence indicating women to be congenitally unreliable, the further safeguard of corroboration is unjustified.

172. In many jurisdictions, the credibility of the complainant is open to impugnment by legislation which allows her character to be brought into question during the trial¹³⁶ and by common law rules which allow her to be questioned about past sexual relationships with men other than the accused. Where the common law rules exist, evidence as to her past sexual activity can be introduced either to prove that the woman is of "notoriously bad character", for example a prostitute or highly promiscuous and thus likely to have consented or to prove that she is unreliable and her evidence thus suspect.¹³⁷

173. In general, the law as it exists allows examination of the complainant's past sexual activity on fairly narrow grounds. As it is practised, however, it allows a barrage of questions pertaining to her past sexual, social and medical experience in cross examination. Such are put with the aim of protecting the defendant and destroying the character of the complainant. A complainant who is or who was a prostitute or is promiscuous will be considered to be willing participant, even where violence is involved.¹³⁸ Even if a virgin, a woman with little sexual experience cross-examination can be savage, destructive and demeaning, leaving her with the impression that she is on trial.¹³⁹

174. A number of jurisdictions have limited the introduction of evidence of this nature.¹⁴⁰ The provisions restrict evidence of sexual activity with men other than the

accused, but grant the judge a discretion to admit such evidence if he or she considers it is just or reasonable to do so. Differences exist in the formulation of the discretion. In the English legislation (ss.2,3 Sexual Offences (Amendment) Act 1976) such evidence can only be admitted if an application to do so is made to the judge in the absence of the jury and the judge is satisfied that it would be unfair to the accused to refuse to allow the evidence to be adduced or a question of such nature to be asked. The Canadian provision is less general (s.246.6 Criminal Code 1970). Here evidence of the complainant's past sexual activity with persons other than the accused cannot be adduced unless it falls into one of three categories. These are, evidence which rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution, evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge or evidence relating to the consent that the accused alleges he believed was given by the complainant to the sexual activity that is the subject matter of the charge. Even if the evidence falls within one of the categories, it is admissible only after reasonable notice in writing has been given to the prosecutor of the evidence and its particulars and the judge has conducted a closed hearing, wherein he or she decides that the evidence falls within one of the allowed categories.

175. The absence of specific guidelines in the English legislation has resulted in uneven interpretation of the discretion by individual judges. Thus, Zsuzanna Adler's Old Bailey study found that in 60% of rape cases applications to admit evidence as to the complainant's past sexual history are made and of those 75% are accepted.¹⁴¹ Law reformers must appreciate that legislation which leaves wide discretion to individual judges is subject to differential treatment and that more specific guidance may be valuable.

176. It is clear that the past sex life of the complainant will be relevant in very few cases. Prostitutes are as susceptible to sexual assault as virgins, but the evidence of the past prostitution of a woman will almost inevitably lead a jury to acquit the accused. Prior sexual activity with the accused is clearly relevant to the issue of consent and thus stands on a different footing. Automatic introduction of such evidence may nonetheless be problematic as it becomes an easy task to argue that because the complainant once consented to sexual activity with the accused or perhaps cohabited with the accused, she must have consented yet again. Judges and legal practitioners must be made aware of the impact of such evidence on the jury. Introduction of the evidence is necessary to assure the accused a fair trial, but it must be introduced sensitively.

177. Sensitivity by magistrates, judges and counsel for both prosecution and defence could alleviate the ordeal of the complainant in the courtroom. Whilst the defence must destroy her testimony in order to succeed, such an end should be achieved without the destruction of the complainant. Independent representation of complainants at trial to shield them from irrelevant and harassing questions has been suggested.¹⁴² Such representation should be unnecessary as the judge and prosecution counsel should protect her from such questions. Further, defence counsel should exercise a proper discipline and guard against questions intended to insult or annoy.¹⁴³ Experience shows that defence counsel frequently cross-examine brutally and judges fail to fulfil their protective function, indeed proving sometimes to be more harassing and irrelevant than the defence.¹⁴⁴ The behaviour of the bench and bar can only be improved by education, both during legal training and as part of a continuing education programme. Such education should introduce the profession to women's perspectives in sexual assault and ideally incorporate knowledge from other disciplines.

Strategies to alleviate the ordeal of the alleged victim during police investigation and trial

178. Clear evidence exists which indicates that rape victims are reluctant to report the incident to the police, because of the stereotypical attitudes with which police have traditionally received such complaints.¹⁴⁵ Such attitudes manifest themselves in various ways. First, the initial complaint may be totally disbelieved and the complainant discouraged completely. Second, police investigation may consist of insensitive and bullying questioning of the complainant. This may involve several, or a succession, of officers and medical examination in unpleasant or threatening surroundings. Moreover, the complainant may not be supplied with basic information, or, indeed, more helpful information which could lead her to agencies offering comprehensive victim support services.

179. As police stations are the traditional rape victim reception agencies, the response of the police to complainants requires priority treatment. It is crucial that the treatment which she receives is sympathetic and helpful, but at the same time investigation into her complaint must be meticulous. Important here is education and training. Police at all levels must be educated so that prejudicial and stereotypical visions of rape complainants are eliminated. Training must sensitise all police to the behaviour that victims may exhibit following sexual assault which may depart from general stereotypes.

180. It is important that the initial interview of the complainant occur in pleasant physical surroundings, in private, unless the victim requests the support of a relative or friend or rape crisis worker. Consideration could be given to the training of specialist personnel, who may be female. It is important to note, however, that many police forces are understaffed and that the response of the officer at desk level to the complainant is critical. The training of specialised teams should thus not detract from the importance of general training for all police officers.

181. The complainant should be told of all the procedures to be followed throughout the enquiry and the reasons for these procedures. Particularly important here is the medical examination. The victim must be told of the importance of this procedure which may be particularly distasteful. While it is important that the doctor conducting the examination should be trained in forensic examination, the alleged victim should be given the option of a woman doctor or a doctor of her choice, if the doctor is sufficiently knowledgeable to conduct a thorough and proper examination.

182. Serious consideration should be given to the introduction and implementation of kits to facilitate the culling of evidence in rape enquiries. A kit of this nature, entitled the "Sexual Assault Examination Kit" has been designed and implemented by the Royal Canadian Mounted Police. The kit is inexpensive and is used in the examination and precautionary treatment of a rape victim, its aim being to aid the collection and preservation of evidence and to allow it to be presented sympathetically. The R. C. M. P. kit cannot be used until the complainant completes a consent form. It contains an information guide for the complainant which explains legal procedures, medical examinations, the trial and victim services, a guide for police officers, a guide for the examining physician, various forms to be completed by the physician and receptacles for collecting and preserving physical evidence such as fingernail scrapings, swabs, hair and clothes. All guides and forms are in the two official languages of the country.

183. Kits of this nature serve two purposes. Most obviously, they assist in the treatment of individual complainants. At the same time, the use of the Kit continues the work of training and educating officers, making them more meticulous in their collection of evidence and directing their enquiry in a manner which is less heavy-handed than heretofore.

184. Sympathetic treatment of the alleged victim should continue up to and during the trial. The delay between incident and trial should be as short as possible,¹⁴⁶ bail should

be refused to the accused unless very exceptional circumstances exist and information of developments in the case should be supplied as a matter of course. Certainly, sufficient notice of the commencement of the trial should be afforded to the complainant and perhaps a carefully worded explanatory summons could be sent to her.

185. The physical aspects of the court require careful attention. Separate waiting rooms and other facilities should be arranged so that the complainant does not meet the accused and/or his family and friends in the precinct of the court. The complainant and victim should not be within too close proximity within the courtroom - indeed, courtrooms should be arranged so that complainant and accused are invisible to each other.

186. The anonymity of the complainant at pre-trial, trial and post trial stages must be assured. Provisions allowing for the victim's evidence by affidavit or in closed court should be considered¹⁴⁷ as should provisions limiting the revelation of information which may lead to her identification beyond the trial.¹⁴⁸ Such provisions should be carefully drafted to provide comprehensive coverage of sexual crimes¹⁴⁹ and discretions to allow the revelation of such information should be exercised with extreme responsibility.¹⁵⁰

187. Finally, sentences for those convicted of sexual assault should reflect the opprobrium with which such crimes should be judged. Any sentence which is light will trivialise the victim's ordeal and trivialise the crime of sexual assault generally.¹⁵¹

FOOTNOTES

1. See, for example, Commonwealth Africa, Phillips, A, and Morris, H P, Marriage Laws in Africa, Oxford University Press, 1971, p.118ff. See also, the situation in countries of the Commonwealth Pacific, for example, Vanuatu, Joint Regulation No. 16 of 1970.
2. See, for example, Nigeria, Matrimonial Causes Decree, No. 18 of 1970; Ghana, Matrimonial Causes Act, 1971; Tanzania, Law of Marriage Act, 1971; Zimbabwe, Matrimonial Causes Act (Cap. 35); Sierra Leone, Matrimonial Causes Act (Cap. 30); The Seychelles, Matrimonial Causes Ordinance (Cap. 72); Botswana, Matrimonial Causes Act, 1973; Uganda, Divorce Act, 1964.
3. See, for example, Malaysia, Islamic Family Law Acts, 1976; Singapore, Administration of Muslim Law Act (Sing) (Cap. 42); Malaysia, Law Reform (Marriage and Divorce) Act, 1982; Singapore, Women's Charter 1961.
4. See, for example, with respect to Zimbabwe, Bello, E G, The Status of Women in Zimbabwe, Harare 1985, p.12-14; and Akande, J O Law and the Status of Women in Nigeria. UN 1979
5. See, for example, Ibrahim, A, Family Law in Malaysia and Singapore, 1978, p. 206-222. See also, the Administration of Muslim Law Act (Sing) (Cap. 42) s.49, Islamic Family Law Acts (Malaysia) 1985, s.52.
6. Legislation allowing divorce throughout the Commonwealth falls into one of three models. First, the undeveloped divorce law which insists on fault before divorce is granted, second, divorce law which allows for divorce on the proof of irretrievable breakdown which is evidenced by one of various grounds, which are reminiscent of the 'fault' provisions and finally, divorce law which provides for divorce on proof of irretrievable breakdown evidenced by separation alone. An example of the first model is the Sierra Leone, Matrimonial Causes Act (cap. 35), the second, England, Matrimonial Causes Act, 1973 and the last, Barbados, Family Law Act No. 29 of 1981.
7. Divorce Act (Uganda) 1964, S.5. See also, Vanuatu's divorce legislation. Evidence exists which indicates that informal separation is far more common in Uganda than formal divorce proceedings, a fact which is not surprising given the grounds for divorce. See, Mukasa-Kikonyogo, L E M, Presentation delivered at the International Federation of Women Lawyers, Sydney, 26-31 August, 1984. In Uganda there are rarely more than 100 petitions to the High Court each year.
8. Some countries have abolished 'judicial separation'. See, for example, Australia, Family Law Act 1975 (Cth.) 5.8.
9. See, for example, Northern Ireland, Matrimonial Causes (N.I) Order, art. 19.
10. In some Commonwealth countries judicial separation decrees can be awarded in the magistrate' courts. In Kenya, for example, the Subordinate Courts (Separation and Maintenance) Act (Cap. 153) s.3, allows for separation where a husband has caused the wife actual bodily harm by unlawfully wounding or assaulting her.
11. Family Law Act 1975 (Australia, s.48); Family Law Act (Barbados) No 29 of 1981; Family Proceedings Act 1980, (NZ).
12. This might be particularly difficult in jurisdictions where physical chastisement of a wife is accepted. See, for example, Nigeria, where s. 55(1)(d) of the Northern

- Nigerian Criminal Code justifies a reasonable amount of physical chastisement of a wife. See, also, Atkins, S, and Hoggett, B, Women and the Law, Blackwells, 1984, 127ff, which outlines a number of English cases where divorce was disallowed although the wife was the subject of abuse.
13. Malaysia, Law Reform (Marriage and Divorce) Act 1976, ss.53, 54 bars divorce, except where there are exceptional circumstances, unless the marriage has lasted two years. The bar is 3 years in Singapore: Women's Charter, 1961, s.81; Trinidad and Tobago, Matrimonial Proceedings and Property Act, Cap. 45:51 provides that the bar is 5 years. In England the bar is absolute and is one year: Matrimonial Causes Act 1973 (England and Wales) s.3(1).
 14. The English Offences Against the Person Act 1861 gives an indication of the sort of provisions which are viable in the domestic context: s.42 provides for common assault, punishable on a summary conviction with two months' imprisonment or a fine not exceeding £200, s.43 aggravated assault, s.47 providing for assault 'occasioning actual bodily harm'. This is triable on indictment and is punishable with five years' imprisonment. The actual bodily harm required is not particularly serious and includes injury to the state of the victim's mind as well as her body: R v Miller [(1954)] 2 QB 282, p. 29. s.16 provides an offence of threatening to kill another, s.18 wounding and s.20 causing grievous bodily harm. Other criminal offences may be relevant in the context of domestic violence. Criminal provisions which aim to protect property or goods may be useful where the abusive spouse has damaged property or pets. All Commonwealth countries have similar criminal provisions. In some countries there are special criminal provisions concerning wife assault: see, for example, Malaysia, Islamic Family Law Act (Federal Territory) 1985, s.127.
 15. Pahl, J, 'Police Response to Battered Women' [(1982)] Journal of Social Welfare Law 337.
 16. House of Commons, Select Committee on Violence in Marriage, Report H.C (1975) Lond. HMSO.
 17. House of Commons, Select Committee Report on Violence in the Family, op. cit., paras. 10, 20, 21.
 18. Faragar, T, 'The Police Response to Violence Against Women in the Home' in Pahl, J (ed.), Private Violence and Public Policy, Routledge and Kegan Paul, 1985, 110, 118ff.
 19. Atkins, S and Hoggett, B, Women and the Law, Blackwell, 1984, p. 136
 20. Faragher, T, op. cit, p. 116 ff. However police reluctance to proceed because of complaint withdrawal may well be based on common wisdom rather than reality. Recent research in the UK indicates that the level of withdrawal is no greater than any other criminal proceeding. See: Wasoff, F, 'Legal Protection from Wife Beating: The Processing of Domestic Assaults by Scottish Prosecutors and Criminal Courts', (1982) 10 International Journal of the Sociology of Law 187.
 21. This has been ameliorated in some jurisdictions: See Police and Criminal Evidence Act (UK) 1984 s.80.
 22. Atkins, S, and Hoggett, B, Women and the Law, Blackwell, 1984, p.137.
 23. See, Federal/Provincial/Territorial Report on Wife Battering to the Meeting of Ministers responsible for the Status of Women, Niagara-on-the-Lake. May 28-30, 1984. See also, Bill C-127 of 1983.

24. See, for example, Scotland, where prosecutions are brought by professional prosecutors, independent of the police, called Procurators Fiscal.
25. See Foakes, J, Family Violence. Law and Practice. London, 1984, p. 131; Swaziland, Criminal Procedure and Evidence Act. No. 67 of 1938; and Cyprus, Trofinus v Theocharides [(1983)] 2 Cyprus Law Reports 363.
26. See, for example, Magistrates Summary Proceedings Act 1975 (Vic.) s. 150, Canadian Criminal Code, RSC 1970, s.745, Scotland, 'law burrows'.
27. Hawkins, Pleas of the Crown, Book 1, Ch. 60.
28. Victorian Government Domestic Violence Committee, Report of the Legal Remedies Sub-Committee, November 1983. The Law Reform Commission, Community Law Reform, Domestic Violence in the A.C.T. Discussion Paper, ACTLR 4, May 1984.
29. Domestic Violence Committee Report, NSW, Government Printer, Sydney, 1985.
30. A number of jurisdictions provide for civil actions between married spouses, but allow the court to stay proceedings where no substantial benefit would accrue to either party from the continuation of the proceedings. See, for example, Law Reform (Husband and Wife) Act (England and Wales) 1962.
31. Pibus, CJ, "Civil Remedies for Interspousal Violence in England and Ontario" (1980) 3 UT Fac L Rev 33.
32. Samuel, C., "Abused Women" in Malaysian Women.. Problems and Issues, Hong, E, ed., CAP Penang, 1983, p. 123, 124.
33. Jones, A, Rape Victims and Battered Wives in Malaysia, 1985, unpublished.
34. See, for example, Plows and Plows (1979) FLC 90-712. Here an injunction was awarded to prevent the mental violence of insulting and denigrating the victim in front of the children.
35. The Australian Family Law Act injunction may not be used where there is state or territory legislation in place which deals specifically with domestic violence and the victim is seeking a court order under that legislation. Family Law Act 1975 (Cth.) s. 114AB.
36. Maidment, S, "Domestic Violence and the Law: the 1976 Act and its aftermath" in Johnson, N, Marital Violence, Routledge" and Kegan Paul, 1985 p.4, at 16.
37. It appears that the High Court is not given jurisdiction: see, Cretney, S, Principles of Family Law, Butterworths, London, 1985, p. 264-265.
38. s. 1(2), Davis v Johnson [1979] AC 264, See also Adeoso v Adeoso [1981] 1 All ER 107.
39. The Act was passed primarily to combat the decision in National Provincial Bank Ltd. v Ainsworth [1965] AC 1175 where a wife was unable to bind a third party with her personal right to reside in the matrimonial home.
40. Ray, M, and Le in, J, "Ouster Injunctions since Richards" [1983] LAG Bul. 145.
41. Vaughan v Vaughan [1973] 1 WLR 1159: here the husband was enjoined to stop molesting his wife, his previous behaviour being calling at the wife's house early in the morning and in the evening and at her place of work.

42. Note, the recent case of Ainsbury v Millington [1986] 1 All ER 73 where the Court of Appeal chose to take a conservative view of the ancillary relief power under the Guardianship of Minors Act 1971.
43. Note, the speeches in Davis v Johnson [1979] AC 264 which emphasise that the Act's aim was to achieve personal protection for a spouse and not confer property rights.
44. The situation is different under the Matrimonial Homes Act 1983 where the wife's interest in occupation will be protected while the marriage subsists and there is a machinery whereby her interest may be effective against a third party... see Cretney, S, Principles of Family Law, op. cit., p. 255-260.
45. See, Report of the Select Committee on Violence in Marriage, Vol 1, para 45. Injunctions on occasions are "not worth the paper they were written on".
46. Practice Direction [1974] 2 All ER 1119; see also R v Miller [1954] 2 QB 282, 292 per Lynskey J.. "Including hurt or injury likely to interfere with health or comfort".
47. Note, Ray, M, and Levin J, "Ouster Injunctions since Richards" [1983] LAG Bul. 145 where doubts are expressed whether an order under the Matrimonial Homes Act 1983 is properly an injunction.
48. Cretney, S, Principles of Family Law, op. cit., p. 241-242.
49. White v White (1983) 2 All ER 51. divorced persons are held to be adequately protected by the power of the court to commit for contempt where there has been breach of an injunction.
50. Practice Note, 22 December 1980 encourages judges, where they attach an arrest power to an injunction to limit such a power to three months unless there is sufficient reason for its extension beyond that time.
51. Note the difference between this and the Domestic Violence and Matrimonial Proceedings Act 1976 where the threatened child need not be that of the family. A child of the family for the purposes of the Domestic Proceedings and Magistrates' Courts Act 1978 is given a wide definition by s. 88 and extends to a child who is ordinarily a member of the family.
52. Cretney, S, Principles of Family Law, op. cit., p. 284.
53. s. 18. The Act does not apply equally to married and unmarried spouses. Cohabitants are not given occupancy rights by the Act where he or she is not entitled to them at law, unlike a married spouse. Second, while such occupancy rights may be awarded by the court they will be of limited duration only.
54. This includes any child or grandchild of either spouse and any person who has been brought up or accepted by either spouse as if a child of that spouse: s.22.
55. It should be noted that such a power is only available where it is "necessary", a word not used in the English legislation. See Clive, E.M., The Law of the Husband and Wife in Scotland, 2nd ed., 1982, Edinburgh, p.720.
56. See Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com, No. 6, July 16, 1980, para 4.38).
57. Rules of Court, 97, 170B (1), 170D (4) and see Murdoch v Murdoch [1973] SLT (Notes) 13. It was unclear prior to the Matrimonial Homes (Family Protection) (Scotland) Act

- 1981 whether such an interdict could be awarded while the spouse were cohabiting: see Scot Law Com, No. 60, para 4. 26.
58. The Order was extended by Family Law (Miscellaneous Provisions) Northern Ireland Order 1984, article 20. In order to qualify for the protection of the Order factors such as the couple's length of cohabitation and whether they have children will be taken into account.
 59. Orders may be made ex parte, but such will be interim: s.31.
 60. Atkin et al., "Protecting the Victims of Domestic Violence - the Domestic Protection Act 1982" (1984) 14 Victoria University Law Rev. 119, 127.
 61. Atkin et al, "Protecting the Victims of Domestic Violence - the Domestic Protection Act" (1984) 14 Victoria Univ. Law Rev. 119, 128.
 62. Atkin et al., op cit., pp 130-131.
 63. See, for example, the proposed Malaysian Domestic Violence Act which establishes wide protective orders which include eviction orders and anti-molestation orders.
 64. See, for example, Sexual Offences (Amendment) Act 1976 (England and Wales) s.1. Recent amendments in Canada, New Zealand and a number of the Australia states provide exceptions to this general rule.
 65. Crimes (Sexual Offences) 1980 (Vic.). See also, Western Australia, Criminal Code as amended by Acts Amendment (Sexual Assaults) Act 1985.
 66. Crimes Act 1900 (NSW) s.61A introduced by Crimes (Sexual Assault) Amendment Act 1981 (NSW). The Victorian legislation also "grades" rape in levels of seriousness: level 1 is rape simpliciter, level 2 is where the circumstances are aggravated. See also, Western Australia, Criminal Code as amended by Acts Amendment (Sexual Assaults) Act 1985.
 67. Criminal Code Amendment Act 1980 (Can.) (Bill C-127). This was proclaimed in force on January 1, 1983.
 68. R v Lang, unreported, quoted in Boyle, C M, Bertrand, M-A, Lacerte-Lamontagne, C and Shamaï, C, A Feminist Review of Criminal Law, Minister of Supply and Services Canada, 1985, p.58-59.
 69. R v Thorne (1984) 13 W.C.B. 261 (Ont Co Ct). See also, R v Ramos (1984) 42 C.R.(3d) 370 (N.W.T. Terr Ct) and Gardynik v The Queen (1984) 42 C.R.(3d)362 (Ont.Co.Ct.)
 70. See here, Osborne, J A "Rape Law Reform: The New Cosmetic for Canadian Women" in Criminal Justice, Politics and Women, Haworth Press, 49 at p. 59.
 71. Bertrand, M A et. al, A Feminist Review of Criminal Law, op. cit. p.59.
 72. Crimes (Sexual Assault) Amendment Act 1981 (NSW) adding ss. 61A, 61B, 61C, 61D and 61E to Crimes Act 1900 (NSW).
 73. See, for example, the reform proposals under consideration in Malaysia and Tasmania: Warner, K, "The Mental Element and Consent under the new 'Rape Laws'" (1983) 7 Crim L J 245.

74. Naffin, N, An Inquiry into the Substantive Law of Rape, Women's Adviser's Office, Department of Premier and Cabinet, Adelaide, 1984. This inquiry will be called the "Naffin Report" hereafter.
75. The definition of sexual intercourse is the same as that of New South Wales but is called "sexual penetration".
76. This was initially propounded in the United States Model Penal Code in the early 1960's: Chappel, D, "The Impact of Rape Legislation Report: Some Comparative Trends" (1984) 17 International Journal of Women's Studies 70, p.73, fn.19.
77. Criminal Law Revision Committee, Sexual Offences, Working Paper, London, HMSO, 1980; Criminal Law Revision Committee, 15th Report, Sexual Offences Cmnd. 9213, London HMSO, 1984.
78. Criminal Law Revision Committee, 15th Report, Sexual Offences, Cmnd. 9213, London HMSO, 1984, paras, 4.8 and 4.24: see now Sexual Offences Act 1985 (England and Wales).
79. Criminal Law Revision Committee, Sexual Offences, Working Paper, 1980, para. 45. This is a quote of the Advisory Group on the Law Rape (the Heilbron Committee) Cmnd. 6352 (1975), para 80.
80. Criminal Law Revision Committee, Sexual Offences (1980) para. 45.
81. Temkin, J, "Towards a Modern Law of Rape" (1982) 45 M L R 399, 411.
82. Criminal Law Revision Committee, 1984.
83. Canadian Criminal Code, R S C 1970, s.244; Crimes Act 1900 (NSW), s.61A-D; Western Australia, Criminal Code, as amended by Acts Amendment (Sexual Assaults) Act 1985.
84. See for example, the Naffin Report, p. 65.
85. For example: England and Wales. See also New Zealand which takes the usual step of introducing a new crime, "sexual violation", which it defines as including the act of a male who "rapes" a female.
86. Women's National Commission, Violence Against Women, Report of an Ad Hoc Working Group, London, 1985, p.37. This report will be referred to hereinafter as the Women's National Commission Report.
87. Atkins, S, and Hoggett, B, Women and the Law, Blackwells, 1985, p.67ff.
88. Rape : A Drama from Two Perspectives, Report of a European Seminar Organised by the Swedish Association for Sex Education, June 3-7, Tynningo, Sweden, Hedlund, E., ed., IPPF, 1985, p.17ff.
89. The Naffin Report, p.64.
90. Hale, M, History of the Pleas of the Crown, 1736, p. 636: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract'.
91. Freeman, M D A, "Doing his best to sustain the sanctity of marriage" in Marital Violence, Johnson, N, ed., Routledge and Kegan Paul, London 1985, p. 124.

92. [(1888)] 22 Q B D 23. In reality this case is slender authority for the proposition it is used to support. The remarks pertaining to marital rape were obiter and two judges point to the inconsistency in convicting a husband for assault, but not rape.
93. Miller [(1954)] 2 Q.B. 282. Here the wife was reduced to an hysterical and nervous condition and this was held to amount to actual bodily harm.
94. Miller (supra), per Lynskey J, p. 292. See also, O'Brien [(1974)] 3 All E R 663, Steele [(1977)] Crim L R 290, Clarke [(1949)] 2 All E R 448.
95. Atkins, S and Hoggett, B, Women and the Law, Blackwell, Oxford, 1985, p. 72.
96. Criminal Law Revision Committee, Working Paper, Sexual Offences, London, HMSO, 1980; Criminal Law Revision Committee, 15th Report, Sexual Offences, London, HMSO, 1984.
97. Criminal Law Revision Committee, Sexual Offences, London HMSO, 1980, para 33.
98. Finkelhor, D, and Yllo, K, "Rape in Marriage : A Sociological View" in Rape: A Drama From Two Perspectives, Report of a European Seminar Organised by the Swedish Association for Sex Education, June 3-7, Tynningo, Sweden, Hedlund, E, ed., IPPF, Stockholm, 1985, p. 57, p57-58.
99. Finkelhor, D, and Yllo K, op. cit, p. 62ff.
100. HM Advocate v D [(1982)] SCCR 182; Forte [(1983)] 99 LQR.
101. See also, Sexual Offences Bill (Trinidad and Tobago) clause 4 which creates a new offence called "sexual assault" which is committed by a husband who has forceful intercourse with his wife without her consent. Such is punishable by imprisonment for 10 years.
102. See, however, Scotland, where the use of force has been traditionally emphasised. Hence, it is not rape where the victim is unconscious or sleeping, drunk or drugged, unless the drugs or alcohol is given with intent to make her insensible for the purpose of intercourse: H M Advocate v Logan (1963) J C 100.
103. See, for example, the English Sexual Offences Act 1956, s. 1(2). The situation may be different where the accused obtains consent by impersonating a person other than the husband, but the leading academic authorities suggest it should be the same: Smith, J C and Hogan B, Criminal Law, 1983.
104. Naffin Report, p.22ff; Consumers Association of Penang, Memorandum on Amendments to Rape Laws, 1985, p.4; Edwards, S, Female Sexuality and the Law, Martin Robertson, Oxford 1981, Chapter 4.
105. Edwards, S, Female Sexuality and the Law, op. cit., Chapter 4.
106. The Naffin Report, p.23ff.
107. Edwards, S, Female Sexuality and the Law, op. cit., Chapter 4. Consider also the suggestions of defence counsel in R v Morgan [(1976)] A C 182, quoted in Edwards at p.111.
108. The Naffin Report, p.50ff.
109. This introduced s. 61 A - E into the Crimes Act 1900.

110. People v Kahn (1978) 264 N W 2d. 360, 80 Mich. App. 605; Marsh, J C, Geist, A and Caplan, N, Rape and the Limits of Law Reform, Boston, Mass., 1982; The Naffin Report, p.26-29.
111. Crimes (Sexual Assault) Amendment Act 1981. See also, New Zealand where s. 128A of the Crimes Act 1961 (NZ) inserted by the Crimes Act Amendment Act (No 3) 1985 provides that consent will not be taken to exist when gained through fear of or actual force to the victim or another or mistake as to the identity of the other person or mistake as to the nature and quality of the act.
112. Warner, K, "The Mental Element and Consent under the New "Rape Laws" (1983) 7 Crim L J 245.
113. Canadian Criminal Code, R S C 1970, s. 244. There is little authority on the meaning of "exercise of authority". It has been suggested that it is likely to be construed to cover only the most blatant cases of exploitation of power: Boyle, C L M, Bertrand, M-A, Lacerte-Lamontagne, C and Shamai, R, A Feminist Review of Criminal Law, Ministry of Supply and Services Canada, 1985, p.61.
114. Tasmania: see Warner K, "The Mental Element and Consent under the New "Rape" Laws" (1983) 7 Crim L J 245; South Australia: The Naffin Report.
115. The Naffin Report.
116. Indian Penal Code, s.376 A-376-B. See also, Sexual Offences Bill (Trinidad and Tobago) Clause 8 which creates the offence of unlawful sexual intercourse with adopted daughters, foster daughter and female wards, and intercourse with minors in the employ of the defendant. A similar provision is under consideration in Malaysia: proposed Penal Code, s.376 A.
117. This is the test in the English case of R v Morgan [(1976)] A C 182 now codified in the Sexual offences Act 1976 s. 1(2). The test appears to apply throughout the Commonwealth: see, e.g. Scotland: Meek v H M Advocate [(1982)] SCCR 613, 618; Canada: Pappajohn v The Queen [(1980)] 52 CCC (2d) 481; NSW: Crimes (Sexual Assault) Amendment Act 1981; South Australia: Criminal Law Consolidation Act 1976.
118. See, for example, Sexual Offences (Amendment) Act 1976, s. 1(2) (England and Wales) which directs that the grounds for the accused's belief is an issue for the jury to consider particularly in assessing whether the accused is to be believed. See the Canadian Criminal Code, RSC 1970 s.244 (4) which appears to have the same effect.
119. Report of the Advisory Group on the Law of Rape, HMSO, London, Cmd 6352 (the Heilbron Committee); Royal Commission on Human Relationships, Final Report, AGPS, Canberra, 1977, Volume 5, Annexe VIIb; Criminal Law and Penal Methods Reform Committee of South Australia Special Report: Rape and Other Sexual Offences, 1976 (The Mitchell Committee).
120. The Naffin Report; The Consumer's Association of Penang, Memorandum on Amendments to Rape Laws, Penang, 1985, p.16-17; Boyle, C L M, et al., A Feminist Review of Criminal Law, Ministry of Supply and Services, Canada, 1985, p.59ff.
121. Goode, M, "The Mental Element of Rape: the Naffin Report and Other Questions: A Defence of the Common Law" (1985) 9 Crim. L. Journal 17 provides a good example of the traditional arguments raised in favour of the status quo.
122. Goode, M., op., cit p.22-23.

123. The Naffin Report; Pickard, T, "Culpable Mistakes and Rape: Harsh Words on Pappajohn" (1980) 30 U T L J 415; Boyle, C L M et al, A Feminist Review of Criminal Law, Ministry of Supply and Services, Canada, 1985, p.59ff; Wells, C, "Swatting the Subjectivist bug" [(1982)] Crim L R 209.
124. Goode, M, op cit, suggests that this in fact the current position in practice: see p.24-25.
125. Goode, M, op cit p.39ff. discusses the provisions in these states; Crimes Act 1961 (NZ) s.128.
126. Edwards, S, Female Sexuality and the Law, op cit Chapters 4 and 5.
127. Indian Penal Code, s. 376 provides an example of this approach.
128. Edwards, S, Female Sexuality and the Law, Martin Robertson and Co, 1981, Chapter 5.
129. Heydon, J H, Cases and Materials on Evidence, Butterworth, London 1975, p.81.
130. Edwards, S, Female Sexuality and the Law, op cit Chapter 5.
131. Legrand, C, E, "Rape and Rape Laws: Sexism in Society and the Law" (1973) 61 Calif. L. Rev. 919.
132. Chambers, G, and Millar, A, Investigating Sexual Assault, Scottish Office Social Research Study, Edinburgh, HMSO 1983.
133. Williams, G, "Corroboration and Sexual Cases" [(1962)] Crim. L. R. 662.
134. Suttcliffe J in 1976, quoted in Edwards, Female Sexuality and the Law, op cit, p.164.
135. See Canada, New South Wales, Victoria, South Australia, Western Australia, Tasmania and New Zealand. other jurisdictions contemplating such a step are Malaysia and Trinidad and Tobago.
136. See, for example, Evidence Act, 1950 (Malaysia) s.155d: "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."
137. R v Krausz (1973) 57 Cr App 466; R v Riley (1887) 18 Q,B,D, 481; R v Bashir and Manzur [(1969)] 3 All E, R, 692.
138. Edwards, S, Female Sexuality and the Law, op cit, p.62ff.
139. Consumers Association of Penang, Memorandum on Amendments to Rape Laws, 1985, p.15-16; Edwards, S, Female Sexuality and the Law, op cit, p.152-157.
140. Sexual Offences Amendment Act 1976 (England and Wales) s.2. Sexual Offences Order 1978 (NI). See also, NSW, Tasmania, Queensland, Northern Territory, South Australia, Victoria, New Zealand, Western Australia, Canada. Jurisdictions considering such amendments are Malaysia and Trinidad and Tobago.
141. Adler, Z, "The Intention of Parliament and the Practice of the Courts" [(1982)] M.L.R. 664; Adler, Z, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" (1985) Crim. L. R. 769.

142. Violence Against Women, Report of an Ad Hoc Working Group, Women's National Commission, London, 1985, p.44.
143. Edwards, S, Female Sexuality and the Law, op cit, chapter 6.
144. Edwards, S, op cit, chapters 4 and 5.
145. Violence Against Women, Report of an Ad Hoc working Group, Women's National Commission, 1985, p.24ff; Rowland, J, Rape: the Ultimate Violation, Pluto Press, 1985: see particularly the Introduction to the English edition by Helena Kennedy; Sebba. L, and Cahan. S, "Sex Offenses: The Genuine and the Doubtful Victim", Victimology: A New Focus, Vol 5, p. 29. Brownmiller. S, Against Our Will, Penguin, 1975, pp.364-368.
146. Violence Against Women, Report of Ad Hoc Working Group, op cit, at p.39 indicates that the usual time lag in the UK is one year.
147. Crimes Act 1961 (NZ) s.375A introduced by Crimes Amendment Act (No.3) 1985, s.5; see also, Indian Code of Criminal Procedure, s.327.
148. See for example, the provisions in Indian Penal Code, s.228-A, Crimes Act 1961 (NZ) s.375A, Sexual Offences (Amendment) Act 1976 (England and Wales) s.4. Similar provisions exist in Tasmania, Western Australia, Queensland, Northern Ireland and The Northern Territory. Trinidad and Tobago and Malaysia have such provisions under consideration.
149. The English provision is flawed as it protects complainants in cases of rape or attempted rape and not indecent assault.
150. Most give the judge a discretion to allow publication. Here not only must the judge act with responsibility, but so must the press. Violence Against Women, Report of an Ad Hoc Working Group, op cit, p.42-43 gives an example of a recent English trial where publication was allowed and the press acted without restraint.
151. See here R v Billam [(1986)] 1 All ER 985 where the English Court of Appeal attempts to lay down guidance for sentences in cases of rape and attempted rape.

VIOLENCE AGAINST WOMEN

A memorandum by the Government of GHANA

In this country it is claimed statistically that there are more women than men. If this is true then it means that women by sheer numerical strength have a greater role to play in national development but this is not the case at present. Why is this so? There are a number of reasons. The woman has been relegated to the subordinate position of a mere housekeeper because of lack of education of the woman. Without education the woman's earning capacity is either nil or not very strong, and she is destined therefore to remain in the home and rely on the man, either husband or brothers. Without financial support of her own a woman is reduced to a willing, obliging nonentity, with the resultant violence against her in the home especially emanating from the husband who knows that she cannot retaliate or even report to police for action for fear of losing her livelihood. Because of this the violence against her may continue unabated and unchecked and even unreported. There are millions of women suffering in this way unnoticed.

2. In respect of other forms of violence against the woman the Criminal Law of Ghana provides punishment. The offences connecting violence include rape, defilement of female under ten years or between ten and fourteen years old, abortion, causing harm, assault, kidnapping, abduction of unmarried female under 18 years, carnal knowledge of female idiot, unnatural carnal knowledge, incest, householder permitting defilement of young female on his premises, procuration, causing or encouraging the seduction or prostitution of a girl under 14 years, compulsion of marriage, male person trading in prostitution, persons keeping brothel, and gross indecency in public places. All these are criminal offences which are directed mainly against women and involves the element of force or violence and or indecency.

3. In respect of the above mentioned criminal offences directed at women the criminal law provides adequate punishment for the offenders. But after punishing the offender there is the question of rehabilitating victims of crimes such as rape, forced marriages, forced abortions and use of force by a husband against the woman in the home when in a drunken or angry state. The effects of such use of force on a woman is greatly damaging, and affects even the personality and self respect of the woman. All appropriate measures should therefore be taken to inform women of their rights and where to report such use of violence on them.

4. In the case of the use of force in the family by a husband or relative she should be able to report to the Social Welfare Department for redress instead of at first instance to the police. This would encourage the woman to report use of force in family matters. There should be free legal aid centres where advice should be made available to the woman. The minimum age should be made uniform for all types of marriages to save girls from sexual violence at an early age without their consent. Ghana is in the process of amending the marriage age to 21 years for both boys and girls.

5. Girls should receive the same education just as boys and this would lead to the liberation of the woman and prevent all forms of political, economic and social discrimination against her. There should also be an all out effort to educate public opinion on the need to eradicate all customary practices and traditional attitudes that are degrading to the status of women, and involves the use of violence, and to this end Ghana has over the past few months passed legislation to this effect namely, degrading and violent widowhood rights have been abolished and a new Intestate Succession Law and Administration of Estates Amendment Law which give adequate protection to the woman have been passed. The Customary Marriage and Divorce Registration law has also recognised the rights of the woman in this type of marriage and preserved her dignity and inheritance rights. Before the passing of these laws a widow was subjected to violence and degrading widowhood rights, and very often she and her children were driven out of the home of the deceased husband with nothing to live on. The only way to check the effects of violence on women is by passing legislation to abolish obsolete and inhuman customs and practices, to award adequate compensation to victims of violence, and rehabilitate and treat them medically and spiritually at counselling centres.

6. The psychological effects of use of violence on the woman is more serious and difficult to eradicate and consideration should be given to this. In this country the handling of complaints from women are treated and handled the same way as any other complaints, but it might probably be best to train women officers in the handling of these cases exclusively in the future. The hearing of such cases in court should also so far as possible be in camera for often it is the fear of adverse publicity to the woman victim during the trial of a case in public that prevents her from reporting such criminal case to police at all.

7. Member States should co-operate to find solutions to the problem of violence against women bearing in mind that a woman is weaker than the man physically, and needs the protection of society from men who misuse what-ever greater physical strength God has in his wisdom endowed them with. The woman may be physically weaker than the man, but she is an important member of society without whom the society cannot continue to exist as it is now. Activities at educating men to respect womanhood should be mounted in all member countries together with effective legislation to protect women against violence.

Mutual Assistance in the Commonwealth

COMMISSIONS OF ENQUIRY SITTING IN OTHER JURISDICTIONS

Memorandum by the Government of Australia

(A) INTRODUCTION: GENERAL

1. This paper will confine itself to inquiries established by federal Royal Commission and not deal with lesser statutory inquiries or administratively established inquiries. Federal Royal Commissions are established under both Royal prerogative and the federal Royal Commissions Act 1902, s.18. However, all Commissions rely on their statutory powers and protection under the Act.

2. Australia is a federation and all States have legislation enabling inquiries to be conducted by a Commissioner appointed pursuant to Letters Patent issued by a State Governor. NSW: Royal Commissions Act 1923; QLD Commissions of Inquiry Acts 1950 to 1954; SA Royal Commissions Act 1917-1982; TAS Evidence Act 1910, ss.13A-22; VIC Evidence Act 1958 Part 1, Div 4A; and the WA Royal Commissions Act 1968. However, it is not an uncommon occurrence in Australia for State Governments to participate with the Federal Government in the establishment of joint Commonwealth/State Royal Commissions. This is brought about the issue of complementary Letters Patent by the Governor-General and a State Governor and if the subject matters of such a joint inquiry include matters which fall within the legislative powers of both State and the Commonwealth the terms of reference given by the State and the Commonwealth may be the same or similar. This results in the Commission having powers which the Commonwealth's Royal Commissions Act confers on the Royal Commission and in areas outside Commonwealth power, the Commission is reinforced with powers which the Acts of Parliament of participating States confer. For example, the Royal Commission of Inquiry into Drug Trafficking which reported in 1983 was issued with Letters Patent by the State Governments of New South Wales, Queensland and Victoria complementary to those issued by the Commonwealth.

3. A Royal Commission's functions are to inquire into a matter and report to the the executive government. Its findings are only in the nature of recommendations which the executive government may accept or reject. While the Royal Commission Act empowers Royal Commissions to compel attendance of witnesses and the giving of evidence on oath or affirmation, and prescribes offences to encourage co-operation with and respect for Royal Commission proceedings. Royal Commissions are not courts - inasmuch as their conclusions do not determine or alter rights or liabilities. Offences referred to are tried by courts and not by the Commission (except in relation to an offence of contempt of the Commission where the Chairman of the Commission is a judge - there is some doubt as to the constitutional validity of the provision as it would appear to offend against the separation of powers entrenched by Chapter III of the Australian Constitution. A jurisdiction to try and punish offences created by federal law clearly involves an exercise of the judicial power of the Commonwealth and under the Constitution this power is only exercisable by the courts listed in s.71 of the Constitution).

4. Although Royal Commissions are not courts, the taking of evidence on oath or affirmation such as they are empowered to do is generally recognised as a court-like activity, for a Commission, having been appointed by the Australian Government, to engage in this activity in a foreign jurisdiction would at the least be a breach of comity and most likely also be a breach of local law - such as a law preventing unauthorised persons from administering oaths to take evidence - if it purported to operate in another country without authorisation by the Government of that country.

5. In fact, because of the trans-national nature of the subjects of some recent Royal Commissions, the Royal Commissions Act was amended in 1982 to permit Royal Commissions, for the purposes of preparing their reports on their inquiries, i.e., for the purposes of Australian law, to use evidence taken overseas by different methods -

in the court of an inquiry commissioned by the overseas country; and

the taking of evidence on oath pursuant to arrangements with the foreign country.

The Act enables Australian Royal Commissions to function in a foreign country where appropriate arrangements in that regard have been made with a foreign country on the basis of either taking evidence pursuant to an authority issued under the law of the foreign country or pursuant to its Australian Commission.

(B) INQUIRY UNDER LOCAL LAW OF A FOREIGN COUNTRY

6. The Royal Commissions Act, s.78, provides that where by Letters Patent a commission to make inquiry into and report upon matters has been issued to a person and an authority to inquire into and take evidence in relation to significantly related matters is issued under a law of another country to that person, information obtained or evidence taken in that other country may be used for the purpose of the Commission in Australia. For this to occur, however, the Commonwealth Attorney-General must be of the opinion that the matters to be inquired into are the same or substantially the same or are significantly related and that Australia and the other country concerned must have made certain arrangements in relation to the matters.

7. These provisions were enacted in response to the fact that in some instances, there would be considerable benefit to a Royal Commission in its inquiry into the matters specified in its terms of reference which have transnational significance, if arrangements could be made for the taking of evidence, in a formal sense, in a foreign country. This situation arose in the Royal Commission of Inquiry into Drug Trafficking by Mr Justice Stewart. In that particular instance, the matters under inquiry had close connection with New Zealand. It was considered by the Royal Commission that there was a large body of material of interest to the Commission which would not normally be made available on a voluntary basis. Some of the persons under investigation were residents of New Zealand and therefore outside the Commission's jurisdiction and use had been made of financial institutions in New Zealand which were not subject to the Commission's power to require the production of documents and other information. The Royal Commissioner therefore indicated the desirability of some form of Commission being issued to him by the New Zealand Government which would permit the calling of evidence and the production of documentary material in that country, in aid of the Commission's Australian terms of reference.

8. Following inter-governmental consultations, the New Zealand Government appointed the Australian Royal Commission of Inquiry into Drug Trafficking as a Commission of Inquiry under the New Zealand Commissions of Inquiry Act 1908. This enabled the Commissioner to extend the scope of his inquiry from Australia to New Zealand and in particular enabled him to compel the appearance of witnesses living in New Zealand and also to conduct hearings in that country. The New Zealand part of the inquiry was required to comply with the New Zealand statute and case law by the Letters Patent issued to it by the New Zealand Government. This was the first occasion upon which a Royal Commissioner appointed pursuant to Letters Patent issued in Australia had also been issued with Letters Patent by the Government of another country,

(C) TAKING OF EVIDENCE OVERSEAS BY ARRANGEMENT WITH AN OVERSEAS COUNTRY

(1) Taking of Evidence on Oath

9. A Royal Commission which has not been granted an authority to undertake an inquiry or take evidence under a law of a foreign country can only take evidence in a foreign country if arrangements have first been made for that purpose between Australia and the foreign country. This is because, under the Royal Commissions Act 1902, the power to take evidence outside Australia is limited to the circumstances specified in s.78 of the Royal Commissions Act.

10. Section 78 states that where by Letters Patent, a Commission has been issued to a person or persons under the Act and arrangements have been made between Australia and the foreign country in relation to the taking of evidence in that country by the Commission, the Commission may, in that country, subject to any provision of the arrangements and to the laws of that other country, administer an oath or affirmation to any person appearing as a witness before the Commission and take evidence given by that witness on oath or affirmation. Any evidence taken in that country by the Commission in accordance with those arrangements can be used by the Commission in Australia for the purpose of the performance of any function, or the exercise of any power, under the commission.

11. The question of what precisely is the nature of the arrangements contemplated by the provisions is not certain. While a treaty would not be required, it seems that some formal exchange between Governments setting out in detail what is proposed is called for. In the past, the Australian Government has arrived at these arrangements by an exchange of letters or other appropriate correspondence by Ministers of the respective Governments. (An example of these arrangements was the approval of the British Government for the Royal Commission into British Nuclear Tests in Australia to hold sittings in the United Kingdom).

12. It should be noted that S.78 makes the powers of the Commission 'subject to the laws of (the) other country'. For example, the administration of an oath or affirmation by a Royal Commission, but not the taking of the evidence, could be an offence under the laws of the foreign country. In the Royal Commission into the British Nuclear Tests in Australia, evidence was taken on oath in the United Kingdom because the UK Consular Relations Act 1968 enabled the Royal Commission to administer oaths for the purposes of taking evidence in the United Kingdom where an Australian diplomatic or consular officer had been authorised under Australian law to administer an oath or affirmation for the Royal Commission. That authorisation can be given under the Royal Commissions Act. Section 10(1) of the Consular Relations Act 1968 provided as follows:

'10.(1) A diplomatic agent or consular officer of any State may, if authorised to do so under the laws of that State, administer oaths, take affidavits and do notarial acts

(a) required by a person for use in that State or under the laws thereof;'

(a) Liability of witnesses for false evidence etc.

13. Without foreign legislation authorising it, a person could not be served with a summons under the Royal Commissions Act 1902 to appear before the Commission in the foreign country. Hence the offence provisions of that Act concerning failure to attend pursuant to a summons (s.3) would not apply and s.6 (refusing to be sworn to give evidence) would be irrelevant since the person appearing could simply discontinue his appearance.

14. However, although the matter is not free from doubt, it is considered that the offence provisions of the Royal Commissions Act do have extra territorial application in foreign

countries. Therefore, provided the Royal Commission proceedings had been duly authorised in accordance with s.78 of the Royal Commissions Act (see above), the other provisions creating offences by witnesses (e.g. s.6H on knowingly giving false or misleading evidence and s.60 on contempt) would apply and a person could be prosecuted in Australia for any offence against those proceedings.

(b) Immunity of foreign citizens in giving evidence

15. A major policy issue that gives rise to it in the conduct of an inquiry in a foreign country is the question whether citizens of that country who gave evidence to the Royal Commission should be open to prosecution in Australia for alleged offence against the Royal Commissions Act if they subsequently enter Australia. Assurances may be sought by the foreign government that there will not be proceedings instituted in respect of alleged offences committed by foreign citizens arising out of the presence of the Royal Commissions in the foreign country (The British Government sought such assurances for witnesses appearing before the Royal Commission on British Nuclear Tests in Australia when sitting in the United Kingdom).

16. On the one hand it would be disadvantageous to a Royal Commission if the prospect of immunity for false statements encouraged persons who gave evidence to the Royal Commission to feel that they were not bound to tell the truth before the Commission and for the Commission thereby to be hampered in its inquiries. There is the policy of most countries that persons should, where appropriate, be prosecuted for offences such as perjury. However, in certain particular circumstances the Australian Government has recognised that there are countervailing policy reasons for granting immunity which relate to the need for a Royal Commission to be able, so far as is possible, to get to all the facts concerning the matter in which it is charged with inquiring. That is, the possibility of prosecution in Australia of a citizen of a foreign country for false evidence given in a Royal Commission, if that person travelled to Australia, could be a major barrier to obtaining useful evidence relating to matters under inquiry. Another policy consideration is whether the Australian Government should as a matter of policy prosecute in Australia foreign citizens for conduct in their own country, albeit before an Australian Royal Commission sitting in that foreign country.

17. It would appear that the options open to the Australian Government are:

- (a) a decision not to prosecute or a direction to the responsible prosecuting agency not to undertake such a prosecution;
- (b) the giving of an indemnity by the Attorney-General (first law officer) to a person who might be prosecuted should the situation arise; or
- (c) to have the Royal Commission receive material from witnesses on an informal basis and for evidence not to be taken on oath or affirmation.

18. It has been our experience that in some instances it is necessary for the Australian Government to give an undertaking that citizens of the foreign country are to be immune from prosecution in Australia for offences against a Royal Commission sitting in that foreign country. The Commonwealth Attorney-General has power to give a direction under s.8 of the Director of Public Prosecutions Act 1983 to the Director of Public Prosecutions, (an office established by federal legislation to carry out prosecutions of offences against a Commonwealth law such as ss.6H and 60 of the Royal Commissions Act). Where the Attorney-General does give such a direction, he must publish in the Gazette and table in Parliament a copy of the instrument within 15 days of its issue. Since the commencement of the DPP Act, no such direction has been given.

19. The problem with option (b) is that it is difficult for the Attorney-General to give an indemnity at the stage where consultations are taking place between Governments and no

evidence has been taken so that the persons who may be given an indemnity and the conduct for which they are to be indemnified is not known. It is also uncertain whether an indemnity given by the first law officer could extend to prosecutions brought by private individuals. (see s.10 of the Royal Commissions Act). However, under s.9(5) of the Director of Public Prosecutions Act, the Director of Public Prosecutions may take over a proceeding that was instituted or is being brought by another person where that proceeding was for the commitment of a person for trial in respect of an indictable offence against a law of the Commonwealth or was for the summary conviction of a person in respect of an offence against a law of the Commonwealth. He may then decline to carry on those proceedings further.

20. The problem with option (c) is that the Royal Commission may argue that the greatest value to the Royal Commission would be obtained from evidence which is sworn and that sanctions for false or misleading evidence or for contempt of the Royal Commission which apply to persons giving evidence in Australia should also apply to foreign citizens giving evidence to the Royal Commission.

21. A consideration which needs to be taken account of in this matter is whether the foreign country's legislation could be used to apply sanctions to its citizens who give false evidence to the Royal Commission. For example in the United Kingdom it would appear that the Perjury Act 1911 (UK) would apply to evidence given to an Australian Royal Commission sitting in that country.

22. The Australian Government has taken the view, on one occasion, that it would not wish, for reasons of comity, for there to be prosecutions in Australia in respect of alleged offences committed by the foreign country's citizens arising out of the presence of a Royal Commission in a foreign country.

(2) Taking of evidence informally

23. Where the foreign government does not agree to a Royal Commission taking evidence on oath in their country or to administering oaths under Australian law to the residents of that foreign country who are affected by the Royal Commission, an alternative approach is for a Royal Commission to undertake a fact-finding visit. This could involve informal interviews with the foreign country's nationals affected who would give information to the Royal Commission on an entirely voluntary basis. These persons could in the course of such interviews, be asked to subscribe to written statements or claims that they may make to the Commission, but this would be done in accordance with the law of the foreign country. It may be also advisable in this regard to offer to the foreign country's officials the opportunity to have an observer present at the Commission's proceedings and should any matters arise which cause them concern, to communicate those concerns immediately to the Australian embassy. (The visit of the Commission of Inquiry into Compensation Arising from Social Security conspiracy Prosecutions to Greece to interview persons who had submitted claims to it was an example of this type of arrangement). It has been our experience that this model for a Royal Commission to take evidence informally is the only available option where the foreign country is concerned that the activities of a Commission in their country would amount to an infringement of their sovereignty.

(3) Considerations Common to Taking Evidence on Oath and Informally

(a) Compellability of witnesses

24. Witnesses may not be compelled in the foreign country to give evidence before the Royal Commission pursuant to s.78 of the Royal Commissions Act, thus compellability would depend on the existence of legislation in the foreign country for that purpose.

(b) Question of protection of Commissioner and witnesses

25. Provided the Royal Commission had been duly authorised under the Royal Commissions Act, the protective provisions of that Act would probably apply in respect of evidence given in the foreign country but only, of course, in so far as Australian law is concerned.

26. A Commissioner, in the exercise of his duty, has the same protection and immunity as a Justice of the High Court. A witness appearing before the Commission has the same protection and is subject to the same liabilities in civil or criminal proceeding as a witness in any case tried in the High Court. A legal practitioner assisting or appearing before a Commission has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

27. A statement or disclosure made by a witness in the course of giving evidence that is taken pursuant to arrangements for taking evidence with a foreign country is not admissible in evidence against that witness in any civil or criminal proceedings in any court of Australia except in proceedings for an offence against the Royal Commissions Act. (see discussion in paras 18-20).

28. The question of any protection in the laws of the foreign country such as the common law defence of qualified privilege in the case of defamation would need to be assessed. In principle, the giving of evidence to the Royal Commission ought to be held as an occasion of qualified privilege. It is our view that it would be prudent to obtain the advice of counsel experienced in the foreign country laws on defamation, use of evidence in criminal proceedings against the witness, etc.

(c) Where a Royal Commission may sit within a foreign country

29. There may be legal obstacles to sitting in Australian diplomatic consular premises or other premises. This question would need to be cleared with the foreign country's government.

(d) Opportunity for foreign government to be able to present its evidence

30. It is important for a Royal Commission visiting a foreign country and taking evidence by arrangement to make sure that the foreign government is given a full opportunity to place before the Royal Commission any evidence it considers relevant to the inquiry. To facilitate this, it may be advisable that the Royal Commission grant leave to appear to the foreign government. This may also help in obtaining access to documents held by the foreign government. It may be prudent for the Letters Patent to include a requirement that the Commission give right of representation to the foreign government concerned.

(e) Restrictions on evidence by foreign nationals

31. There may be need for action to be taken by the foreign government to enable its citizens to disclose information to a Royal Commission. This could arise where the foreign citizens giving evidence are present or past employees of the foreign government and some type of official secrets legislation is applicable.

(f) Matters that the Royal Commission should address

32. Where the Royal Commission takes evidence on oath or affirmation, witnesses would be examined before it by Counsel assisting the Royal Commission. The Foreign jurisdiction may want the right also to examine witnesses.

(g) Arrangements for foreign documents to be made available to the Royal Commission

33. Where a Royal Commission requests release of a particular document of a foreign country, it may be prudent for the Royal Commission to provide the Foreign government with details of the Commission's grounds for believing that the document is relevant to the inquiry, whether the Commission is preparing to give that document public release or whether it will only be available to members of the Commission and arrangements for the status of the documents at the end of the inquiry, i.e. there may be a need for prior agreement governing the use of the document for purposes other than Royal Commission purposes. It should also be pointed out to the foreign government whether any document released to the Royal Commission which are relevant to any legal actions may be required to be tendered in court proceedings. Questions of privilege to protect the confidentiality of any documents may then arise.

(D) BACKGROUND FAMILIARISATION VISIT BY MEMBERS OF A ROYAL COMMISSION TO FOREIGN COUNTRIES

34. Apart from formal arrangements between Australia and foreign countries for the taking of evidence in foreign countries, a number of Australian Royal Commissions have travelled overseas for the purpose not of taking evidence but of obtaining background information which was pertinent to their inquiries (e.g. the Commission of Inquiry on Australia's Security and Intelligence Agencies, the Commission of Inquiry on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, the Royal Commission on the Activities of the Federated Ship Painters and Dockers' Union and the Royal Commission of Inquiry into Drug Trafficking).

35. In these instances, the Australian Government contacted foreign governments to make arrangements for members of a Royal Commission to hold discussions with officials and citizens of the foreign country. These arrangements are not made pursuant to the Royal Commissions Act, and the Royal Commission does not hold sittings nor does it take evidence in the foreign country.

(E) FOREIGN COMMISSIONS OF INQUIRY SITTING IN AUSTRALIA

36. Australia has had only very limited experience of foreign governments requesting that their commissions of inquiry be able to take evidence in Australia. Recently, however, Australia acceded to a request from the Papua New Guinea Government for its Commission of Inquiry into Pelair/Air Niugini to be allowed to interview Australian nationals in Australia and facilitated access by the Commissioner to Australian authorities. In cases where it is proposed that evidence be taken from Australian nationals by a foreign commission of inquiry, a formal agreement should be entered into between the respective governments and that formal agreement followed by an exchange of correspondence which would govern the terms and conditions upon which the Commission could conduct its inquiries in Australia.

37. It is the policy of the Australian Government not to agree to a foreign Commission having power to compel the attendance of witnesses in Australia. The view is taken that the service, without the consent of the Australian Government, of such foreign process is a breach of Australian sovereignty. The particular concern in this area is that non-compliance with compulsory process usually carries criminal penalties and it is regarded as inappropriate that a foreign government exercise any such powers in Australia. It is noted that there is no statutory basis upon which Australia can offer facilities or assistance to a foreign Commission. In relation to a foreign Commission taking evidence and administering oaths, all States and the Australian Capital Territory have legislation permitting foreign authorities to administer oaths within those jurisdictions, subject to certain conditions. These conditions generally require that the person administering the oath be a judge or that the person, if he is not a judge, first receive the consent of the State Attorney-General or Chief Justice.

THE IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION WITHIN THE UNITED KINGDOM

A paper prepared by the Government of the United Kingdom

PART I: LEGISLATIVE ASPECTS

This paper has been prepared on a slightly false pretence. Although the United Kingdom has enacted the Child Abduction and Custody Act 1985 Part I of which will give effect to the Hague Convention on International Child Abduction of 1980 (hereafter "The Hague Convention") this Act only comes into force on 1st August of this year. Therefore this paper will concentrate on the problems encountered in implementing the 1985 Act and in particular Part I and on the arrangements which have been made by the United Kingdom in respect of the Central Authorities and the procedure for these Authorities to receive applications under the Convention. Practical problems cannot be described although it is hoped that few or even none will occur.

2. The Child Abduction and Custody Act 1985 will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention of the same year on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (hereafter "The European Convention"). The latter Convention is of less importance in the context of the Commonwealth than the Hague Convention. However, Article 23 of the European Convention enables a state which is not a member of the Council of Europe to accede to the European Convention. In the interests of combating the growing social problem of child abduction each Commonwealth country should weigh up the advantages and disadvantages of acceding to the European Convention. The rest of this Paper deals with the Hague Convention.

3. The impetus behind the Hague Convention came from the Commonwealth. In October 1976, following a suggestion made in January 1976 by the Canadian representative the Hague Conference on Private International Law agreed to include in its programme for the Fourteenth Session the preparation of a Convention dealing with the problem of international child abduction. This proposal was given added momentum by the recognition at the meeting at Winnipeg in August 1977 of the Commonwealth Law Ministers of the need for international agreement on the subject. A special Commission drafted the Convention which was put in its final form at the meeting in October 1980 of the Fourteenth Session. The resulting Convention is given effect to in the United Kingdom in Part I of the 1985 Act. As the impetus came from the Commonwealth, there is much to be said for this process to be continued by as many Commonwealth countries as possible by their ratification of this Convention.

4. The Hague Convention has now been ratified by Canada, France Portugal and Switzerland. The U.S.A., West Germany and The Netherlands already have intimated that they intend to ratify the Hague Convention within the next two years. It is interesting to note the experience of Switzerland, which has not experienced any cases of child abduction since ratifying the Convention.

5. In proceedings in the United Kingdom the general principle where the custody or upbringing of a child is in question is that the court is required to have regard to the welfare of the child as the first and paramount consideration (see section 1(1) of the Guardianship of Minors Act 1971 and *J v C* (1970) A.C. 668). The first problem which the United Kingdom was confronted with when deciding whether to implement the Hague Convention

was whether the provisions of the Convention would derogate from the paramountcy principle. In the United Kingdom Government's view this is not so and it was reinforced in this view by the following arguments. First, the general principle of law that the child's welfare is paramount is now widely recognised in other countries particularly in the Commonwealth and in Europe as well as in the United Kingdom. Indeed the preamble to the Hague Convention recites that the states signatory to the Convention are "firmly convinced that the interests of children are of paramount importance in matters relating to custody". Secondly, as was succinctly put by Buckley L.J. in *Re L* (1974) 1 WLR 250 and is enshrined in the provisions of the Hague Convention, where a child has been abducted to another country, a full investigation of the merits of the case may be incompatible with the welfare of the child. In such circumstances as the Hague Convention so provides, an order that the child should be returned forthwith to the country from which he has been removed, in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as in his best interests. However, there may be an exceptional case where the child should not be returned to his or her home jurisdiction because, for example, the custodial parent has become inadequate or it is necessary to protect the child against ill treatment.

Articles 12 and 13 of the Hague Convention provide grounds on which the judicial or administrative authority hearing an application under the Hague Convention can refuse to return a child. Such cases will be very exceptional, both because any country which ratified the Convention must pay regard to the preamble and the great majority of these countries do already accept the paramountcy principle. Therefore, abducted children will be returned to their home jurisdiction which is the proper and only forum for determining custody disputes over these children.

6. As has already been mentioned in this Paper, Part I of the 1985 Act gives effect to the Hague Convention. The provisions in Part I give legislative force to those Articles of the Convention which could not be directly applied into United Kingdom law as was the case for the Hague Convention Articles set out in Schedule 1 to the 1985 Act. Certain other Articles were not given direct force within the United Kingdom by the Act. The provisions of these Articles either created only international obligations to which the United Kingdom is of course bound or were already reflected in the law of the United Kingdom.

7. There are two important lynch pins under the Hague Convention. First, the Central Authority which by virtue of Article 6 all the contracting states to the Convention are obliged to designate and secondly, the judicial or administrative authorities who are required to hear applications under the Convention (see Articles 11 to 15 and Article 21). The Central Authority assumes responsibility for making the administrative arrangements necessary to achieve the objectives of the Convention. The functions of the Central Authority which are set out in Articles 7 to 10 are extensive, including, inter alia, receiving from and sending to other Central Authorities applications under the Convention, tracing the whereabouts of the child, initiating or facilitating the institution of proceedings. The functions of the United Kingdom Central Authorities are described in more detail later on in this Paper. All that needs to be said at present is that without the Central Authority the Hague Convention cannot fully operate. By virtue of section 3 of the 1985 Act the Lord Chancellor is designated the Central Authority for England and Wales and Northern Ireland and, is also, because the United Kingdom has more than one Authority, the Supreme Central Authority for the United Kingdom. The Secretary of State for Scotland is the Central Authority for Scotland.

8. Although it is to the Central Authorities to which applications under the Convention will normally come (direct application to the judicial or administrative authorities is permitted by Article 29 of the Convention), it is for the designated judicial or administrative authorities under the Convention to determine whether or not a child should be restored to the person whose rights of custody have been infringed. Section 4 of the 1985

Act designates the High Court in England and Wales and Northern Ireland and the Court of Session in Scotland as the judicial authority to determine Hague Convention Applications. The reason why these courts have this jurisdiction conferred on them is:

- (i) their jurisdiction extends throughout the whole of the parts of the United Kingdom in which they sit;
- (ii) the provision of rules to determine which lower court should have jurisdiction could lead to considerable difficulties and complexities;
- (iii) the importance of securing consistency and speed in the giving of decisions; and,
- (iv) the international nature of the jurisdiction.

The rules of court which have been made for the Hague Convention for these courts further ensure that Hague Convention applications will, in accordance with reason (iii) above be determined expeditiously.

9. The United Kingdom Government was faced with a number of problems when devising the legislative scheme to implement the Hague Convention. The first issue arises because Article 16 of the Convention provides that:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

It was decided that the effect of this Article was that it would impose a Stay (or Sist in Scotland) on any existing proceedings. Section 9 of the 1985 Act defines for the purposes of Article 16 what are proceedings determining "the merits of rights of custody". Such proceedings include, for example, care orders made under section 1 of the Children and Young Persons Act 1969 and custody orders made in matrimonial proceedings, under sections 42 and 43 of the Matrimonial Causes Act 1973. The effect of Article 16 and section 9 of the 1985 Act is that once a Hague Convention Application has been made, any custody proceedings in respect of the same child will be stayed and the stay will only be lifted if the Convention application is unsuccessful. These provisions therefore ensure that the child's home jurisdiction has primacy in determining questions of custody.

10. The second issue was what was to be the effect of a United Kingdom custody order as defined in section 27(1) of the 1985 Act when the court had ordered the return of a child under the Hague Convention. In addition, Article 17 of the Hague Convention provides that the sole fact that a decision relating to custody had been made in the requested Contracting State was not a ground for not making a Hague Convention Order. The solution, which is contained in section 25(1) of the 1985 Act was to provide that once an order for the return of a child had been made under the Hague Convention any custody order relating to the child would cease to have effect. Section 25(1) of the 1985 Act also prevents the issue of custody being raised in the child's home jurisdiction on the basis that there is an existing (and possibly conflicting) custody order made in the United Kingdom.

11. The third issue concerned the question of the costs of applications under the Hague Convention. Article 26 of the Convention provides that Central Authorities are not to require any payment from an applicants in respect of measures taken by them, including the costs involved in representation in legal proceedings for the return of the child.

Paragraph 3 of Article 26 enables a Contracting State to enter a reservation to limit this financial help to those costs covered by the Contracting State's system of legal aid and advice. The United Kingdom has entered such a reservation. The effect of this reservation is that an applicant under the Hague Convention seeking the return of a child who has been taken to the United Kingdom will be given free legal aid when he or she applies to the appropriate United Kingdom Central Authority. All the costs of the proceedings will be paid by the United Kingdom Government under the legal aid system. There will be no means test for the applicant and he or she will not be required to pay any contribution. A similar system is in operation in Canada.

12. As this Paper has already mentioned the 1985 Act will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention. A conflict may arise if simultaneous applications are made in respect of the same child by different persons under both Conventions. The United Kingdom Government was determined to avoid this conflict. The 1985 Act provides that any application under Part I of the Act in respect of the Hague Convention will be determined before the application under the European Convention can be considered (section 9(b) and 16(4)(c)). An application under the European Convention will only be entertained if the application under the Hague Convention is in accordance with the statements made by the United Kingdom representatives at the time of the adoption of this Convention at the Fourteenth Session of the Hague Conference. Article 19 of the European Convention permits the Hague Convention to prevail where the Contracting States are parties to both Conventions: Article 20.1 permits the Hague Convention to prevail where one State is party to the Hague Convention but not to the European Convention. The United Kingdom has entered reservations against the European Convention to this effect.

PART II: PRACTICAL ASPECTS

13. When the United Kingdom central authority receives a request for the return of the child who has been allegedly abducted to the United Kingdom the first task is to ensure that the application is not manifestly outside the scope of the Convention. This is not considered to be an onerous task but clearly requires a lawyer or other person with knowledge of the scope and operation of the Convention to consider the application. When the application is accepted Article 7 provides that the central authority itself must take certain measures which cannot be delegated e.g. to solicitors. Generally, these duties will simply amount to collection, transmission and coordination of information, and where appropriate, the initiation of procedures by other internal authorities such as insuring that the immigration authorities prevent further abduction of the child. It is envisaged that the central authorities will have close but nevertheless informal links with the police, social services and probation departments, immigration and customs authorities etc. It will sometimes be necessary to give urgent instructions to one or another agency and for these reasons it is important for close links to be maintained so that an atmosphere of trust between internal agencies may be developed. Likewise, it is obviously important that the assistance of those agencies is invoked only in those cases where it is necessary.

14. Having, if necessary, taken whatever provisional measures are indicated, the central authority will then place the application in the hands of a solicitor. The problem arises how the solicitor should be chosen. It is clearly important that the central authority is not accused or suspected of favouritism in its choice of solicitors: likewise, it is important that the solicitors chosen should have experience of family law in general and, where possible, the operation of the Convention in particular. It is therefore proposed that, in consultation with the Law Societies in the three jurisdictions, a panel of approved solicitors should be established to cover the whole country and from which the solicitor should be drawn. It would be open to all solicitors to apply to join the panel. In this way it is hoped that a high standard of service may be maintained without any question of "favouritism" arising.

15. Although the central authorities are obliged, under the Convention, to work efficiently and quickly, nevertheless there is always the possibility that for any number of reasons (not the least of which may be possible delays in the post), applications may fail to be dealt with rather less speedily than may be hoped. In order to combat this difficulty and in order to try to obtain a speedy and informal method of exchanging information both on particular cases and on general experience of operation of the Convention, the European Community countries (all of which have signified their intention to ratify either or both the Hague Convention and the European Convention on Recognition and Enforcement of Custody Decisions) have set up a system of "correspondents". This system provides for one official within the central authority in each country, giving his or her name, address and telephone number who may be contacted informally and quickly by any other of the "correspondents" with a view of finding out what has happened in a particular case, giving or receiving further information. Such a system helps to avoid the possibility that urgent cases might get lost in the necessarily somewhat bureaucratic machine and it is to be hoped that the trust, mutual knowledge and cooperation which will grow up between the various correspondents will supplement the operation of the Convention in a useful way. A similar system of correspondents may be useful between the countries of the Commonwealth.

16. Finally, the value of the Convention is apparent in combating the social evil of child abduction. With mutual trust and sensible co-operation the countries of the Commonwealth, with their shared Common Law tradition, can make a valuable contribution to stamping out this evil ensuring the best possible future for the innocent children involved.

MULTILATERAL CONVENTIONS RELATING TO INTERNATIONAL TERRORISM

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INTRODUCTION

The purpose of this paper is to examine the techniques employed by certain multilateral conventions in co-ordinating State action against international terrorism. The Conventions to be considered are the following:

- (i) Convention on offences and certain other acts committed on board aircraft, Tokyo, 14 September 1963 ("the Tokyo Convention").
- (ii) Convention for the suppression of unlawful seizure of aircraft, The Hague, 16 December 1970 ("the Hague Convention").
- (iii) Convention for the suppression of unlawful acts against the safety of civil aviation, Montreal, 23 September 1971 ("the Montreal Convention")
- (iv) Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, New York, 14 December 1973 ("the Internationally Protected Persons Convention").
- (v) International Convention against the taking of hostages, New York, 17 December 1979 ("the Hostages Convention").

2. All of these Conventions have received widespread support from the international community. 124 States are currently parties to the Tokyo Convention. 130 States are currently parties to the Hague Convention. 130 States are currently parties to the Montreal Convention. 62 States are currently parties to the Internationally Protected Persons Convention. 25 States are currently parties to the Hostages Convention.

3. These Conventions have been adopted, in general, in response to particular events or developments in the field of international terrorism. As such activities increased during the 1960s and 1970s, it became essential for States to adopt a co-ordinated approach to counteract them. Aircraft being prime targets for international terrorism, it was natural that States should attempt to co-ordinate their approach to the prevention and punishment of such activities on board and in relation to aircraft. This was achieved by a series of Conventions. The first, the Tokyo Convention, deals with the extension of municipal criminal law and jurisdiction to activities on board aircraft and the rights and duties of contracting States in relation to such activities, their prevention and punishment. Although it contains certain limited provisions relating to hijacking it is left to the Hague Convention to deal with this in detail. A third convention, the Montreal Convention, was subsequently adopted in order to deal with sabotage and acts against the safety of civil aviation which were outside the scope of the Hague Convention. More recently, the vulnerability of persons such as Heads of State, Heads of Government, Minister of Foreign Affairs, and representatives of States or international organisations of an intergovernmental character, now described collectively as "internationally protected persons" led to the Internationally Protected Persons Convention of 1973. This has since been followed by the Hostages Convention of 1979

which is of much wider application and which was, in turn, a response to the dramatic increase in such activities and necessary to fill gaps left by the earlier Conventions. While there is inevitably a measure of overlap between the Conventions, the result has been the development of a coherent body of "treaty law" co-ordinating inter-State action against international terrorism in a most effective manner and commanding the support and active participation of a large number of States.

4. The Conventions are, in general, all concerned with international terrorism as opposed to criminal activities taking place within one State and lacking an international element. For example, the Hostages Convention has no application where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State (Article 13). The application of each of these Conventions is considered in detail subsequently. An international element may be supplied, for example, by the nationality of the actor, the place where the offence was committed, the nationality of the victim, the State against which the act of terrorism is directed or the State of registration of the aircraft on which the activity takes place or against which the activity is directed. The existence of different rules of criminal law, jurisdiction and procedure in each municipal system makes a concerted approach to such international activities essential. Furthermore, the existence of efficient procedures for extradition and judicial assistance are indispensable. The framework to meet such needs is provided by these Conventions.

5. The Conventions under consideration, with the exception of the Tokyo Convention which deals in more general terms with the extension of municipal law to criminal activities on aircraft, adopt the general approach of describing a specific offence or offences and obliging each contracting State to make that conduct a criminal offence in its municipal law. The great advantage of this approach is that it ensures that the conduct in question is a criminal offence in the municipal law of a large number of States. As a result, there is a commendable uniformity of approach resulting from a standardisation of offences.

6. All of the Conventions impose obligations on contracting States to establish their jurisdiction in specified circumstances. The Tokyo Convention requires each contracting State to take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State. The other Conventions all require each contracting State to take such measures as may be necessary to establish its jurisdiction over the offence or offences to which that Convention relates in certain specified circumstances. It seems clear that these provisions are intended to relate to both the jurisdiction of a contracting State's courts and the ambit and territorial application of that State's law since both are required to render the conduct in question criminal and punishable in the municipal law of that State. The circumstances in which States are required to establish their jurisdictions under these various conventions are very wide indeed and provide examples not only of the more conventional bases on which States claim to exercise jurisdiction founded on territoriality or nationality but also on the more controversial grounds of passive personality or the security of the acting State. Widest of all is the requirement found in all conventions other than the Tokyo Convention that contracting States must take such measures as may be necessary to establish their jurisdiction over the offence or offences in question when the only connection with that State is that the alleged offender is present in its territory. The result is a requirement that each contracting State establish in its municipal law an offence or offences which may be committed by non-nationals abroad in circumstances which have no connection with that State. Given the numbers of States parties to some of these conventions, the effect is to establish criminal offences of something approaching universal jurisdiction. As a general rule, substantial coincidence of the criminal jurisdictions of States may be regarded as undesirable since this creates a potential source of conflict. It is suggested, however, that in the context of the fight against international terrorists the creation of overlapping criminal jurisdictions is desirable and necessary if such hostes humani generis are not to

escape justice. It must be emphasised, nevertheless, that very wide extensions of criminal law and jurisdiction of the type now under consideration render it all the more important that such action is co-ordinated in the manner which these conventions are intended to achieve.

7. A further consequence of the very wide extensions of criminal law and jurisdiction achieved by contracting States pursuant to the scheme of these Conventions is that it becomes all the more important to safeguard the interests of alleged offenders pending prosecution or extradition. As a result, each Convention includes provisions for the protection of alleged offenders.

8. Of central importance to the scheme of all of the Conventions under consideration, with the exception of the Tokyo Convention, is the obligation on each contracting State in whose territory an alleged offender is found to submit the case to its competent authorities for the purpose of prosecution if it does not extradite him. This obligation on a contracting State is expressed, in each case, to be "without exception whatsoever" and in the cases of the Hague, Montreal and Hostages Conventions is expressed to arise "whether or not the offence was committed in its territory". The authorities are required to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. The effect of these provisions is that whenever an alleged offender is found in the territory of a contracting State that State is bound either to extradite him or to submit the matter to its prosecuting authorities. As a result no alleged offender can find refuge in any of the States parties to these Conventions. The closer the international community comes to universal participation in these Conventions, the more difficult it will become for a terrorist to find a safe haven.

9. All of the Conventions under consideration, with the exception of the Tokyo Convention, include provisions which supplement existing arrangements between contracting States for the extradition of alleged offenders. This is achieved in the following ways:

- (i) The offences to which the Convention relates are deemed to be included as extraditable offences in any extradition treaty existing between contracting States.
- (ii) Contracting States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
- (iii) A contracting State which makes extradition conditional on the existence of a treaty may, at its option, if it receives a request for extradition from another contracting State with which it has no extradition treaty, consider the Convention as the legal basis for extradition in respect of the offence or offences to which it relates, subject to the conditions provided by the law of the requested State.
- (iv) Contracting States which do not make extradition conditional on the existence of a treaty are required to recognise the offence or offences to which the Convention relates as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

10. All of the Conventions employ the technique of deeming the activities complained of to have occurred in a certain place or places for the purposes of extradition.

11. The refusal of States to extradite alleged offenders on the ground that the offence in question is a political offence causes considerable difficulties in the fight against international terrorism. The Conventions now under consideration, with the exception of the Tokyo Convention go some way to meeting this difficulty by allowing a State in whose

territory an alleged offender is found either to extradite him or to submit the case to its own prosecution authorities. As a result, there is no mandatory requirement of extradition. Certain of the Conventions go further in this regard. The Hostages Convention provides that a request for the extradition of an alleged offender, pursuant to that Convention, shall not be granted

if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion or that his position may be prejudiced for any of those reasons or because communication with him by the appropriate authorities of State entitled to exercise rights of protection cannot be guaranteed (Article 9).

12. Both the Internationally Protected Persons Convention and the Hostages Convention expressly provide that they do not affect the application of treaties on asylum, in force at the date of the adoption of the Convention, as between States which are parties to those treaties.

13. It is suggested that the Conventions under consideration provide a very sound basis for the co-ordination of State activity in seeking to defeat international terrorism, an objective which is in the interest of all States and their nationals. These Conventions have already received widespread support from the international community. It is to be hoped that they will soon command universal support.

14. The provisions of the Conventions are considered in detail in the following sections.

Convention on offences and certain other acts committed on Board aircraft, Tokyo, 14 September 1963

15. The Tokyo Convention is based on a draft prepared by the International Civil Aviation Organisation. The Convention was adopted by an international conference at Tokyo on 14 September 1963 and it entered into force on 4 December 1969. 124 States are currently parties to the Tokyo Convention.

16. The Convention establishes a uniform approach to acts on board aircraft which are offences against criminal law and to acts on board aircraft which may or do jeopardise the safety of aircraft or of persons or property on board aircraft or which jeopardise good order and discipline on board aircraft. The first of these categories is based on the assumption that the criminal laws of one or more States extend to activities on board aircraft. What constitutes an offence within this category will vary according to the applicable law. The Convention, with the exception of Chapter III, applies to offences committed or acts done by a person on board an aircraft registered in a contracting State while the aircraft is in flight, on the surface of the high seas or on the surface of any area outside the territory of any State (Article 1(2)). The Convention does not apply to aircraft used in military, customs or police service (Article 1(4)).

17. Chapter II creates an obligation on a contracting State to take such measures as may be necessary to establish its jurisdiction over offences on board aircraft registered in that State (Articles 3(2)). The Convention does not exclude any criminal jurisdiction exercised in accordance with national law (Article 3(3)). However it provides that a contracting State which is not the State of registration may interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence on board only in certain specified circumstances (Article 4).

18. Particular provision is made for joint air transport operating organisations and international operating agencies (Article 18)

19. Chapter III, which applies to activities on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State only if the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or if the aircraft subsequently flies in the airspace of a State other than that of registration with the actor still on board, confers on the commander of the aircraft in specified circumstances special powers which may be summarised as follows:

- (1) A commander who has reasonable grounds to believe that a person has committed or is about to commit an offence on board the aircraft may impose upon that person reasonable measures, including restraint, which are necessary to protect the safety of the aircraft or persons or property therein, to maintain good order and discipline on board or to enable him to deliver that person to competent authorities or to disembark him (Articles 6,7).
- (11) The commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed or is about to commit an act prejudicial to safety, provided that it is necessary to protect the safety of the aircraft or of persons or property therein or to maintain good order and discipline on board (Article 8).
- (111) The commander may deliver to the competent authorities of any contracting State in the territory of which the aircraft lands any person who he has reasonable cause to believe has committed on board the aircraft an act which, in his opinion, is a serious offence according to the law of the State of registration of the aircraft (Article 9). The aircraft commander, the crew, the passengers, the owner or operator of the aircraft and the person on whose behalf the flight was performed are not responsible in any legal proceedings in respect of actions taken in accordance with the Convention (Article 10).

20. Chapter IV deals in general terms with unlawful seizure of an aircraft in flight. It provides that when such an act is committed or is about to be committed contracting States are under a duty to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft. In such circumstances, the contracting State in which the aircraft lands is obliged to permit its passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to the persons lawfully entitled to possession (Article 11). Although rudimentary, these provisions foreshadow the more detailed treatment of hijacking in the Hague Convention.

21. The Convention makes detailed provisions in Chapter V and VI for the powers and duties of States. Contracting States are required to pay due regard to the safety and other interests of air navigation in taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with offences on board aircraft (Article 17). Contracting States are under a duty to allow the commander of an aircraft registered in another contracting State to disembark persons in accordance with the Convention (Article 12). Corresponding provision is made for taking delivery of persons whom the commander delivers in accordance with the provisions of the Convention (Article 13). A contracting State to whom a person is delivered must make a preliminary inquiry into the facts and, if satisfied that the circumstances so warrant, take custody or other measures to ensure the person's presence. The result of the preliminary inquiry and notice of whether it is proposed to exercise jurisdiction must be reported promptly to the State of registration of the aircraft, the State of nationality of the individual and, if it is considered advisable, any other interested State (Article 13).

22. The Convention makes further provisions for the powers and duties of States where a person has been disembarked or delivered, in accordance with the Convention, or where a

person has disembarked after having committed an act of unlawful seizure or having attempted to do so. Where such a person cannot continue his journey or does not desire to do so and the State of landing refuses to admit him, that State may if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air (Article 14(1)). A contracting State is not to be regarded as having admitted a person to its territory for the purpose of its law relating to entry or admission of persons simply because it has permitted his disembarkation or delivery or has taken custody or other measures contemplated by the Convention. Similarly the return of a person does not have that effect. Furthermore, the Convention provides that it does not affect the law of a contracting State relating to expulsion of persons from its territory (Article 14(2)). Such a person who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice, unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings (Article 15(1)). Finally, the State of landing is obliged to accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of that State in like circumstances (Article 15(2)).

23. The Convention includes certain limited provisions in respect of extradition. The Convention does not, of itself, create any obligation to grant extradition (Article 16(2)). Consequently, the rights and duties of contracting States with respect to extradition will be governed by such other agreements or arrangements as may exist among them in relation thereto. However, the Convention does provide that certain persons disembarked or delivered by the aircraft commander in accordance with the Convention are not at liberty to depart from the State of landing if their presence is required for the purpose of extradition proceedings (Article 15(1)) and that they may be detained in custody for such time as is reasonable to enable any extradition proceedings to be instituted (Article 13(2)). The Convention also provides that offences committed on aircraft registered in a contracting State shall be treated for the purpose of extradition as if they had been committed not only in the place where they have occurred but also in the territory of the State of registration of the aircraft (Article 16(1)). This provision can have effect only where an extradition treaty or arrangement exists between the requesting State and the State holding the person but in such a case it may have the useful result of extending its operation.

24. The International Civil Aviation Organisation is the depository of the Tokyo Convention. It is required to inform all member States of the United Nations and the Specialised Agencies of signatures, ratifications, accessions, reservations and denunciations (Article 26).

25. A contracting State may denounce the Convention by notification addressed to the International Civil Aviation Organisation. Denunciation takes effect six months after the date of receipt by the International Civil Aviation Organisation of the notification of denunciation (Article 23).

26. The Convention provides that any dispute between two or more contracting States concerning the interpretation or application of the Convention which cannot be settled through negotiation shall at the request of one of them be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court (Article 24(1)). However, a contracting State may at the time of signature, ratification or accession enter a reservation declaring that it does not consider itself bound by Article 24(1). Such a reservation operates on a reciprocal basis (Article 24(2)). A contracting State may withdraw a reservation by notification to the International Civil Aviation Organisation (Article 24(3)).

27. No reservation may be made to the Tokyo Convention, with the single exception that reservations may be made to Article 24(1) as described above (Article 25).

28. The Tokyo Convention is open to accession at any time by any State Member of the United Nations or of any of the Specialised Agencies (Article 22(1)). The instrument of accession must be deposited with the depositary, the International Civil Aviation Organisation. The Convention enters into force for an acceding State on the ninetieth day after the date of deposit of its instrument of accession (Article 22(2)). The depositary, I.C.A.O., is required to inform all signatory and acceding States of the date of deposit of each instrument of accession (Article 26).

29. A complete list of ratifications, accessions and successions as at 30 May 1986 is set out in Appendix 1.

30. A table showing the participation by Commonwealth States in the Tokyo Convention as at 30 May 1986 appears as Appendix 2.

Convention for the suppression of unlawful seizure of aircraft, The Hague, 16 December 1970

31. Although the Tokyo Convention includes certain provisions relating to the unlawful seizure of aircraft these are general in their terms and limited in their effect and were insufficient to combat effectively hijacking which increased dramatically after 1967. A further international convention was urgently required to co-ordinate State action in deterring and punishing such conduct. The Hague Convention, which is based on a draft prepared by the International Civil Aviation Organisation goes a considerable way to meeting that requirement. The Convention was adopted by an international conference at The Hague on 16 December 1970 and it entered into force on 14 October 1971. 130 States are currently parties to the Hague Convention.

32. In the preamble to the Convention the contracting States express their grave concern at the occurrence of acts of unlawful seizure of aircraft, which jeopardize the safety of persons and property, seriously affect the operation of air services and undermine confidence in the safety of civil aviation. The preamble also refers to the urgent need to provide appropriate measures for the punishment of offenders, for the purpose of deterring such acts.

33. The approach adopted by the Hague Convention is entirely different from that employed in the Tokyo Convention. The Hague Convention begins by establishing an offence of hijacking (Article 1). It then imposes an obligation on contracting States to make the offence punishable by severe penalties (Article 2). Each contracting State is required to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against the passengers or crew of an aircraft, in certain defined circumstances (Article 4). Each contracting State, if satisfied that the circumstances so warrant, is under a duty to take an alleged offender into custody or to take other measures to secure his presence (Article 6). A contracting State in the territory of which an alleged offender is found is under a duty to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him (Article 7). The Convention also deals with questions of extradition (Article 8).

34. The Convention is intended to apply only to civil aircraft and provides that it shall not apply to aircraft used in military, customs or police services (Article 3(2)).

35. Generally, the Convention applies only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft (Article 3(3)). However, there are a number of exceptions to this general rule.

36. When any of the acts which constitute the offence of hijacking within Article 1(a) have occurred or are about to occur, contracting States are under a duty to take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft (Article 9(1)). In such cases, any contracting State in which the aircraft or its passengers or crew are present must facilitate the continuation of the journey of the passengers and crew as soon as practicable and must, without delay, return the aircraft and its cargo to the persons lawfully entitled to possession (Article 9(2)).

37. A contracting State in the territory of which an alleged offender is present is required to make immediately a preliminary enquiry into the facts (Article 6(2)). Upon being satisfied that the circumstances so warrant, a contracting State in the territory of which the offender or the alleged offender is present must take him into custody or take other measures to ensure his presence (Article 6(1)). The custody or other measures must be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted (Article 6(1)). Any person in custody pursuant to Article 6(1) must be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national (Article 6(3)). When a State takes a person into custody pursuant to Article 6, it must notify the fact that such person is in custody and the circumstances which warrant his detention to the State of registration of the aircraft, where the alleged offence took place on board an aircraft leased without crew to the State where the lessee has his principal place of business, or, if he has none, his permanent residence, the State of nationality, of the detained person, and, if it considers it advisable, any other interested States (Article 6(4)).

38. The offence of hijacking created by the Convention is committed by any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any act or is an accomplice of a person who performs or attempts to perform any such act (Article 1).

39. The Convention requires each contracting State to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against the passengers or committed by the alleged offender in connection with the offence in the following circumstances:

- (i) when the offence is committed on board an aircraft registered in that State (Article 4(1)(a));
- (ii) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board (Article 4(1)(b));
- (iii) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has not such place of business, his permanent residence in that State (Article 4(1)(c));
- (iv) when the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in the preceding paragraphs (Article 4(2)).

The extension of the ambit of a State's criminal law and its criminal jurisdiction so as to include conduct in the circumstances described above in effect requires each contracting State to establish in its municipal law an offence of hijacking which, subject to certain exceptions, may be committed by any person on board any civil aircraft anywhere in the world. Such a result is achieved, for example, by the United Kingdom Hijacking Act 1971, section 1(1). The Convention does not exclude any criminal jurisdiction exercised in accordance with national law (Article 4(3)).

40. The Convention provides that the offence of hijacking shall be treated, for the purpose of extradition between contracting States, as if it had occurred not only in the place in which it occurred but also in the territories of the State of registration of the aircraft, the State in which the aircraft lands with the alleged offender still on board and, in the case of an aircraft leased without crew, the State in which the lessee has his principal place of business or, if he has none, his permanent residence (Article 8(4)). This provision is intended to overcome the difficulty that extradition treaties frequently provide that the offence in respect of which the return of the alleged offender is requested must have been committed in the territory of the State seeking his extradition.

41. The provisions dealing with extradition constitute a further exception to the general rule as to the scope of the Convention. These provisions apply whatever the place of take-off or the place of actual landing of the aircraft on board which the offence was allegedly committed, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft (Article 3(5)).

42. There is a duty on contracting States to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence or other acts of violence against passengers or crew committed by the alleged offender in connection with the offence (Article 10(1)). However, this duty is without prejudice to any obligations arising under any other treaty relating to mutual assistance in criminal matters.

43. It should be noted that in the case of Articles 6,7,8, and 10 there is an exception to the general rule as to the application of the Convention. These provisions apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft (Article 3(5)).

44. Article 7 is of central importance to the scheme of the Convention. It provides that a contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. The authorities are required to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. The effect of this provision is that whenever an alleged offender is found in the territory of one of the States which are currently parties to the Hague Convention, the State is bound either to extradite him or to submit the matter to its prosecuting authorities. As a result, no hijacker can find refuge in any of the States parties to the Hague Convention. The provision does not impose an absolute obligation to prosecute in such circumstances. It would perhaps be unreasonable to require States to abandon their discretion whether or not to prosecute in such circumstances. Nevertheless the requirement that the decision be taken in the same manner as in the case of ordinary offences of a serious nature under the law of that State renders it probable that such persons will be prosecuted in the vast majority of cases.

45. Each contracting State is under a duty to report to the Council of I.C.A.O. as promptly as possible any relevant information in its possession concerning the circumstances in which a hijacking took place and the action taken to restore or preserve the control of the commander of the aircraft, to facilitate the continuation of the journey by the passengers and crew and to return the aircraft and its cargo to the persons lawfully entitled to possession. In addition, each contracting State is required to notify the Council of I.C.A.O. of any measures taken in relation to the offender or alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings (Article 11).

46. The Hague Convention acknowledges the problem created by imperfect or non-existent extradition arrangements and attempts to solve it by extending existing arrangements for

extradition and by providing a basis for new arrangements. The first method employed is to deem the offence of hijacking to be included as an extraditable offence in any extradition treaty existing between contracting States (Article 8(1)). In this way the provisions of one multilateral treaty serve to amend a number of bilateral treaties between States which are parties to the multilateral treaty. Secondly, contracting States undertake to include the offence of hijacking as an extraditable offence in every future extradition treaty to be concluded between them (Article 8(1)). Thirdly, the Hague Convention supplies a new legal basis for extradition by providing that if a contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another contracting State with which it has no extradition treaty, it may, at its option, consider the Hague Convention as the legal basis for extradition in respect of the offence of hijacking (Article 8(2).) Fourthly, the Convention includes a comparable provision which applies to contracting States which do not make extradition conditional on the existence of a treaty. The Convention provides that such States shall recognise the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State (Article 8(3)).

47. It must be emphasised that extradition of hijackers is not mandatory under the Hague Convention. The approach it adopts whereby a contracting State will generally have the choice of extraditing an alleged hijacker found in its territory or prosecuting him itself is a workable compromise which has already received the assent of a large majority of States.

48. The Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America are the Depositary Governments of the Hague Convention. The Depositary Governments are required to inform promptly all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of the Convention and other notices (Article 13).

49. A contracting State may denounce the Convention by written notification to the Depositary Governments. Denunciation takes effect six months following the date on which notification is received by the Depositary Governments (Article 14).

50. The Convention provides that any dispute between two or more contracting States concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months of the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court (Article 12(1)). However, a contracting State may at the time of signature, ratification or accession enter a reservation declaring that it does not consider itself bound by Article 12(1). Such a reservation operates on a reciprocal basis (Article 12(2)). A contracting State may withdraw a reservation by notification to the Depositary Governments (Article 12(3)).

51. The Hague Convention is open to accession at any time by any State which did not sign the Convention before it came into force on 14th October 1971 (Article 12(1)). The instrument of accession must be deposited with the Depositary Governments, namely the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America (Article 13(2)). The Convention enters into force for an acceding State thirty days following the date of deposit of its instrument of accession (Article 13(4)). The Depositary Governments are required promptly to inform all signatory and acceding States of the date of deposit of each instrument of accession (Article 13(5)).

52. Unlike the Tokyo Convention, the Hague Convention includes no prohibition on reservations.

53. A complete list of signatures, ratifications, accessions and successions as at 30 May 1986 is set out in Appendix 3.

54. A table showing the participation by Commonwealth States in the Hague Convention as at 30 May 1986 appears as Appendix 4.

Convention for the suppression of unlawful acts against the safety of civil aviation,
Montreal, 23 September 1971

55. The offence of hijacking created by the Hague Convention is severely limited in that it requires a seizure of or an exercise of control over an aircraft, or an attempt to perform either of these acts and may be committed only by a person or persons on board the aircraft which is the object of the activity. It does not include, for example, cases where force is applied from outside an aircraft or cases of sabotage. A further international Convention was required, therefore, to co-ordinate State action in relation to such activities which had become frequent occurrences. The Montreal Convention which is based on a draft prepared by the International Civil Aviation Organisation meets this requirement. The Convention was adopted by an international conference at Montreal on 23 September 1971 and entered into force on 26 January 1976. 130 States are currently parties to the Montreal Convention.

56. In the preamble to the Convention the contracting States express their grave concern at the occurrence of unlawful acts against the safety of civil aviation which jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine confidence in the safety of civil aviation. The preamble also refers to the urgent need to provide appropriate measures for the punishment of offenders, for the purpose of deterring such acts.

57. The approach adopted by the Montreal Convention is very similar to that of the Hague Convention and many of their provisions are in identical terms. The Montreal Convention begins by establishing a number of offences (Article 1). It then imposes an obligation on each contracting State to make the offences punishable by severe penalties. (Article 3.) Each contracting State is required to take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against the passengers or crew of an aircraft in certain defined circumstances (Article 4). Each contracting State, if satisfied that the circumstances so warrant is under a duty to take an alleged offender into custody or to take other measures to secure his presence (Article 6). A contracting State in the territory of which the alleged offender is found is under a duty to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him (Article 7). The Convention also deals with questions of extradition (Article 8).

58. The Convention is intended to apply only to civil aircraft and provides that it shall not apply to aircraft used in military, customs or police services (Article 4(1)). This provision is identical to those contained in Article 1(4) of the Tokyo Convention and Article 3(2) of the Hague Convention.

59. Generally, the Convention applies only in the following cases:

- (i) The Convention applies if the place of take-off and the place of landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of the aircraft or if the offence is committed in the territory of a State other than the State of registration of the aircraft (Article 4(2)). This provision is slightly wider than the comparable provision in the Hague Convention (Article 3(3)) in that it applies if either the actual or intended place of landing is situated outside the territory of the State of registration. The provision in the Montreal Convention would

also extend its application to conduct in relation to an aircraft passing through the airspace of another State while travelling between two points in the State of registration. If these requirements are satisfied it is, however, immaterial whether the aircraft was engaged on an international or a domestic flight.

- (11) The Convention applies if the offender or alleged offender is found in the territory of a State other than the State of registration of the aircraft (Article 4(3)). This is the case even if the places of take-off and landing, actual or intended, are situated in the State of registration of the aircraft and the offence is committed in the territory of the State of registration.

To these rules as to the applicability of the Convention there are two important exceptions:

- (i) In the case of the offence created by Article 1(1)(d) (destroying or damaging air navigation facilities) the Convention applies only if the air navigation facilities are used in international air navigation (Article 4(5)).
- (ii) Special provision is made for joint air transport operating organizations or international operating agencies which operate aircraft which are subject to joint or international registration. With respect to States which establish such organizations or agencies, the Convention does not apply, save in the case of the offence created by Article 1(1)(d) which is governed by the rule stated in the preceding paragraph, if the places of take-off and landing, actual or intended, are situated within the territory of the same State and that State is one which has established the organisation or agency. However the Convention will apply if the offender or alleged offender is subsequently found in the territory of a State other than that State (Article 4(4)).

60. The offences created by Article 1(1) of the Convention are committed by a person who unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Any person who attempts to commit any of the offences commits an offence as does an accomplice of a person who commits or attempts to commit an offence (Article 2).

Each contracting State undertakes to make the offences punishable by severe penalties (Article 3).

61. Each contracting State is required to take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

- (i) when the offence is committed in the territory of that State (Article 5(1)(a));
- (ii) when the offence is committed against or on board an aircraft registered in that State (Article 5(1)(b));
- (iii) when the Aircraft on board which the offence is committed lands in its territory with the alleged offender still on board (Article 5(1)(c));
- (iv) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or if the lessee has no such place of business, his permanent residence, in that State (Article 5(1)(d)).

62. The Montreal Convention also imposes a duty on each contracting State to establish its jurisdiction over certain offences in the case where the alleged offender is present in its territory and it does not extradite him to:

- (a) the State in whose territory the offence was committed; or
- (b) the State of registration of the aircraft; or
- (c) the State in which the aircraft on board which the offence was committed landed with the alleged offender still on board; or
- (d) the State where a person, to whom the aircraft on which the offence was committed was leased without crew, has his principal place of business or, if he has none, where he has his permanent residence (Article 5(2)).

The offences to which Article 5(2) relates do not include the offence created by Article 1(1)(d) (destruction of or damage to air navigation facilities or interference with their operation) or Article 1(1)(e) (communication of information known to be false).

The Convention does not exclude any criminal jurisdiction exercised in accordance with national law (Article 5(3)).

63. Contracting States are required, in accordance with international and national law, to endeavour to take all practicable measures for the purpose of preventing the offences (Article 10(1)). The duties of contracting States in relation to the onward journey of passengers and crew and in relation to the return of aircraft and cargo to those persons lawfully entitled to possession are identical to those under Article 9(2) of the Hague Convention (Article 10(2)).

64. The duties of contracting States in the matter of the custody of alleged offenders, preliminary inquiries, and communication with other States are very similar to those under the Hague Convention (Article 6).

65. A contracting State in whose territory the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution (Article 7). This provision is identical to that in the Hague Convention.

66. Article 11 which governs mutual assistance in criminal proceedings is very similar to Article 10 of the Hague Convention.

67. The duties of contracting States in the matter of reporting to I.C.A.O. correspond exactly with those under the Hague Convention (Article 13).

68. A contracting State which has reason to believe that an offence within Article 1 will be committed is required to furnish any relevant material in its possession to those States which it believes are required to establish their jurisdiction over the intended offence in accordance with Article 5(1) (Article 12.)

69. Contracting States which establish joint air transport operating organisations or international operating agencies, which operate aircraft which are subject to joint or international registration are required to designate which State shall exercise the jurisdiction and shall have the attributes of the State of registration for the purpose of the Convention (Article 9). Notice of this designation must be given to I.C.A.O. which is required to communicate it to other contracting States.

70. The provisions of the Montreal Convention in relation to extradition (Article 8) are identical to those contained in Article 8 of the Hague Convention.

71. The Governments of the Union of Soviet Socialist Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America are the Depositary Governments of the Hague Convention. The Depositary Governments are required to inform promptly all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of the Convention and other notices (Article 15(5)).

72. A contracting State may denounce the Convention by written notification to the Depositary Governments. Denunciation takes effect six months following the date on which notification is received by the Depositary Governments (Article 16).

73. The Convention provides that any dispute between two or more contracting States concerning the interpretation or application of the Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court (Article 14(1)). However, a contracting State may at the time of signature, ratification or accession enter a reservation declaring that it does not consider itself bound by Article 14(1). Such a reservation operates on a reciprocal basis (Article 14(2)). A contracting State may withdraw a reservation by notification to the Depositary Governments (Article 14(3)).

74. The Montreal Convention is open to accession at any time by an State which did not sign the Convention before it came into force on 26 January 1976 (Article 15(1)). The instrument of accession must be deposited with the Depositary Governments, namely the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America (Article 15(2)). The Convention enters into force for an acceding State thirty days following the date of deposit of its instrument of accession (Article 13(4)).

75. Unlike the Tokyo Convention, the Montreal Convention includes no prohibition on reservations.

76. A complete list of signatures, ratifications, accessions and successions as at 30 May 1986 is set out in Appendix 5.

77. A table showing the participation by Commonwealth States in the Hague Convention as at 30 May 1986 appears as Appendix 6.

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973

78. This Convention was adopted by the General Assembly of the United Nations on 14 December 1973. It entered into force on 20 February 1977. 62 States are currently parties to the Convention.

79. In the preamble to the Convention the contracting States express their conviction that there is an urgent need to adopt appropriate and effective measures for the prevention and punishment of crimes against diplomatic agents and other internationally protected persons which jeopardize the safety of those persons and create a serious threat to the maintenance of normal international relations.

80. The approach adopted by the Convention is similar to that of the Hague and Montreal Conventions. It begins by defining internationally protected persons and establishing the offence to which the Convention relates (Article 1,2). States are obliged to make these offences punishable by appropriate penalties which take into account their grave nature. Each contracting State is obliged to take such measures as may be necessary to establish its jurisdiction over the offences in specified circumstances (Article 3). Contracting States are obliged to co-operate in the prevention of such offences (Article 4) and in communicating information in relation to offences to assist in the apprehension of offenders (Article 5). Contracting States are obliged to take appropriate measures under internal law to ensure the presence of an alleged offender for the purpose of prosecution or extradition and to notify such measures (Article 6). A contracting State in whose territory an alleged offender is present is under a duty to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him (Article 7). The Convention also makes provision for extradition (Article 8) and judicial assistance (Article 10).

81. "Internationally protected person" is defined as:

- (i) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;
- (ii) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household (Article 1).

82. The offences to which the Convention relates are the international commission of:

- (i) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
- (ii) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his personal or liberty;

- (iii) a threat to commit any such attack;
- (iv) an attempt to commit any such attack;
- (v) an act constituting participation as an accomplice in any such attack (Article 2(1)).

Each contracting State is required to make in its internal law such activities a crime punishable by appropriate penalties which take account of their grave nature (Article 2(1),(2)). These provisions are expressed not to derogate from the other obligations of contracting States in international law (Article 2(3)).

83. Each contracting State is obliged to take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

- (i) when the offence is committed in the territory of that State (Article 3(1)(a));
- (ii) when the offence is committed on board a ship or aircraft registered in that State (Article 3(1)(a));
- (iii) when the alleged offender is a national of that State (Article 3(1)(b));
- (iv) when the offence is committed against an internationally protected person who enjoys his status as such by virtue of functions which he exercises on behalf of that State (Article 3(1)(c));
- (v) when the alleged offender is present in its territory and it does not extradite him to any of the States described above (Article 3(2));

84. Contracting States undertake to co-operate in the prevention of the offences in question, in particular by taking all practicable measures to prevent preparations in their respective territories for the commission of those offences and by exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences (Article 4). A contracting State in which a relevant offence has been committed is required, if it has reason to believe that an alleged offender has fled from its territory, to communicate to all other States concerned, directly or through the Secretary-General of the United Nations, all the pertinent facts regarding the offence and all available information regarding the identity of the alleged offender (Article 5(1)). A contracting State which has information concerning the victim and the circumstances of such an offence is required to endeavour to transmit it, under the conditions provided for in its internal law, fully and promptly to the contracting State on whose behalf he was exercising his functions (Article 5(2)).

85. If satisfied that the circumstances so warrant, a contracting State in whose territory an alleged offender is present is required to take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition (Article 6(1)). The Convention makes detailed provision for notification of such measures and for the rights of the persons with respect to whom such measures are taken (Article 6(2)).

86. A contracting State in whose territory an alleged offender is present is obliged, if it does not extradite him, to submit the case without undue delay to its competent authorities for the purpose of prosecution through proceedings in accordance with the law of that State. This obligation is expressed to be "without exception whatsoever" (Article 7). These provisions, which closely resemble those of the Hague and Montreal Conventions are of central importance to the scheme of the Convention.

87. The Convention makes detailed provision in relation to extradition. Article 8 is in almost identical terms to the corresponding provisions of the Hague and Montreal Conventions.

Its effect may be summarised as follows:

- (i) The offences described in Article 2 are deemed to be included as extraditable offences in any extradition treaty existing between contracting States (Article 8(1)).
- (ii) Contracting States undertake to include such offences as extraditable offences in every future extradition treaty to be concluded between them (Article 8(1)).
- (iii) A contracting State which makes extradition conditional on the existence of a treaty and which receives a request for extradition from another contracting State with which it has no extradition treaty may, if it decided to extradite, consider this Convention as the legal basis for extradition in respect of those offences (Article 8(2)).
- (iv) Contracting States which do not make extradition conditional on the existence of a treaty are required to recognise these offences as extraditable offences between themselves subject to the procedural provisions and the other conditions of the law of the requested State (Article 8(3)).
- (v) The offences are to be treated, for the purpose of extradition between contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 3(1) (Article 8(4)).

88. Any person regarding whom proceedings are being carried out in connection with any of these offences is to be guaranteed fair treatment at all stages of the proceedings (Article 9).

89. Contracting States undertake to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of these offences, including the supply of all evidence at their disposal necessary for the proceedings (Article 10).

90. The outcome of a prosecution must be communicated by the State where the prosecution takes place to the Secretary General of the United Nations who is required to communicate the information to the other contracting State (Article 11).

91. The Convention does not affect the application of treaties on asylum, in force at the date of adoption of the Convention, as between the States which are parties to those treaties. However, a party to this Convention may not invoke those treaties with respect to another State party to this Convention which is not a party to those treaties (Article 12).

92. The Convention makes provision for settlement of disputes (Article 13(1)). A reservation may be made to Article 13(1).

93. The Secretary General of the United Nations is the depositary of the Convention (Articles 15,16).

94. The Convention is open for accession by any State which did not sign the Convention before it came into force on 20 February 1977. The instrument of accession must be deposited with the Secretary General of the United Nations (Article 16). The Convention enters into force for each State now ratifying or acceding to the Convention on the thirtieth day after deposit of the instrument of ratification or accession (Article 17(2)).

Any contracting State may denounce the Convention by written notification to the Secretary General of the United Nations. Such denunciation will take effect six months following the date of its receipt (Article 18(2)).

95. A complete list of signatures, ratifications, accessions and successions as at 30 May 1986 is set out in Appendix 7. A table showing the participation of Commonwealth States in the Convention at that date appears as Appendix 8.

International Convention against the taking of hostages, New York, 17 December 1979

96. The Tokyo, Hague and Montreal Conventions deal with activities similar to hostage taking occurring in the context of civil aviation and the New York Convention on the Prevention and Punishment of crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, deals with such activities in relation to those categories of persons. However, there was clearly a need for a further international convention governing hostage taking in a wider range of circumstances. The result is the International Convention against the taking of hostages, which was adopted by the General Assembly of the United Nations on 17 December 1979. The Convention entered into force on 3 June 1983. 25 States are currently parties to the Convention.

97. In the preamble to the Convention the contracting States express the opinion that the taking of hostages is an offence of grave concern to the international community and refer to the urgent necessity of developing international co-operation in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism.

98. The scheme of the Convention is similar to that of the Hague and Montreal Conventions. It begins by establishing offences of hostage-taking (Article 1). It then imposes an obligation on contracting States to make the offences punishable by appropriate penalties which take into account their grave nature. Contracting States are obliged to take measures for the relief of hostages and for the return of property obtained as a result of hostage-taking (Article 3) and are required to co-operate in the prevention of the offences of hostage-taking (Article 4). Contracting States are obliged to take necessary measures to establish their jurisdiction over the offences when committed in specified circumstances (Article 5). The Convention makes provision for the custody of an alleged hostage-taker (Article 6). A contracting State in whose territory an alleged offender is found is under a duty to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite him (Article 8). The Convention makes provision for extradition (Articles 9,10) and for judicial assistance (Article 11). Certain matters are excluded from the scope of the Convention and certain savings are made (Article 12 - 15).

99. The offence of hostage-taking is committed by any person who seizes or detains and threatens to kill, to injure or to continue to detain another person ("the hostage") in order to compel a third person, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any acts as an explicit or implicit condition for the release of the hostage. Any person who attempts to commit an act of hostage-taking or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence (Article 1). It must be emphasised, however, that the Convention has no application where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State (Article 13).

100. Each State party is required to make the offences punishable by appropriate penalties which take into account the grave nature of those offences (Article 2).

101. Each State party in whose territory the hostage is held is obliged to take all measures it considers appropriate to ease the situation of the hostage, in particular to secure his release and, thereafter, to facilitate his departure, when relevant (Article 3).

102. Contracting States are required to co-operate in the prevention of the offences, in particular by taking all practicable measures to prevent preparations in their respective territories for the commission of those offences and by exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences (Article 4).

103. The Convention requires each contracting State to take such measures as may be necessary to establish its jurisdiction over the offences described by the Convention in the following circumstances:

- (i) when committed in its territory (Article 5(1)(a));
- (ii) when committed on board a ship or aircraft registered in that State (Article 5(1)(a));
- (iii) when committed by any of its nationals (Article 5(1)(b));
- (iv) when committed in order to compel that State to do or abstain from doing any act (Article 5(1)(c));
- (v) when the alleged offender is present in its territory and it does not extradite him to any of the States described in Article 5(1) (i.e. cases (1) - (4), above and (6) and (7) below).

In addition, if a contracting State considers it appropriate, it may establish its jurisdiction over the offences described by the Convention in the following further circumstances:

- (vi) when committed by stateless persons who have their habitual residence in its territory (Article 5(1)(b));
- (vii) when the hostage is a national of that State (Article 5(1)(d)).

The Convention does not exclude any criminal jurisdiction exercised in accordance with internal law (Article 5(3)).

104. If satisfied that the circumstances so warrant, a contracting State in whose territory an alleged offender is present, is obliged to take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted (Article 6(1)). The Convention makes detailed provision for notification of custody or other measure and for the rights of any person in custody or subject to such measures (Articles 6(2)-(6),7).

105. A contracting State in whose territory an alleged offender is found is obliged, if it does not extradite him, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. This obligation is expressed to be "without exception whatsoever and whether or not the offence was committed in its territory". The authorities are required to take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State (Article 8(1)). These provisions, which closely resemble those of the Hague and Montreal Conventions, and in the Convention on Internationally Protected Persons are of central importance to the scheme of the Convention and are intended to ensure that an offender who is found in the

territory of a contracting State is brought to justice in one or other contracting State. The alleged offender is guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present (Article 8(2)).

106. The Convention makes detailed provision in relation to extradition (Articles 9,10). Article 10 is in almost identical terms to the corresponding provisions of the Hague and Montreal Conventions and the Convention on Internationally Protected Persons. Its effect may be summarised as follows:

- (i) The offences described in Article 1 are deemed to be included as extraditable offences in any extradition treaty existing between contracting States. (Article 10(1))
- (ii) Contracting States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them (Article 10(1))
- (iii) A contracting State which makes extradition conditional on the existence of a treaty may at its option, if it receives a request for extradition from another State party with which it has no extradition treaty, consider this Convention as the legal basis for extradition in respect of the offences described in Article 1. Such extradition is required to be subject to the other conditions provided by the law of the requested State (Article 10(2));
- (iv) Contracting States which do not make extradition conditional on the existence of a treaty are required to recognise the offences described in Article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State (Article 10(3));
- (v) The offences described in Article 1 are to be treated for the purpose of extradition between contracting States as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5(1).

The provisions of all extradition treaties and arrangements between contracting States are modified with respect to the offences described in Article 1 as between contracting States to the extent that they are incompatible with the Convention (Article 9(2)).

107. An important exception to the scheme of the Convention is created by Article 9 which provides that a request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion or that his position may be prejudiced for any of those reasons or because communication with him by the appropriate authorities of State entitled to exercise rights of protection cannot be guaranteed. The Convention includes provisions for judicial assistance in criminal proceedings (Article 11).

108. An exception to the application of this Convention is created in the case of acts of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto (Article 12).

109. The Convention provides that none of its provisions are to be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations (Article 14).

110. The Convention does not affect the application of treaties on asylum, in force at the date of adoption of the Convention, as between the States which are parties to those treaties. However a party to this Convention may not invoke those treaties with respect to another State party to this Convention which is not a party to those treaties (Article 15).

111. The Convention makes provision for settlement of disputes (Article 16(1)). A reservation may be made to Article 16(1).

112. The Secretary General of the United Nations is the depositary of the Convention (Article 17).

113. The Convention is open for accession by any State which did not sign the Convention before it came into force on 3 June 1983. The instruments of accession must be deposited with the Secretary General of the United Nations (Article 17(3)). The Convention enters into force for each State now ratifying or acceding to the Convention on the thirtieth day after deposit of the instrument of ratification or accession (Article 18(2)).

114. Any contracting State may denounce this Convention by written notification to the Secretary General of the United Nations. Such denunciation will take effect one year following the date of its receipt (Article 19).

115. A complete list of signatures, ratification, accessions and successions as at 30 May 1986 is set out in Appendix 9. A table showing the participation of Commonwealth States in the Convention at that date appears as Appendix 10.

Convention on offences and certain other acts committed on board aircraft, Tokyo, 14 September 1963.

	<u>Actions</u>	<u>Date</u>	<u>Eff. Date</u>
Afganistan	Accession	15.04.1977	14.07.1977
Antigua & Barbuda	Accession	19.07.1985	17.10.1985
Argentina	Accession	23.07.1971	21.10.1971
Australia	Accession	22.06.1970	20.09.1970
Austria	Accession	07.02.1974	08.05.1974
Bahamas	Succession	15.05.1975	10.07.1973
Bahrain	Accession	09.02.1984	09.05.1984
	Reservation	09.02.1984	
	Reservation	09.02.1984	
Bangladesh	Accession	25.07.1978	23.10.1978
Barbados	Signature	25.06.1969	
	Ratification	04.04.1972	03.07.1972
Belgium	Signature	20.12.1968	
	Ratification	06.08.1970	04.11.1970
Bolivia	Accession	05.07.1979	03.10.1979
Botswana	Accession	16.01.1979	16.04.1979
Brazil	Signature	28.02.1969	
	Ratification	14.01.1970	14.04.1970
Burundi	Accession	14.07.1971	12.10.1971
Canada	Signature	04.11.1964	
	Ratification	07.11.1969	05.02.1970
Chad	Accession	30.06.1970	28.09.1970
Chile	Accession	24.01.1974	24.04.1974
China P R	Accession	14.11.1978	12.02.1979
	Reservation	14.11.1978	
	Declaration	14.11.1978	
Colombia	Signature	08.11.1968	
	Ratification	06.07.1973	04.10.1973
Congo Brazzaville	Signature	14.09.1963	
	Ratification	13.11.1978	11.02.1979
Costa Rica	Accession	24.10.1972	22.01.1973
Cyprus	Accession	31.05.1972	29.08.1972
Czechoslovakia	Accession	23.02.1984	23.05.1984
	Reservation	23.02.1984	
Denmark	Signature	21.11.1966	
	Ratification	17.01.1967	04.12.1969
Dominican Republic	Accession	03.12.1970	03.03.1971

	<u>Actions</u>	<u>Date</u>	<u>Eff. Date</u>
Ecuador	Signature	08.07.1969	
	Ratification	03.12.1969	03.03.1970
Egypt	Accession	12.02.1975	13.05.1975
	Reservation	12.02.1975	
El Salvador	Accession	13.02.1980	13.05.1980
Ethiopia	Accession	27.03.1979	25.06.1979
	Reservation	27.03.1979	
Fiji	Succession	18.01.1972	10.10.1970
Finland	Signature	24.10.1969	
	Ratification	02.04.1971	01.07.1971
France	Signature	11.07.1969	
	Ratification	11.09.1970	10.12.1970
Gabon	Accession	14.01.1970	14.04.1970
Gambia The	Accession	04.01.1979	04.04.1979
Germany F R	Signature	14.09.1963	
	Ratification	16.12.1969	16.03.1970
Ghana	Accession	02.01.1974	02.04.1974
Greece	Signature	21.10.1969	
	Ratification	31.05.1971	29.08.1971
Grenada	Accession	28.08.1978	26.11.1978
Guatemala	Signature	14.09.1963	
	Ratification	17.11.1970	15.02.1971
	Reservation	17.11.1970	
Guyana	Accession	20.12.1972	19.03.1973
Haiti	Accession	26.04.1984	25.07.1984
Hungary	Accession	03.12.1970	03.03.1971
	Reservation	03.12.1970	
Iceland	Accession	16.03.1970	14.06.1970
India	Accession	22.07.1975	20.10.1975
	Reservation	22.07.1975	
Indonesia	Signature	14.09.1963	
	Ratification	07.09.1976	06.12.1976
	Reservation	07.09.1976	
Iran	Accession	28.06.1976	29.09.1976
Iraq	Accession	15.05.1974	13.08.1974
	Declaration	15.05.1974	
Ireland Republic of	Signature	20.10.1964	
	Ratification	14.11.1975	12.02.1976
Israel	Signature	01.11.1968	
	Ratification	19.09.1969	18.12.1969
Italy	Signature	14.09.1963	
	Ratification	18.10.1968	04.12.1969
Ivory Coast	Accession	03.06.1970	01.09.1970

	<u>Actions</u>	<u>Date</u>	<u>Eff.Date</u>
Jamaica	Accession	16.09.1983	15.12.1983
Japan	Signature	14.09.1963	
	Ratification	26.05.1970	24.08.1970
Jordan	Accession	03.05.1973	01.08.1973
Kenya	Accession	22.06.1970	20.09.1970
Korea P D R	Accession	09.05.1983	07.08.1983
	Reservation	09.05.1983	
Korea Republic of	Signature	08.12.1965	
	Ratification	19.02.1971	20.05.1971
Kuwait	Accession	27.11.1979	25.02.1980
	Declaration	27.11.1979	
Laos	Accession	23.10.1972	21.01.1973
Lebanon	Accession	11.06.1974	09.09.1974
Lesotho	Accession	28.04.1972	27.07.1972
Liberia	Signature	14.09.1963	
Libya	Accession	21.06.1972	19.09.1972
Luxembourg	Accession	21.09.1972	20.12.1972
Malagasy Republic	Signature	02.12.1969	
	Ratification	02.12.1969	02.03.1970
Malawi	Accession	28.12.1972	28.03.1973
Malaysia	Accession	05.03.1985	03.06.1985
Mali	Accession	31.05.1971	29.08.1971
Mauritania	Accession	30.06.1977	28.09.1977
Mauritius	Accession	05.04.1983	04.07.1983
Mexico	Signature	24.12.1968	
	Ratification	18.03.1969	04.12.1969
Monaco	Accession	02.06.1983	31.08.1983
Morocco	Accession	21.10.1979	19.01.1976
	Reservation	21.10.1975	
Nauru	Accession	17.05.1984	15.08.1984
Nepal	Accession	15.01.1979	15.04.1979
Netherlands the	Signature	09.06.1967	
	Ratification	14.11.1969	12.02.1970
	Declaration	14.11.1969	
Netherlands Antilles	Extension	04.06.1974	02.09.1974
Suriname	Extension	04.06.1974	02.09.1974

	<u>Actions</u>	<u>Date</u>	<u>Eff. Date</u>
New Zealand	Accession	12.02.1974	13.05.1974
Nicaragua	Accession	24.08.1973	22.11.1973
Niger	Signature	14.04.1969	
	Ratification	27.06.1969	04.12.1969
Nigeria	Signature	29.06.1965	
	Ratification	07.04.1970	06.07.1970
Norway	Signature	19.04.1966	
	Ratification	17.01.1967	04.12.1969
Oman	Accession	09.02.1977	10.05.1977
	Declaration	09.02.1977	
	Reservation	09.02.1977	
Pakistan	Signature	06.08.1965	
	Ratification	11.09.1973	10.12.1973
Panama	Signature	14.09.1963	
	Ratification	16.11.1970	14.02.1971
Papua New Guinea	Succession	06.11.1975	16.09.1975
	Reservation	06.11.1975	
Paraguay	Accession	09.08.1971	07.11.1971
Peru	Accession	12.05.1978	10.08.1978
	Reservation	12.05.1978	
Phillippines	Signature	14.09.1963	
	Ratification	26.11.1965	04.12.1969
Poland	Accession	19.03.1971	17.06.1971
	Reservation	19.03.1971	
Portugal	Signature	11.03.1964	
	Ratification	25.11.1964	04.12.1969
Qatar	Accession	06.08.1981	05.12.1981
Romania	Accession	15.02.1974	16.05.1974
	Reservation	15.02.1974	
Rwanda	Accession	17.05.1971	15.08.1971
Saudi Arabia	Signature	06.04.1967	
	Ratification	21.11.1969	19.02.1970
Senegal	Signature	20.02.1964	
	Ratification	09.03.1972	07.06.1972
Seychelles	Accession	04.01.1979	04.04.1979
Sierra Leone	Accession	09.11.1970	07.02.1971
Singapore	Accession	01.03.1971	30.05.1971
Solomon Islands	Succession	23.03.1982	07.07.1978
South Africa	Accession	26.05.1972	24.08.1972
	Reservation	26.05.1972	
Spain	Signature	27.07.1964	
	Ratification	01.10.1969	30.12.1969

	<u>Actions</u>	<u>Date</u>	<u>Eff. Date</u>
Sri Lanka	Accession	30.05.1978	28.08.1978
St. Lucia	Accession	31.10.1983	29.01.1984
Suriname	Succession	10.09.1979	25.11.1975
Sweden	Signature	14.09.1963	
	Ratification	17.01.1967	04.12.1969
Switzerland	Signature	31.10.1969	
	Ratification	21.12.1970	21.02.1970
Syria	Accession	31.07.1980	29.10.1980
	Reservation	31.07.1980	
Tanzania	Accession	12.08.1983	10.11.1983
Thailand	Accession	06.03.1972	04.06.1972
Togo	Accession	26.07.1971	24.10.1971
Trinidad & Tobago	Accession	09.02.1972	09.05.1972
Tunisia	Accession	25.02.1975	26.05.1975
	Reservation	25.02.1975	
Turkey	Accession	17.12.1975	16.03.1976
Uganda	Accession	25.06.1982	23.09.1982
United Arab Emirates	Accession	16.04.1981	15.07.1981
	Reservation	16.04.1981	
Anguilla	Extension	01.12.1982	01.12.1982
United Kingdom	Signature	14.09.1963	
	Ratification	29.11.1968	04.12.1969
	Declaration	29.11.1968	
United States of America	Signature	14.09.1963	
	Ratification	05.09.1969	04.12.1969
Upper Volta	Signature	14.09.1963	
	Ratification	06.06.1969	04.12.1969
Uruguay	Accession	26.01.1977	26.04.1977
	Reservation	26.01.1977	
Vatican City	Signature	14.09.1963	
Venezuela	Signature	13.03.1964	
	Ratification	04.02.1983	05.05.1983
	Reservation	04.02.1983	
Vietnam	Accession	10.10.1979	08.01.1980
	Reservation	10.10.1979	
Yugoslavia	Signature	14.09.1963	
	Ratification	12.02.1971	13.05.1971
Zaire	Accession	20.07.1977	18.10.1977
Zambia	Accession	14.09.1971	13.12.1971

NOTE: A number of states have made reservations or declarations

Convention on offences and certain other acts committed on board aircraft,
Tokyo, 14 September 1963: Participation of Commonwealth States.

	<u>Signature</u>	<u>Ratification accession or succession</u>	<u>Effective date</u>
Antigua and Barbuda		19.07.1985(b)	17.10.1985
Australia		22.06.1970(b)	20.09.1970
Bahamas		15.05.1975(c)	10.07.1973
Bangladesh		25.07.1978(b)	23.10.1978
Barbados	25.06.1969	04.04.1972(a)	03.07.1972
Belize			
Botswana		16.01.1979(b)	16.04.1979
Brunei Darussalam			
Canada	04.11.1964	07.11.1969(a)	05.02.1970
Cyprus		31.05.1972(b)	29.08.1972
Dominica			
Fiji		18.01.1972(c)	10.10.1970
The Gambia		04.01.1979(b)	04.04.1979
Ghana		02.01.1974(b)	02.04.1974
Grenada		28.08.1978(b)	26.11.1978
Guyana		20.12.1972(b)	19.03.1973
India		22.07.1975(b)(d)	20.10.1975
Jamaica		16.09.1983(b)	15.12.1983
Kenya		22.06.1970(b)	20.09.1980
Kiribati			
Lesotho		28.04.1972(b)	27.07.1972
Malawi		28.12.1972(b)	28.03.1973
Malaysia		05.03.1985(b)	03.06.1985
Maldives			
Malta			
Mauritius		05.04.1983(b)	04.07.1983
Nauru		17.05.1984(b)	15.08.1984
New Zealand		12.02.1974(b)	13.05.1974
Nigeria	29.06.1965	07.04.1970(a)	06.07.1970

	<u>Signature</u>	<u>Ratification accession or succession</u>	<u>Effective date</u>
Papua New Guinea		06.11.1975(c)(d)	16.09.1975
St Christopher - Nevis			
St Lucia		31.10.1983(b)	29.01.1984
St Vincent and the Grenadines			
Seychelles		04.01.1979(b)	04.04.1979
Sierra Leone		09.11.1970(b)	07.02.1971
Singapore		01.03.1971(b)	30.05.1971
Solomon Islands		23.03.1982(c)	07.07.1978
Sri Lanka		30.05.1978(b)	28.08.1978
Swaziland			
Tanzania		12.08.1983(b)	10.11.1983
Tonga			
Trinidad and Tobago		09.02.1972(b)	09.05.1972
Tuvalu			
Uganda		25.06.1982(b)	23.09.1982
United Kingdom	14.09.1963	29.11.1968(a)(e)	04.12.1969
Vanuatu			
Western Samoa			
Zambia		20.07.1977(b)	13.12.1971
Zimbabwe			

(a) Ratification

(b) Accession

(c) Succession

(d) Subject to reservation

(e) Subject to declaration

Convention for the suppression of unlawful seizure of aircraft, The Hague,
16 September 1970

	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
United Kingdom	16.12.1970	16.12.1970	16.12.1970	22.12.1971	22.12.1971	22.12.1971
Soviet Union	16.12.1970	16.12.1970	16.12.1970	24.09.1971	24.09.1971	24.09.1971
USA	16.12.1970	16.12.1970	16.12.1970	21.09.1971	23.09.1971	14.09.1971
Afghanistan	16.12.1970	16.12.1970	16.12.1970		29.08.1979	
Albania						
Algeria						
Angola						
Antigua & Barbuda				22.07.1985a		
Argentina	16.12.1970	16.12.1970	16.12.1970	21.09.1972	20.09.1972	11.09.1972
Australia	15.06.1971	15.06.1971	15.06.1971	09.11.1972	09.11.1972	09.11.1972
Austria	28.04.1971	28.04.1971	28.04.1971	11.02.1974	11.02.1974	11.02.1974
Bahamas				11.08.1976s	30.08.1976s	13.08.1976s
Baharain				20.02.1984a		
Bangladesh						28.06.1978a
Barbados	16.12.1970	16.12.1970	16.12.1970	02.04.1973		
Belgium	16.12.1970	16.12.1970	16.12.1970	24.08.1973	24.08.1973	24.08.1973
Belize						
Benin			05.05.1971			13.03.1972
Bhutan						
Bolivia						18.07.1979a
Botswana						28.12.1978a
Brazil	16.12.1970	16.12.1970	16.12.1970	14.01.1972	14.01.1972	14.01.1972
Brunei						
Bulgaria	16.12.1970	16.12.1970	16.12.1970	26.05.1971	23.02.1972	19.05.1971
Burkina						
Burma						
Burundi		17.02.1971				
Byelorussia S R	16.12.1970	16.12.1970	16.12.1970		30.12.1971	

	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Cambodia	16.12.1970	16.12.1970	16.12.1970			
Cameroon						
Canada	16.12.1970	16.12.1970	16.12.1970	19.06.1972	23.06.1972	20.06.1972
Cape Verde					20.10.1977a	
Central African Rep.						
Chad			27.09.1971	12.07.1972a	17.08.1972a	12.07.1972
Chile	04.06.1971			02.02.1972		
China, P R						10.09.1980a
China, R of Taiwan	16.12.1970		16.12.1970			27.07.1972
Colombia	16.12.1970	16.12.1970	16.12.1970			03.07.1973
Comoros Islands						
Congo, P R						
Costa Rica	16.12.1970	16.12.1970	16.12.1970			09.07.1971
Cuba						
Cyprus				06.06.1972a	08.06.1972a	05.07.1972a
Czechoslovakia	16.12.1970	16.12.1970	16.12.1970	06.04.1972	06.04.1972	06.04.1972
Denmark	16.12.1970	16.12.1970	16.12.1970	17.10.1972	17.10.1972	17.10.1972
Djibouti						
Dominica						
Dominican Rep			29.06.1971			22.06.1978
Ecuador			19.03.1971			14.06.1971
Egypt						28.02.1975a
El Salvador	16.12.1972	16.12.1972	16.12.1972			17.01.1973
Equatorial Guinea			04.06.1971			
Ethiopia	16.12.1970	16.12.1970	16.12.1970	09.04.1979a	20.04.1979a	26.03.1979
Fiji	05.10.1971			14.08.1972	29.08.1972	27.07.1972
Finland	08.01.1971	08.01.1971	08.01.1971	15.12.1971	15.12.1971	15.12.1971
France	16.12.1970	16.12.1970	16.12.1970	18.09.1972	18.09.1972	18.09.1972

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	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Gabon	16.12.1970	16.12.1970	16.12.1970	14.07.1971		
German Dem. Rep.		04.01.1971			03.06.1971	
F R Germany	16.12.1970	16.12.1970	16.12.1970	11.10.1974		11.10.1974
Ghana	16.12.1970	16.12.1970	16.12.1970			12.12.1973
Greece	16.12.1970	16.12.1970	16.12.1970	20.09.1973		
Grenada						10.08.1978a
Guatemala	16.12.1970	16.12.1970	16.12.1970			16.05.1979
Guinea						02.05.1984a
Guinea-Bissau					20.08.1976a	
Guyana						21.12.1972a
Haiti						09.05.1984a
Holy See						
Honduras						
Hungary	16.12.1970	16.12.1970	16.12.1970	13.08.1971	13.08.1971	13.08.1971
Iceland				29.06.1973a	29.06.1973a	19.06.1973a
India	14.07.1971	14.07.1971	14.07.1971	12.11.1982	25.11.1982	12.11.1982
Indonesia	16.12.1970	16.12.1970	16.12.1970			27.08.1976
Iran	16.12.1970	16.12.1970	16.12.1970	25.01.1972	02.02.1972	25.01.1972
Iraq	30.03.1971	22.02.1971		04.01.1972	30.12.1971	
Ireland, Rep of				24.11.1975a		
Israel	16.12.1970	16.12.1970	16.12.1970	16.08.1971	16.08.1971	16.08.1971
Italy	16.12.1970	16.12.1970	16.12.1970	19.02.1974	19.02.1974	19.02.1974
Ivory Coast						09.01.1973a
Jamaica	16.12.1970	16.12.1970	16.12.1970			16.09.1983
Japan	16.12.1970	16.12.1970	16.12.1970	19.04.1971	19.04.1971	19.04.1971
Jordan	24.06.1971	25.05.1971	09.06.1971	01.12.1971	16.11.1971	18.11.1971
Kenya						11.01.1977a
Kiribati						
Korea, P D R					28.04.1983a	
Korea. Rep of						18.01.1973
Kuwait	13.07.1971	28.06.1971	21.07.1971	29.05.1979	06.06.1979	25.05.1979

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	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Laos	16.02.1971	22.02.1971	16.02.1971			
Lebanon					10.08.1973a	05.06.1974a
Lesotho	12.10.1971					27.07.1978a
Liberia						01.02.1982a
Libya						04.10.1978a
Liechtenstein	24.08.1971	24.08.1971	24.08.1971			
Luxembourg	16.12.1970	16.12.1970	16.12.1970	22.11.1978		22.11.1978
Madagascar						
Malawi						21.12.1972a
Malaysia	16.12.1970	16.12.1970	16.12.1970	04.05.1985	04.05.1985	04.05.1985
Maldives						21.12.1972a
Mali					17.08.1971a	29.09.1971a
Malta						
Mauritania						01.11.1978a
Mauritius						25.04.1983a
Mexico	16.12.1970	16.12.1970	16.12.1970	19.07.1972	19.07.1972	19.07.1972
Monaco				03.06.1983a		
Mongolia		18.01.1971			08.10.1971	
Morocco						24.19.1975a
Mozambique						
Namibia						
Nauru						17.05.1984a
Nepal				11.01.1979a	22.02.1979a	10.01.1979a
Netherlands	16.12.1970	16.12.1970	16.12.1970	27.08.1973	27.08.1973	27.08.1973
New Zealand	15.09.1971	15.09.1971	15.09.1971	12.01.1974	12.01.1974	12.01.1974
Nicaragua						06.11.1973a
Niger			19.02.1971			15.10.1971
Nigeria				09.07.1973a	20.07.1973a	03.07.1973a
Norway	09.03.1971	09.03.1971	09.03.1971	23.08.1971	23.08.1971	23.08.1971
Oman				02.02.1977		
Pakistan			12.08.1971	29.11.1973		
Panama	16.12.1970	16.12.1970	16.12.1970			10.03.1972

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	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Papua New Guinea				04.12.1975s	17.01.1976s	15.12.1975s
Paraguay			30.07.1971			04.02.1972
Peru				08.08.1978a	12.07.1978a	28.04.1978a
Philippines	16.12.1970	16.12.1970	16.12.1970			26.03.1973
Poland	16.12.1970	16.12.1970	16.12.1970	21.03.1972	21.03.1972	21.03.1972
Portugal	16.12.1970	16.12.1970	16.12.1970	27.11.1972		
Qatar						26.08.1981a
Romania	13.10.1971	13.10.1971	13.10.1971	10.07.1972	10.07.1972	10.07.1972
Rwanda	16.12.1970	16.12.1970	16.12.1970			
San Marino						
Sao Tome & Principe						
Saudi Arabia						14.06.1974a
Senegal			10.05.1971	03.02.1978a		
Seychelles				29.12.1978a		
Sierra Leone	19.07.1971	20.07.1971	19.07.1971	13.11.1974		
Singapore	08.09.1971	08.09.1971	08.09.1971	12.04.1978		12.04.1978
Solomon Islands						
Somali D R						
South Africa	16.12.1970	16.12.1970	16.12.1970			30.05.1972
Spain			16.03.1971			30.10.1972
Sri Lanka				30.05.1978a	29.06.1978a	02.06.1978a
St. Kitts & Nevis						
St. Lucia						08.11.1983a
St. Vincent & Grenadines						
Sudan						18.01.1979a
Suriname						27.10.1978s

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	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Swaziland						
Sweden	16.12.1970	16.12.1970	16.12.1970	07.07.1971	07.07.1971	07.07.1971
Switzerland	16.12.1970	16.12.1970	16.12.1970	14.09.1971	14.09.1971	14.09.1971
Syria						10.07.1980a
Tanzania						09.08.1983a
Thailand	16.12.1970	16.12.1970	16.12.1970	16.05.1978	16.05.1978	16.05.1978
The Gambia	18.05.1971	21.05.1971				28.11.1978
Togo						09.02.1979a
Tonga				21.02.1977a		
Trinidad & Tobago	16.12.1970	16.12.1970	16.12.1970	31.01.1972		
Tunisia				16.11.1981a	14.01.1982a	02.12.1981a
Turkey	16.12.1970	16.12.1970	16.12.1970	17.04.1973		
Tuvalu						
Uganda				27.03.1972a		
Ukraine	16.12.1970	16.12.1970	16.12.1970		21.02.1972	
United Arab Emirates				14.04.1981a		
Uruguay						21.01.1977a
Venezuela	16.12.1970	16.12.1970	16.12.1970			07.07.1983
Vietnam, Soc. Rep.					17.09.1979a	
Western Samoa						
Yemen Arab Republic						
Yemen, P D R						
Yugoslavia	16.12.1970	16.12.1970	16.12.1970	02.10.1972	02.10.1972	02.10.1972
Zaire						06.07.1977a
Zambia						
Zimbabwe						

NOTE: A number of states have made reservations or declarations.

Convention for the suppression of unlawful seizure of aircraft, The Hague,
16 December 1970: Participation of Commonwealth States.

	<u>Signature</u>	<u>Ratification accession or succession</u>
Antigua and Barbuda		22.07.1985(b)
Australia	15.06.1971	09.11.1972(a)
Bahamas		11.08.1976(c)
Bangladesh		28.06.1978(b)
Barbados	16.12.1970	02.04.1973(a)
Belize		
Botswana		28.12.1978(b)
Brunei Darussalam		
Canada	16.12.1970	19.06.1972(a)
Cyprus		06.06.1972(b)
Dominica		
Fiji	05.10.1971	27.07.1972(a)
The Gambia	18.05.1971	28.11.1978(a)
Ghana	16.12.1970	12.12.1973(a)
Grenada		10.08.1978(b)
Guyana		21.12.1972(b)
India	14.07.1971	12.11.1982(a)
Jamaica	16.12.1970	16.09.1983(a)
Kenya		11.01.1977(b)
Kiribati		
Lesotho	12.10.1971	27.07.1978(a)
Malawi		21.12.1972(b)
Malaysia	16.12.1970	04.05.1985(a)
Maldives		21.12.1972(b)
Malta		
Mauritius		25.04.1983(b)
Nauru		17.05.1984(b)

	<u>Signature</u>	<u>Ratification accession or succession</u>
New Zealand	15.09.1971	12.01.1974(a)
Nigeria		03.07.1973(b)
Papua New Guinea		04.12.1975(c)
St Christopher - Nevis		
St Lucia		08.11.1983(b)
St Vincent and the Grenadines		
Seychelles		29.12.1978(b)
Sierra Leone	19.07.1971	13.11.1974(a)
Singapore	08.09.1971	12.04.1978(a)
Solomon Islands		
Sri Lanka		30.05.1978(b)
Swaziland		
Tanzania		09.08.1983(b)
Tonga		03.01.1974(b)
Trinidad and Tobago	16.12.1970	31.01.1972(a)
Tuvalu		
Uganda		27.03.1972(b)
United Kingdom	16.12.1970	22.12.1971(a)
Vanuatu		
Western Samoa		
Zambia		
Zimbabwe		

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- (a) Ratification
(b) Accession
(c) Succession

Convention for the suppression of unlawful acts against the safety of civil aviation,
montreal, 23 September 1971

Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
UK M				25.10.1973	25.10.1973	25.10.1973
Soviet Union M				19.02.1973	19.02.1973	19.02.1973
USA M				15.11.1972	22.11.1972	01.11.1972
Afghanistan					26.09.1984a	
Albania						
Algeria						
Angola						
Antigua & Barbuda				22.07.1985a		
Argentina M				26.11.1973	26.11.1973	26.11.1973
Australia	12.10.1972	12.10.1972	12.10.1972	12.07.1973	12.07.1973	12.07.1973
Austria	13.11.1972	13.11.1972	13.11.1972	11.02.1974	11.02.1974	11.02.1974
Bahamas						27.12.1984
Bahrain				20.02.1984a		
Bangladesh						28.06.1978a
Barbados M				06.08.1976		
Belgium M				13.08.1976	13.08.1976	13.08.1976
Belize						
Benin						
Bhutan						
Bolivia						18.07.1979a
Botswana	12.10.1972					28.12.1978
Brazil M				24.07.1972	24.07.1972	24.07.1972
Brunei						
Bulgaria M				22.02.1973	20.03.1974	28.03.1973
Burkina						
Burma						
Burundi		06.03.1972				
Byelorussia S R M					31.01.1973	

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Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Cambodia						
Cameroon						11.07.1973a
Canada M				19.06.1972	23.07.1972	20.06.1972
Cape Verde					20.10.1977a	
Central African Rep.						
Chad M				12.07.1972	17.08.1972	12.07.1972
Chile						28.02.1974a
China, P R						10.09.1980a
China, R of Taiwan M						27.12.1972
Colombia						04.12.1974a
Comoros Islands						
Congo, P R M	23.09.1971	23.09.1971	23.09.1971			
Costa Rica M						21.09.1973
Cuba						
Cyprus	03.11.1972	02.11.1972	28.11.1972	27.07.1973	30.07.1973	15.08.1973
Czechoslovakia M				10.08.1973	10.08.1973	10.08.1973
Denmark	17.10.1972	17.10.1972	17.10.1972	17.01.1973	17.01.1973	17.01.1973
Djibouti						
Dominica						
Dominican Rep			31.05.1972			28.11.1973
Ecuador						12.01.1977a
Egypt	24.11.1972					20.05.1975a
El Salvador						25.09.1979a
Equatorial Guinea						
Ethiopia M			23.09.1971	09.04.1979a	20.04.1979a	26.03.1979
Fiji	21.08.1972			18.04.1973	27.04.1973	05.03.1973
Finland				13.07.1973a	13.07.1973a	13.07.1973a
France				30.06.1976a	30.06.1976a	30.06.1976a

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Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Gabon	24.11.1971					29.06.1976
German Dem. Rep.		13.03.1972			09.06.1972	
F R Germany M				03.02.1978		03.02.1978
Ghana						12.12.1973a
Greece			09.02.1972			15.01.1974
Grenada						10.08.1978a
Guatemala			09.05.1972			19.10.1978
Guinea						02.05.1984a
Guinea-Bissau					20.08.1976a	
Guyana						21.12.1972a
Haiti			06.01.1972			09.05.1984a
Holy See						
Honduras						
Hungary M				27.12.1972	27.12.1972	27.12.1972
Iceland				29.06.1973a	29.06.1973a	29.06.1973a
India	11.12.1972	11.12.1972	11.12.1972	12.11.1982	25.11.1982	12.11.1982
Indonesia						27.08.1976a
Iran				10.07.1973a	10.07.1973a	10.07.1973a
Iraq					10.09.1974a	
Ireland, Rep of				12.10.1976a		
Israel M				30.06.1972	10.07.1972	06.07.1972
Italy M				19.02.1974	19.02.1974	19.02.1974
Ivory Coast						09.01.1973a
Jamaica M			23.09.1971			16.09.1983
Japan				12.06.1974a	12.06.1974a	12.06.1974a
Jordan	17.04.1972	04.05.1972	02.05.1972	13.02.1973	19.02.1973	25.04.1973
Kenya						11.01.1977a
Kiribati						
Korea, P D R					13.08.1980a	
Korea. Rep of						02.08.1973a
Kuwait				23.11.1979a		27.11.1979a

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Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Laos	02.01.1973	27.11.1972	01.11.1972			
Lebanon					27.12.1977a	23.12.1977a
Lesotho						27.07.1978a
Liberia						01.02.1982a
Libya						19.02.1974a
Liechtenstein						
Luxembourg	24.11.1971	07.12.1971	24.11.1971	18.05.1982		18.05.1982
Madagascar						
Malawi						21.12.1972a
Malaysia				04.05.1985a	04.05.1985a	04.05.1985a
Maldives						
Mali						24.08.1972a
Malta						
Mauritania						01.11.1978a
Mauritius						25.04.1983a
Mexico	25.01.1973	25.01.1973	25.01.1973	12.09.1974	12.09.1974	12.09.1974
Monaco				03.06.1983a		
Mongolia	26.01.1972	02.02.1972	18.02.1972	14.09.1972	20.10.1972	05.09.1972
Morocco						24.10.1975a
Mozambique						
Namibia						
Nauru						17.05.1984a
Nepal				11.01.1979a	22.02.1979a	10.01.1979a
Netherlands M				27.08.1973	27.08.1973	27.08.1973
New Zealand	26.09.1972	26.09.1972	26.09.1972	12.02.1974	12.02.1974	12.02.1974
Nicaragua			22.12.1972			06.11.1973
Niger			06.03.1972			01.09.1972
Nigeria				09.07.1973a	20.07.1973a	03.07.1973a
Norway				01.08.1973a	01.08.1973a	01.08.1973a
Oman				02.02.1977a		
Pakistan				24.01.1974a	16.01.1974a	24.01.1974a
Panama			18.01.1972			24.04.1972

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Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Papua New Guinea				04.12.1975s	07.01.1976s	15.12.1975s
Paraguay			23.01.1973			05.03.1974
Peru				08.08.1978a	12.07.1978a	28.04.1978a
Philippines M						26.03.1973
Poland M				28.01.1975	28.01.1975	28.01.1975
Portugal M				15.01.1973		
Qatar						26.08.1981a
Romania	10.07.1972	10.07.1972	10.07.1972	15.08.1975	15.08.1975	19.08.1975
Rwanda		04.05.1972	26.06.1972			
San Marino						
Sao Tome & Principe						
Saudi Arabia						14.06.1974a
Senegal M				03.02.1978a		
Seychelles				29.12.1978a		
Sierra Leone						20.09.1979a
Singapore	21.11.1972	24.11.1972	21.11.1972	12.04.1978	12.04.1978	12.04.1978
Solomon Islands				13.04.1982s		03.05.1982s
Somali D R						
South Africa M						30.05.1972
Spain	15.02.1972					30.10.1972
Sri Lanka				30.05.1978a	29.06.1978a	02.06.1978a
St. Kitts & Nevis						
St. Lucia						08.11.1983a
St. Vincent & Grenadines						
Sudan						18.01.1979a
Suriname						27.10.1978s

cont./...

Signed at Montreal - M	Signature at			Ratification / Accession (a) / Succession (s)		
	London	Moscow	Washington	London	Moscow	Washington
Swaziland						
Sweden				10.07.1973a	10.07.1973a	10.07.1973a
Switzerland M				17.01.1978	17.01.1978	17.01.1978
Syria						10.07.1980a
Tanzania						09.08.1983a
Thailand				16.05.1978a	16.05.1978a	16.05.1978a
The Gambia						28.11.1978a
Togo						09.02.1979a
Tonga				21.02.1977a		
Trinidad & Tobago			09.02.1972			09.02.1972
Tunisia				16.11.1981a	14.01.1982a	02.12.1981a
Turkey			05.07.1972			23.12.1975
Tuvalu						
Uganda						19.07.1982a
Ukraine M					26.02.1973	
United Arab Emirates				14.04.1981a		
Uruguay						12.01.1977a
Venezuela M						21.11.1983
Vietnam, Soc. Rep.					17.09.1979a	
Western Samoa						
Yemen Arab Republic	23.10.1972					
Yemen, P D R						
Yugoslavia M				02.10.1972	02.10.1972	02.10.1972
Zaire						06.07.1977a
Zambia						
Zimbabwe						

NOTE: A number of states have made reservations or declarations.

Convention for the suppression of unlawful acts against the safety of civil aviation, Montreal, 23 September 1971: Participation of Commonwealth States.

	<u>Signature</u>	<u>Ratification accession or succession</u>
Antigua and Barbuda		22.07.1985(b)
Australia	12.10.1972	12.07.1973(a)
Bahamas		27.12.1984(b)
Bangladesh		28.06.1978(b)
Barbados	23.09.1971	06.08.1976(a)
Belize		
Botswana	12.10.1972	28.12.1978(a)
Brunei Darussalam		
Canada	23.09.1971	19.06.1972(a)
Cyprus	02.11.1972	27.07.1973(a)
Dominica		
Fiji	21.08.1972	05.03.1973(a)
The Gambia		28.11.1978(b)
Ghana		12.12.1973(b)
Grenada		10.08.1978(b)
Guyana		21.12.1972(b)
India	11.12.1972	12.11.1982(a)
Jamaica	23.09.1971	16.09.1983(a)
Kenya		11.01.1977(b)
Kiribati		
Lesotho		27.07.1978(b)
Malawi		21.12.1972(b)
Malaysia		04.05.1985(b)
Maldives		
Malta		
Mauritius		25.04.1983(b)

	<u>Signature</u>	<u>Ratification accession or succession</u>
Nauru		17.05.1984(b)
New Zealand	26.09.1972	12.02.1974(a)
Nigeria		03.07.1973(b)
Papua New Guinea		04.12.1975(c)
St Christopher - Nevis		
St Lucia		08.11.1983(b)
St Vincent and the Grenadines		
Seychelles		29.12.1978(b)
Sierra Leone		20.09.1979(b)
Singapore	21.11.1972	12.04.1978(a)
Solomon Islands		13.04.1982(c)
Sri Lanka		30.05.1978(b)
Swaziland		
Tanzania		09.08.1983(b)
Tonga		21.02.1977(b)
Trinidad and Tobago	09.02.1972	09.02.1972(a)
Tuvalu		
Uganda		19.07.1982(b)
United Kingdom	23.09.1971	25.10.1973(a)
Vanuatu		
Western Samoa		
Zambia		
Zimbabwe		

(a) Ratification
(b) Accession
(c) Succession

Convention on the prevention and punishment of crimes against
internationally protected persons, including diplomatic agents, New York,
14 December 1973:

	<u>Signature</u>	<u>Ratification accession (a)</u>
Argentina		18.03.1982(a)
Australia	30.12.1974	20.06.1977
Austria		03.08.1977(a)
Barbados		26.10.1979(a)
Bulgaria	27.06.1974	18.07.1974
Burundi		17.12.1980(a)
Byelorussian SSR	11.06.1974	05.02.1976
Canada	26.06.1974	04.08.1976
Chile		21.01.1977(a)
Costa Rica		02.11.1977(a)
Cyprus		24.12.1975(a)
Czechoslovakia	11.10.1974	30.06.1975
Denmark	10.05.1974	01.07.1975
Democratic People's Republic of Korea		01.12.1982(a)
Dominican Republic		08.07.1977(a)
Ecuador	27.08.1974	12.03.1975
El Salvador		08.08.1980(a)
Finland	10.05.1974	31.10.1978
Gabon		14.10.1981(a)
German Democratic Republic	23.05.1974	30.11.1976
Germany, Federal Republic of	15.08.1974	25.01.1977
Ghana		25.04.1975(a)
Greece		03.07.1984(a)
Guatemala	12.12.1974	18.01.1983
Haiti		25.08.1980(a)
Hungary	06.11.1974	26.03.1975
Iceland	10.05.1974	02.08.1977
India		11.04.1978(a)

	<u>Signature</u>	<u>Ratification accession (a)</u>
Iran (Islamic Republic of)		12.07.1978(a)
Iraq		28.02.1978(a)
Israel		31.07.1980(a)
Italy	30.12.1974	30.08.1985
Jamaica		21.09.1978(a)
Jordan		18.12.1984(a)
Liberia		30.12.1975(a)
Malawi		14.03.1977(a)
Mexico		22.04.1980(a)
Mongolia	23.08.1974	08.08.1975
Nicaragua	29.10.1974	10.03.1975
Norway	10.05.1974	28.04.1980
Pakistan		29.03.1976(a)
Panama		17.06.1980(a)
Paraguay	25.10.1974	24.11.1975
Peru		25.04.1978(a)
Philippines		26.11.1976(a)
Poland	07.06.1974	14.12.1982
Republic of Korea		25.05.1983(a)
Romania	27.12.1974	15.08.1978
Rwanda	15.10.1974	29.11.1977
Seychelles		29.05.1980(a)
Sweden	10.05.1974	01.07.1975
Togo		30.12.1980(a)
Trinidad and Tobago		15.06.1979(a)
Tunisia	15.05.1974	21.01.1977
Turkey		11.06.1981(a)
Ukrainian SSR	18.06.1974	20.01.1976
Union of Soviet Socialist Republics	07.06.1974	15.01.1976
United Kingdom	13.12.1974	02.05.1979
United States of America	28.12.1973	26.10.1976
Uruguay		13.06.1978(a)
Yugoslavia	17.12.1974	29.12.1976
Zaire		25.07.1977(a)

NOTE: A number of states
have made reservations of
declarations.
Objections have been
made to certain of these.

Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, New York, 14 December 1973: Participation of Commonwealth States.

	<u>Signature</u>	<u>Ratification accession or succession</u>
Antigua & Barbuda		
Australia	30.12.1974	20.06.1977(a)
Bahamas		
Bangladesh		
Barbados		26.10.1979(b)
Belize		
Botswana		
Brunei Darussalam		
Canada	26.06.1974	04.08.1976(a)
Cyprus		24.12.1975(b)
Dominica		
Fiji		
The Gambia		
Ghana		25.04.1975(b)(d)
Grenada		
Guyana		
India		11.04.1978(b)(d)
Jamaica		21.09.1978(b)(d)
Kenya		
Kiribati		
Lesotho		
Malawi		14.03.1977(b)(d)
Malaysia		
Maldives		
Malta		
Mauritius		
Nauru		
New Zealand		
Nigeria		

	<u>Signature</u>	<u>Ratification accession or succession</u>
Papua New Guinea		
St Christopher - Nevis		
St Lucia		
St Vincent and the Grenadines		
Seychelles		29.05.1980(b)
Sierra Leone		
Singapore		
Solomon Islands		
Sri Lanka		
Swaziland		
Tanzania		
Tonga		
Trinidad & Tobago		15.06.1979(b)(d)
Tuvalu		
Uganda		
United Kingdom	13.12.1974	02.05.1979
Vanuatu		
Western Samoa		
Zambia		
Zimbabwe		

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- (a) Ratification
 (b) Accession
 (c) Succession
 (d) Subject to declaration or reservation

International convention against the taking of hostages, New York,
17 December 1979.

	<u>Signature</u>	<u>Ratification accession (a)</u>
Austria	03.10.1980	
Bahamas		04.06.1981(a)
Barbados		09.03.1981(a)
Belgium	03.01.1980	
Bhutan		31.08.1981(a)
Bolivia	25.03.1980	
Canada	18.02.1980	
Chile	03.01.1981	12.11.1981
Dominican Republic	12.08.1980	
Egypt	18.12.1980	02.10.1981
El Salvador	10.06.1980	12.02.1981
Finland	29.10.1980	14.04.1983
Gabon	29.02.1980	
Germany, Federal Republic of	18.12.1979	15.12.1980
Greece	18.03.1980	
Guatemala	30.04.1980	11.03.1983
Haiti	21.04.1980	
Honduras	11.06.1980	01.06.1981
Iceland		06.07.1981(a)
Iraq	14.10.1980	
Israel	19.11.1980	
Italy	18.04.1980	
Jamaica	27.02.1980	
Japan	22.12.1980	
Kenya		08.12.1981(a)

	<u>Signature</u>	<u>Ratification accession (a)</u>
Lesotho	17.04.1980	05.11.1980
Liberia	30.01.1980	
Luxembourg	18.12.1979	
Mauritius	18.06.1980	17.10.1980
Netherlands	18.12.1980	
New Zealand	24.12.1980	
Norway	18.12.1980	02.07.1981
Panama	24.01.1980	19.08.1982
Philippines	02.05.1980	14.10.1980
Portugal	16.06.1980	06.07.1984
Republic of Korea		04.05.1983(a)
Senegal	02.06.1980	
Spain		26.03.1984(a)
Suriname	30.07.1980	05.11.1981
Sweden	25.02.1980	15.01.1981
Switzerland	18.07.1980	
Togo	08.07.1980	
Trinidad and Tobago		01.04.1981(a)
Uganda	10.11.1980	
United Kingdom	18.12.1979	22.12.1982
United States of America	21.12.1979	07.12.1984
Yugoslavia	29.12.1980	
Zaire	02.07.1980	

(a) Ratification
(b) Accession
(c) Succession

NOTE: A number of states have made reservations or declarations.

International convention against the taking of hostages, New York, 17 December 1979: Participation of Commonwealth States.

	<u>Signature</u>	<u>Ratification accession or succession</u>
Antigua and Barbuda		
Australia		
Bahamas		04.06.1981(b)
Bangladesh		
Barbados		09.03.1981(b)
Belize		
Botswana		
Brunei Darussalam		
Canada	18.02.1980	
Cyprus		
Dominica		
Fiji		
The Gambia		
Ghana		
Grenada		
Guyana		
India		
Jamaica	27.02.1980	
Kenya		08.12.1981(b)(d)
Kiribati		
Lesotho	17.04.1980	05.11.1980(a)
Malawi		
Malaysia		
Maldives		
Malta		
Mauritius	18.06.1980	17.10.1980(a)

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Memorandum by the Government of Canada

At the Senior Officials' Meeting held in London in January 1986, Canada agreed to prepare a brief paper on the Hague Convention on the Civil Aspects of International Child Abduction in the light of its experience under that Convention.

2. Canada ratified in June 1983 the Hague Convention on the Civil Aspects of International Child Abduction, making use of a federal State clause. The Convention was initially extended to four provinces. It is now in force in eight of the ten Canadian provinces and the Yukon Territory. It should be extended to the Province of Saskatchewan very soon. Consequently, the only Canadian jurisdictions having yet to adopt the Convention are the province of Alberta and the Northwest Territories.

3. On the international level, it is in force amongst Canada, France, Portugal and Switzerland and it will come into force on August 1, 1986 in the United Kingdom. Hungary has recently acceded to it. President Reagan referred the Convention to the United States Senate in October of last year. There is a possibility that the United States will be in a position to ratify it at the beginning of next year.

4. Domestically as well as internationally, the violation of custody rights has been a subject of concern in Canada for the past several years. A great number of measures have been taken, including important legislative ones at both the federal and provincial levels, to ensure that children are provided with effective protection against disruptions in their lives which necessarily occur when they are abducted. As noted by the Commonwealth Law Ministers in April/May 1980, the paramount consideration in this area is the best interests of children.

5. That principle is the basis of the Hague Convention on the Civil Aspects of International Child Abduction which provides a frame work that should enable States to effectively deal with transborder abductions.

6. The task of commenting on the Convention is greatly facilitated by the fact that there already exists excellent analysis of the convention. Suffice it to mention two of these. The first is the official report of the Hague Conference which thoroughly explains the background to the Convention and its provisions. It was prepared by Elisa Perez-Vera who was the Rapporteur Special throughout the negotiations of the Convention. This document is readily available from the Hague Conference on Private International Law. The second is the explanatory documentation prepared for the Commonwealth jurisdictions by Mr. J. M. Eekelaar. It is one of a series of "accession kits" published by the Commonwealth Secretariat. Mr. Eekelaar makes a very useful analysis of the practical implications of the Convention and the draft Model Act attached to his report will surely assist all States contemplating implementing legislation. Canada would like to commend Professor Eekelaar and the Commonwealth Secretariat for this very useful work.

7. This paper will comment on the Convention, in light of Canada's analysis of the Convention and its limited experience. Although the Convention has been in force since 1983,

there have been very few cases where it has been invoked in Canadian practice, probably because there are only three other Contracting States and because the Convention does not apply to abductions which occurred before its coming into force (Article 35).

Approach taken by the drafters of the convention

8. The drafters of the Convention considered that the situation they were addressing was as follows: a custodial parent faced with the abduction of his or her child (sometimes children) to another State usually faces two problems: a factual one (locating the child) and a legal one (ensuring the respect of his or her custody right).

9. The parent does not always know to which State the child has been abducted, but even when the State where the child is located is known, the custodial parent usually does not know how to obtain the cooperation of the local authorities, if that is at all possible. Traditionally, authorities in many States, including Canada, have been reluctant to intervene in such matters. (It seems, however, that in several States, including Canada, this attitude is changing.) It was, therefore, considered important to provide assistance to the parent in locating the child.

10. The mechanism provided in the Convention to this end is the Central Authority. The duties of the Central Authority, which include taking appropriate measures to discover the whereabouts of the child, are defined in Article 7. It must be remembered that this Convention is an administrative as well as a judicial cooperation Convention. It is basically seen as a framework to encourage international cooperation. For such a practical problem as international child abduction, all involved will have to adopt a flexible approach towards the application of the Convention.

11. The second problem was ensuring respect of custody orders. The traditional legal mechanism, recognition and enforcement of judgments, could be long and a successful outcome was far from assured. This was due in part to the length of the procedure, at the end of which it was often considered that the child was too well established in his or her new environment to be displaced once again.

12. Consequently, the traditional approach to providing for the respect of custody rights was rejected for the purpose of the Convention. Instead, Article 12 prescribes that the judge must order the return of the child if there has been a wrongful removal or retention in terms of Article 3. There is, of course, a time consideration (1 year) and a party opposing the return may do so within the limits of Article 13. These exceptions to the return of the child, for example, if the return would place the child in an intolerable situation, are drafted restrictively in an effort to limit the circumstances in which the child will not be returned. In light of the Convention's stated objectives, it will be important that authorities interpret restrictively the exceptions of Article 13.

13. The same comment applies to Article 20 which provides that the return may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This clause was adopted after a long and difficult debate to prevent the inclusion of a provision on public policy which would have allowed Contracting States to oppose the return of the child where this would be considered incompatible with the fundamental principles of the requested State relating to family and to children. This provision which was far too broad (it opened the door to a reconsideration of the merits of the custody order), risked seriously compromising the success of the Convention's. All the delegations agreed that Article 20 should be allowed to apply only exceptionally and in rare circumstances. It would seem important that when

adopting the Convention, States do not attempt to broaden the possible scope of Article 20 or even identify specific circumstances for its possible application in order not to encourage the use of this Article.

14. Mr Eekelaar states on page 19 of his report that:

"It is significant that none of these grounds for refusal is equivalent to a simple finding 'that to return the child would be contrary to the child's best interests'. To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the Convention."

This is an important statement which stresses that States will no longer permit forum shopping and thereby encourage abductions. By doing this, States take the children's side, i.e. the right of children to be protected against disruptions in their lives which occur when a custody order is violated by one parent. Such an approach counters the argument that by intervening in child abduction cases the State is taking sides in what is seen as a private matter. Protecting children can surely be seen as a question of public policy.

Implementation of the Convention by Canada

15. Comments on the implementation of the Convention in Canada could be useful for other States, especially in light of certain of the issues raised by Mr. Eekelaar.

16. As mentioned above, ten of the twelve Canadian jurisdictions have now adopted the necessary implementing legislation. In all of these cases, the implementing Act was quickly passed by the Legislatures with only favourable comments. Essentially, the Canadian jurisdictions adopted the text of the Convention. In a few jurisdictions, such as Quebec, the text was either re-arranged or a few provisions were added to it. This method was recommended by the Uniform Law Conference of Canada to ensure that the Convention itself has the force of law in Canada. A few regulations were adopted to complement the Convention but it is important that the procedure be as clear and uncomplicated as possible to ensure that the applicant can proceed rapidly.

17. Each jurisdiction has designated its Attorney General as Central Authority and has appointed a person to represent the Attorney General. Requests under the Convention can be made either to the Federal Central Authority or to the relevant Provincial or Territorial Central Authority. Provincial Central Authorities have played a significant role in processing requests received from Foreign Central Authorities or in assisting parents in making a request to a Foreign Central Authority. Their involvement is essential inasmuch as they can have direct access to other services that may be required, such as the different provincial departments or social services, child welfare, official guardians and, of course, the police departments. The role of the police is likely to become important in determining the whereabouts of children. In most of the cases that we have dealt with under the Convention, there was sufficient information to find the children. The role of the police where no such information is available remains to be defined. Decisions will also have to be made with respect to the disclosure of information on the whereabouts of the children once it is obtained. Should the address be communicated to the Foreign Central Authority? If so, under what conditions?

18. On the basis of our limited experience, we have found it useful to have the applicant parent or someone on his or her behalf take charge of the child in the requested State when the child is to return to Canada and are informing applicants accordingly. Foreign

authorities in those countries should not systematically be relied upon to take care of the child. Canadian embassies abroad have cooperated in cases of international child abduction. This, however, must be done taking into account limited resources and their diplomatic status. They cannot replace the parent and there is a limit to the kind of interventions they can make with foreign authorities.

19. When ratifying the Convention, Canada declared that, except for the Province of Manitoba, it will provide legal aid and counsel to foreign applicants insofar as they qualify under the legal aid system of the jurisdiction involved. In Manitoba, the Attorney General is prepared to represent the custodial parent whether he or she lives in Canada or abroad. In the few cases that have gone to court in Canada under the Convention, the provincial jurisdiction involved provided a lawyer to represent the child in court as Professor Eekelaar suggests in page 12 of his report. On the other hand, the parent who submitted the application was often advised by the Provincial Central Authority to retain the services of a local lawyer in private practice and was informed that he could obtain legal aid if he was eligible. Canada does not pay for the costs, including travel expenses, involved in the return of a child from Canada to the requesting State. In a successful case of the return of a child from a requested State to Canada, the custodial parent made all the necessary arrangements for the travel of her child.

20. It should also be noted that in Canada, the Convention is applied on a basis of reciprocity: it only applies to cases involving children habitually residing in another Contracting State.

21. The language of communication in the international context will always raise difficult questions. Clarifications with other Contracting States have already been necessary. Under the Convention, the matter is governed by Article 24 which states that:

"any application, communication, or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English".

A Contracting State may object to the use of French or English, but not both. This provision governs the language of any documents sent to the Central Authority. In most States, an application to the Central Authority in either English or French will probably be entertained.

22. In any event, the determining factor on this question of translation remains the possibility that the documents may have to be used in relation to an application to the court of the requested State. It cannot be assumed that a foreign judge will either accept or understand the document written in what is for him a foreign language. Consequently, we are advising any applicant in Canada that he or she should provide a translation of at least the documents on which the custody rights are based.

23. We also tell applicants that, although the Convention does not require that the application be accompanied by documents or that judicial decisions or agreements between the parties attesting to the right of custody accompany the application, they would be well advised, if the judicial authority of the requested State is required to consider their application, to append all the necessary documents in order to expedite the process by preparing a complete file for the court in advance. Article 15 enables the judicial or administrative authorities of the requested State to ask that the applicant obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention of the child was wrongful within the meaning of Article 3 of the Convention. In

view of the difficulties of obtaining such a determination on the original application, we would hope that the procedure would be used in exceptional cases.

24. Finally, the most difficult point in relation with the Convention has been up to now the exercise of access rights. It seemed important during the negotiations of the Convention that a provision on access rights be included. The access right is the counterpart to the custody right and the child has a right to be able to establish a relationship with both his parents. Unfortunately, sending a child to a foreign country for the exercise of access rights may often result in abduction, insofar as the child does not come back at the end of the stated period. This seems to occur more frequently where the parents are in different States, particularly where the access periods are few and far between and the access parent believes that he or she will not see the child again.

25. Canadian judges have ordered the custodial parent to send the child to a foreign jurisdiction for the exercise of access rights. In some cases, however, where there has been a previous abduction or evidence of non-cooperative behaviour on the part of the access parent, Canadian judges have ordered that the exercise of access rights take place only within the jurisdiction of the custodial parent. It is hoped that enhanced cooperation between authorities of the different States will ensure that the children do return after the exercise of access rights and reassure the access parent that he or she will be able to effectively exercise their rights.

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

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

Memorandum by the Commonwealth Secretariat

Much water has flowed under the bridge since the Legal Division was established in 1969 and its miniscule staff of first three (Director, an assistant and a secretary) was charged with "the primary role of keeping governments informed of legal developments throughout the Commonwealth". Almost two decades on, the size of the Legal Division remains miniscule, but the the depth and range of its activities has grown beyond recognition. This has been achieved through a mode of operation both catalytic and unashamedly exploitative of the readiness of others to help. The spontaneous goodwill of numerous lawyers throughout the Commonwealth, both inside and outside government, has in no small measure helped carry the load the staff of the Legal Division has been happy to bear. We are deeply conscious of the demands we, of necessity, make on our Commonwealth colleagues and record our gratitude to them.

2. Ministers will be aware of the general pattern of the Secretariat's legal activities, and this review seeks to highlight some of the more recent developments in this work. Our legal work continues to follow a pattern which has been developed over the years in close consultation with Ministers and their officials, and is now well established. This has as its primary thrust keeping Commonwealth Jurisdictions apprised of legal developments in other Commonwealth countries, fostering Commonwealth co-operation in the legal field, assisting in developmental matters, providing assistance through the Commercial Crime Unit and servicing the day-to-day legal needs of the Secretariat and of the Commonwealth Fund for Technical Co-operation (CFTC).

Commonwealth Schemes on Mutual Assistance in the Administration of Justice, and on cultural Heritage

3. From its inception the Legal Division sought to survey and, where possible, prompt extensions of intra-Commonwealth arrangements for assistance in the Legal field. First, arrangements in the area of Private International Law were examined, and workshops held on the arrangements for the enforcement of judgments and orders, including maintenance orders. This led to our undertaking a review of the 1966 Scheme for the Rendition of Fugitive Offenders within the Commonwealth, which concluded in 1983, at Colombo. At the same Meeting which adopted the revised Scheme, Law Ministers invited the Secretary-General to initiate consultations on three possible new Schemes - on mutual assistance in criminal matters; on the transfer of convicted offenders; and on protection of the cultural heritage.

4. This introduced wholly new and exciting dimension to the work of the Legal Division. The subject matters and their scope called for an innovative and qualitative approach. The task was especially daunting as the experience of the world community in each area had been less than promising. In the past three years, therefore, through our system of consultancy, we have been putting together the three draft schemes. In so doing we have wherever possible drawn on the experience of particular Commonwealth countries. Outlines were circulated to governments for comment, and then refined in the light of the reaction conveyed. These culminated in three draft schemes - a Commonwealth Scheme for

Mutual Assistance in Criminal Matters; a Commonwealth Scheme for the Transfer of Convicted Offenders within the Commonwealth; and a Scheme to Protect the Cultural Heritage within the Commonwealth - which were considered by Senior Officials from Law Ministries, meeting at Marlborough House in January-February 1986.

5. As Ministers are aware their Senior Officials have unanimously recommended, that two of the Schemes (as amended by their meeting) be adopted - one, to increase and enlarge the areas of assistance given by Commonwealth countries to each other in the investigation and prosecution of criminal matters; the second, to permit the transfer of offenders convicted abroad to enable them, in appropriate cases, to serve the balance of their sentences in their home countries.

6. Senior Officials also commended to Law Ministers that arrangements be made to ensure that criminals are not permitted to enjoy the proceeds of their crime where these have been transferred from the jurisdiction in which the offences were committed. A proposal for consideration for incorporation in the relevant Scheme, or as a separate scheme, is before this Meeting.

7. The third proposed Scheme, designed to protect the cultural heritage of Commonwealth countries by prohibiting the importation into a Commonwealth country of illegally exported articles of the cultural heritage of other Commonwealth countries and establishing a validation system to protect bona fide purchasers, was given close consideration and proved more difficult. Items illegally imported would, on request and subject to safeguards, be returned to the country of origin. Law Ministers in Sri Lanka in 1983 had identified the problem of protecting major items of a country's cultural heritage as being appropriate for collective action, and as being one in which the special character of the Commonwealth association suggested that a solution to the problem of jurisdiction should be sought.

8. A number of policy considerations have been identified on which guidance from Law Ministers is needed before further progress could be made, and are discussed in the Report of Chairman of the Senior Officials Meeting circulated as LMM(86)13.

9. In the context of the need to keep existing arrangements under review, Senior Officials also gave preliminary consideration to proposals by one delegation that both the prima facie case requirement and the "list of offences" approach in Commonwealth extradition arrangements be dispensed with, as increasingly neither was required in arrangements with non-Commonwealth countries. This suggestion has been followed up, and is to be considered further by Senior Officials in Harare, before the Ministerial Meeting commences.

Commonwealth Law Bulletin

10. It would be difficult for us - and perhaps for many of our readers - to contemplate life without the Commonwealth Law Bulletin. This retains its position as the sheet anchor of our information network in the legal field. Its main attraction is its comprehensiveness and yet regular and timely appearance.

11. The unsolicited compliments which the Bulletin attracts from a wide range of quarters are not only gratifying but encourage us to strive for improvements in quality both of presentation and content. However we are deeply conscious of the debt we owe to Law Ministers, Chief Justices, and their dedicated staff, without whom our task would undoubtedly be impossible. We are also conscious of the need to achieve economies, and some income is now generated from advertisements. The Bulletin is now available on microfiche. As it is now computer typeset, since 1985 the full text has been stored on

disk which will afford the facility, in the medium term, of our being able to make the text of the Bulletin available to electronic data-based libraries under appropriate licensing arrangements. The print-run for each issue now stands at 1750 and a 185 page index for the 1984 volume was sent out with the January 1985 issue. The index for volume II (1985) is with our printers and should be dispatched to Ministers before their departure for Harare.

12. The keenly-awaited Cumulative Index covering the first ten years of the Bulletin (1974-1983) was distributed in June 1984. Its usefulness in facilitating access to some 10,000 pages of comparative material contained in the Bulletin has attracted compliments from users.

Law Reports of the Commonwealth

13. A notable development since Law Ministers last met is the appearance of Law Reports of the Commonwealth by Professional Books (of Oxford). In three annual volumes, the series covers constitutional, commercial, administrative law and criminal cases of particular interest. It makes available the full texts of landmark judgments otherwise unavoidable to many Commonwealth jurisdictions and it is proving to be a useful professional tool. This supplements the Commonwealth Law Bulletin in ways we would never hope to achieve and it represents a happy conjunction of professional and publishing interests in which we have been happy to co-operate. We have been keen to see the new series achieve a sound and viable subscription list, in recognition of its importance to Commonwealth lawyers.

Legislative Drafting Courses

14. The acute shortage of trained draftsmen, commented upon with unfailing regularity in previous reviews, continues to present serious problems for a number of jurisdictions. However there are hopeful signs of an overall improvement in some jurisdictions. It is clear that the continuing series of training courses in legislative drafting funded by the CFTC has had a beneficial impact in an area not usually recognised in technical aid circles as meriting priority attention, but nevertheless vital to underpin the framework and national strategies for economic and social advancement. A recent survey to evaluate the drafting courses in terms of the post-course career of graduates of the training courses reveals that a larger number of trainees than had previously been supposed still remain in Government service and, more importantly, in legislative drafting.

15. For smaller jurisdictions however, and in particular in small island states, a continuing dearth of personnel for training presents problems of a slightly different nature. Ironically this can mean that the jurisdictions most in need may be unable to take advantage of this almost unique facility available to them at no cost. In an attempt to redress the position in the Pacific, a CFTC course was held in Fiji, although by reason of a combination of factors this did not achieve the degree of impact we had hoped.

16. During the three years under review seven courses lasting approximately six months each have been held (including one currently in progress in Harare). These were attended by 83 trainees from 23 different Commonwealth countries (as compared to 35 trainees from 19 different jurisdictions respectively in the previous review). This brings to almost 300 the number of draftsmen trained since the inception of the training programme in 1974/75. Details of these courses are set out in Annex 1. An important element of these courses is the increasing number of women participating. Some 34 women participated in these courses, representing almost 41% of those trained during the period under review.

17. A welcome development has been the introduction since 1984 of a 'masters' element into the training programme. This is designed to provide an opportunity for more

experienced draftsmen from developing countries to sharpen their skills and update their knowledge of and use of modern techniques in the preparation of legislation. So far 14 senior draftsmen have taken advantage of this facility at four different courses which have been held concurrently with the existing basic courses, but each lasting only about 12 weeks.

18. Because of the necessarily limited number of places available on each course, pressure on admission remains high. Courses are regularly oversubscribed and there are sadly few alternative courses of comparable intensity and value to absorb the overflow. In the Caribbean, the expectations generated by the post-graduate course in legislative drafting at the Cave Hill campus of the University of the West Indies in Barbados, introduced in 1979, remain largely unfulfilled. However, we are seeking to cooperate more closely with the University authorities with a view to giving the course a new lease of life. A jointly sponsored course is expected to commence at the University in November 1986.

19. In early 1986, the Government of Australia implemented its plan to provide in-service training facilities for draftsmen from developing Commonwealth countries. As a result and with assistance from the CFTC, two recent graduates of our legislative drafting programme from Tanzania and Zimbabwe have had the opportunity of undergoing six-month periods of attachment with the Parliamentary Counsels' office in Perth and Canberra respectively.

20. The teaching of drafting skills is no easy task and we are profoundly grateful to Mr O.M. De Alwis (Sri Lanka) and Mr Justice VCRAC Crabbe (Ghana) for the dedication, professionalism and quiet humility with which they have directed these courses. Nor could the courses have been held without the willing assistance of the Governments of Bangladesh, Fiji, Sri Lanka and Zimbabwe. We express our gratitude to each for their profound generosity in acting as hosts, and providing physical facilities for the courses.

Legislative drafting service for small states

21. The CFTC has continued to retain the services of Mr W J Menary, an able and efficient law draftsman who is available to undertake ad hoc drafting assignments for small jurisdictions, and who also assists the CFTC's Technical Assistance Group with the preparation of legislation. He has a busy work programme, which is managed by the Legal Division.

Training course in Law Reporting

22. The need for well-produced and regular law reports lies at the heart of any servicing of Commonwealth legal system, dependent as they are on precedent and the ready availability of case law. To assist in particular governments in the East, Central and Southern African region in this vital area, in 1986 the CFTC funded a workshop for editors of law reports. Twelve trainees from eight jurisdictions attended the fortnight-long course, held in Lusaka, Zambia and tutored by Dr Alan Milner of Oxford (well-known for his series of African law reports).

Imperial Statutes of General Application

23. Also through the auspices of the CFTC we have been able to initiate a programme designed to attend to unfinished legal business associated with the attainment of independence by a number of Commonwealth countries. The immediate aim of the project

(initiated on a specific request from one of the small states affected) is to define and identify "Imperial Statutes of General Application" in force at the time of independence (using cut-off dates) in so far as that particular country is concerned, and to identify such statutes which may be considered as being no longer relevant so that definitive lists can be promulgated by Parliament which repeal those considered to be obsolete and save those which it is desired should continue in force. The long term objective is to be able to offer similar assistance to other Commonwealth jurisdictions. A preliminary survey of the project is in a paper LMM(86)30, by Professor Keith Patchett.

Publications

24. As well as the quarterly Commonwealth Law Bulletin, the Legal Division produces occasional texts to meet specific areas of need. Since the Colombo Meeting, we have produced the following:

- (i) Commercial Frauds: Problems and Remedies in the Judicial Process by Dr. Michael Levi.
- (ii) Law Reform Proposals in the Commonwealth and their Implementation: Issue 2: 1983.
- (iii) Ombudsmen in the Commonwealth (A Survey prepared for the Commonwealth Secretariat by the International Ombudsman Institute) (Revised 1983).
- (iv) Commonwealth Directory of Post-Graduate Legal Programmes 1983-1984.
- (v) Directory of Schools of Law in the Commonwealth 1983.
- (vi) Survey of Extradition and Fugitive Offenders Legislation as Between Commonwealth Jurisdictions.
- (vii) 1983 Meeting of Commonwealth Law Ministers, Minutes and Memoranda.
- (viii) The Copyright System: Practice and Problems in Developing Countries by Denis DeFreitas.
- (ix) Family Law: The Commonwealth Experience by Gloria Cumper.
- (x) Law Reform in the Commonwealth: Report of the Hong Kong Meeting 1983.
- (xi) Commonwealth Survey of Terms and Conditions of Service of Legislative Draftsmen.
- (xii) Commonwealth Law Bulletin Cumulative Index 1974-1983.
- (xiii) Commonwealth Legal Education Newsletter: A quarterly publication sent free to members of the CLEA.
- (xiv) Commonwealth Law Bulletin Index 1984.
- (xv) Meeting of Law Officers of Small Commonwealth jurisdictions, Vanuatu, 1985.
- (xvi) Issues in Reproductive Health Law in the Commonwealth by Rebecca Cook and Bernard Dickens.

- (xvii) Commonwealth Law Bulletin Index 1985.
- (xviii) A Decade of Women and Law in the Commonwealth.
- (xix) The Convention on the Elimination of all Forms of Discrimination against Women: Explanatory documentation prepared for Commonwealth jurisdictions.
- (xx) Directory of Schools of Law in the Commonwealth 1985.
- (xxi) Bibliography of Materials on Legislative and other Legal Drafting and the Interpretation of Statutes, Third revised edition, 1985.
- (xxii) The Hague Convention on the Taking of Evidence Abroad: Explanatory Documentation prepared for Commonwealth jurisdictions; Revised 1985.
- (xxiii) Law and Human Ecology in the Commonwealth Volume 1 - Ghana: Water Supply and Control.

Small States

25. In the discharge of the Secretariat's special responsibility towards small states the Legal Division undertakes specific tasks of a legal nature for small states either collectively or individually as the occasion dictates.

26. In the context of the Secretariat's general mandate to assist small states, the Division has helped to nurture what may form the basis of regular meetings of small states. An inaugural meeting held in the Isle of Man in July 1983 at the instigation of its Attorney-General generated considerable interest. The importance attached to this initiative was demonstrated by the presence at the Isle of Man Meeting of the Prime Minister of Vanuatu, who attended as his Country's Minister of Justice. A second meeting was held in July/August 1985, in Port Vila, Vanuatu. These meetings have brought home to all concerned how much the small island states have to offer each other, and how they stand to benefit from the experience of each other.

27. The Division has also played a part in fostering regular meetings of Pacific Islands Law Officers. The Legal Division has participated in previous meetings of the Pacific Law Officers, and will also be represented in the meeting in Apia, Western Samoa, in August 1986.

28. Reference has already been made to the project for the patriation of Imperial Statutes. Because of the human resource and financial implications that would be involved in each individual state carrying out its own study, many Commonwealth jurisdictions, particularly small states, would find such an exercise beyond their available resources and could not attempt it without extensive outside technical help. Although the project is at present being conducted by reference to a specific small territory, it will on completion benefit a number of other small states.

29. Mention has been made of the modest ad hoc legislative drafting service we have been able to provide; other aspects of CFTC assistance to small states are contained in Annex II. Our efforts to encourage strategically-located regional legal units continue. A unit for the Caribbean region is now functioning within the Organisation of Eastern Caribbean States, with CFTC assistance, and we are helping informally with a similar development in the Pacific, based in Port Vila and under the auspices of the University of the South Pacific.

Commonwealth Correctional Administrators

30. Following the endorsement of Law Ministers at Colombo, a meeting of Commonwealth Correctional Administrators, was held in Hong Kong, in March 1985. Not only was the meeting a first for the Commonwealth, it was also acknowledged to have been the first ever international meeting of correctional administrators from all five continents to discuss common problems and to share experience. Among the issues discussed at the meeting were the transfer of convicted prisoners between Commonwealth countries, and alternatives to imprisonment and their effect on the prison population.

31. A report on the meeting has been circulated to governments. Developed and developing countries discovered that they have common and yet very different problems, and there were many suggestions for improving the situation within the Commonwealth. Better arrangements within the Commonwealth for the training of correctional staff and the improvement of technical assistance to developing countries were explored. We hope to be able to be of assistance in bringing this about.

32. The meeting also studied the relationship between rising rates of crime in many countries and the overcrowding in the penal institutions and concluded that this relationship was far more complicated than was normally supposed. In many countries the prison population had gone down while the crime rate was rising, whilst in others it had gone up when the crime rate was going down. One really difficult problem facing most countries was that of increasing numbers of prisoners awaiting trial. In some countries nearly three-quarters of their prison population were prisoners awaiting trial - a subject of some concern explored by Mr William Clifford in a paper which is before the Meeting as LMM(86)9.

33. It was widely felt that legislation had far more effect on the creation of problems in the prisons than was ever appreciated. Some countries were concerned at a flood of legislation with statutes creating new offences containing penal provisions, which could only have the effect of increasing the numbers likely to find their way into the penal institutions. Some doubt was expressed as to whether, as a matter of course, proper scrutiny was given by the legislators when decisions as to the appropriate form of penalty were being taken.

34. Another subject of great interest was the provision of alternatives to imprisonment, and whether these have the effect of reducing the prison population. The feeling was widespread that alternatives to imprisonment, when made available to the judges, tended to be used not instead of imprisonment, but instead of the imposition of other alternatives to imprisonment, such as fines. Fines, themselves, were also a major, if unwitting, contributor, to the prison population. All too often offenders were unable to pay them, and were imprisoned for defaulting.

35. Community service orders were also discussed. Again the general impression was that these, too, tended to be used as alternatives to fines rather than as an alternative to terms of imprisonment. One jurisdiction reported a drastic reduction in its prison population after the introduction of a community service order scheme, but this had also coincided with a change in leadership of its judiciary and the introduction of new sentencing policies.

36. There was a robust discussion of the respective roles of the courts and of correctional services in the sentencing process. Some delegates considered that there was a strong case in favour of correctional administrators having a greater input to inform the sentencing process. Their staff were professionals, and these delegates felt that they have a constructive and useful role to play.

37. Most delegates felt that there was a strong case for correctional administrators to have increased authority to deal with the placement of offenders after sentencing, including the question of parole. Where this was not the position, there was the risk of correctional administrators being turned into mere "jailors", with the status of simple custodians. If correctional officers were to be denied discretion in the discharge of their duties, it should at the same time be acknowledged that they should carry no responsibility whatever for any failures in their correctional system.

38. The meeting concluded with a lively and most useful discussion on the handling of crises within prisons, in ways that were both humane and effective. Delegates were convinced that, as a result of their discussions, they will be returning to their countries better able to meet the challenges that from time to time confront them in this regard. There was universal agreement that greater attention should be given to the prevention of, rather than reaction to, crises.

39. As a consequence of the meeting, we were asked to liaise with its chairman to explore ways of keeping Commonwealth administrators aware of developments in the field of corrections taking place elsewhere in the Commonwealth.

Technical Assistance Group

40. Commonwealth Governments seeking assistance in the form of specialised consultancy services are able to request such services from the Technical Assistance Group (TAG), the in-house consultancy Division of the CFTC. TAG's professional staff consists of legal, economic financial and statistical consultants who provide advisory services on natural resources development in response to requests from governments. The Group's assistance in this area is mainly aimed at providing governments with the legal and fiscal measures needed to encourage development of their natural resources while protecting national interests. If governments wish, TAG staff can also further assist them by participating actively in the negotiations between governments and oil companies, mining companies or other foreign investors.

41. During the period under review TAG's lawyers and economists have assisted Commonwealth countries in Africa, the Caribbean and the Pacific on issues relating to petroleum exploration and development, including the drafting of appropriate legislation, model agreements and the design of financial terms with the aid of computer models. TAG has provided advice on a petroleum exploration package and petroleum development strategy to the Seychelles. The Seychelles National Oil Corporation, with inputs from TAG, is now preparing for a series of promotion seminars to be held shortly where oil companies will be invited to bid for rights to explore for petroleum in the Seychelles. This is a good example of the long-term relationships which TAG seeks to maintain with governments.

42. In addition to providing the legislative and fiscal framework within which oil companies can undertake exploration activities, TAG has provided CARICOM, the regional secretariat of the Caribbean countries, with advice on the harmonisation of petroleum regimes and on a regional energy action plan. Tonga was assisted with advice on petroleum exploration and development, as well as revision of existing legislation and a model agreement. Non-legal assistance was also provided in the form of a review of the financial regime and reinterpretation of exploration data.

43. TAG's lawyers and economists have helped The Gambia in the preparation of petroleum legislation and a model agreement. The Gambia is also preparing to hold promotion seminars, with TAG participation, for oil companies. TAG is now working closely with Botswana government officials in preliminary negotiations with oil companies, and has recently participated in similar negotiations between the Ghana government and three petroleum companies.

44. In mining, TAG's lawyers have also been involved in drafting mining law regulations and model agreements for use in negotiations. The decline in activity worldwide has resulted in a slackening of requests for assistance in mining projects received by TAG. Existing projects, however, still need attention as they evolve over time and TAG lawyers are assisting with coal and gold projects in Mozambique, and gold and asbestos in Swaziland. In 1985, a TAG lawyer provided advice to the government of Papua New Guinea on its legal options if the company developing the gold and copper mine in Papua New Guinea deviated from proposals agreed by the company and the government.

45. In the field of maritime boundary delimitation and fisheries access agreements, governments have continued to seek TAG's expertise. This has included preparation of appropriate legislation in a number of small island states including the Seychelles and Eastern Caribbean states and participation in negotiations between the government of Dominica and France on the maritime boundaries between Dominica and the French overseas territories of Martinique and Guadeloupe.

46. TAG was asked by the Seychelles government to draft the necessary legislation to set up the Seychelles Industrial Fishing Authority and to revise and update all Seychelles fisheries legislation in the context of amalgamating them into a comprehensive fisheries legislation.

47. There are other areas in which TAG's expertise in legal matters has been sought by governments. These include assistance to governments in Barbados, the British Virgin Islands, and Antigua and Barbuda, in their negotiations with an international telecommunications company. In one of these projects TAG's lawyers also prepared both the draft agreement between the company and the government and the operating licence. Other assistance in this field has included the drafting of telecommunications legislation.

49. TAG has provided similar assistance in negotiations on civil aviation agreements between carriers and governments and provided legal advice on proposals concerning sales of equity between foreign companies operating in member countries. In the case of the latter, TAG's assistance has been to monitor the terms of the transaction to safeguard the national interest throughout.

50. Another important area of TAG's assistance to government lies in the opportunity it makes available for staff from relevant government departments to work with TAG's officers for practical training and exposure to TAG's methods. Lawyers from Uganda, CARICOM, Tanzania, Malaysia, Namibia, Angola, Papua New Guinea, Guyana, Gambia and Antigua and Barbuda have been based in TAG's offices over the period. In some cases full or partial costs of their training have been met by IDRC, the World Bank, the UN or their own governments. The length of the training period ranged from between 2-12 weeks and the trainees worked on petroleum legislation and contracts as well as maritime boundary legislation.

50. Finally, TAG is now preparing a revised update version of its earlier mining compendium containing details of the legislative and fiscal regimes in mining agreements in African Commonwealth countries. The new compendium is being enlarged to include similar details for petroleum agreements.

Commercial Crime Unit

51. The Commonwealth Commercial Crime Unit (formerly styled the Commonwealth Fraud Liaison Service) was established in November 1981 as a unit within the Legal Division. Its mandate extends over a wide area including the facilitation and coordination of international enquiries and investigations, the development and deployment of

intelligence, the commissioning and conduct of studies, training and liaison with such organisations as ICPO-Interpol in regard to combating commercial crime and related matters. The philosophy behind this facility is simply that prevention is better, cheaper and more efficient than cure.

52. From the outset it was anticipated that the Unit would devote much of its time to developing cooperation between Commonwealth law enforcement agencies charged with combating commercial crime and abuse. However, from its inception, the Unit was deluged with specific requests for assistance, many of which required its intervention. The facility for coordination also presupposes the existence of effective national agencies for the execution of specific tasks and operations, which as yet do not always exist. Consequently, at Colombo in 1983, Ministers, asked that the facility be strengthened and extended, specially in regard to the development and deployment of intelligence orientated to commercial loss prevention. In November 1983, a Higher Executive Officer was appointed, and in April 1985 an Executive Officer was added. These three posts, together with a secretary, comprise its staff.

53. Law Ministers have designated appropriate contact points in each Commonwealth jurisdiction, including senior law officers, senior police and other officials. These have been welded into an effective Commonwealth network. Where necessary, an approach to a jurisdiction is made through the appropriate official contact point. However, given the necessity for speed the Unit is often encouraged to communicate directly with other appropriate officials after consultation with the official contact point. The system is highly personalised and, thus from an intelligence point of view, efficient. It has always been recognised that it is appropriate for the Unit to work with non-Commonwealth authorities where there is a clear Commonwealth interest, as international commercial crime is not limited to activities as between Commonwealth jurisdictions. Hence a number of non-Commonwealth countries have similarly designated official contact points.

54. Since November 1981 over 1000 requests for assistance have been received. Most related to specific cases. The vast majority originated from developing countries, and in particular from Africa. However, there is a discernible trend of developed Commonwealth countries using the services of the Unit more frequently. It is not uncommon for the Unit to be executing requests for assistance involving simultaneously a number of Commonwealth and non-Commonwealth jurisdictions. The nature and diversity of these requests defy practical analysis and there is little value in seeking to tabulate or categorise them. The following may serve to indicate, however, the nature of the Unit's work in this regard:

- A. A request was received from an Attorney-General for information concerning the antecedents and background of individuals who had approached his government with a view to obtaining bank licences for a number of offshore operations. The Unit was able to supply information that persons associated with these individuals were highly undesirable and the licences were declined.
- B. A request was received from a Minister of Finance as to the background and antecedents of an individual who was offering a substantial loan facility to his government. The Unit was able to identify this as an advance fee fraud in the making, and appropriate action was taken by the government.
- C. A request from a Chief Minister, for information on an American and Swiss corporation and their associates with whom his government was about to enter into a substantial transaction, was relayed to the Unit through his Commissioner of Police. The Unit was able to provide information showing that the principals of the Swiss company were associated with a Mafia

family and had been connected with a series of international frauds, although they had never been convicted. In this particular enquiry the Swiss and American governments willingly gave a great deal of cooperation.

- D. On the basis of information received the Unit was able to coordinate a targetting operation whereby a particular shipment of counterfeit video and audio tapes were monitored from Singapore via Spain to Nigeria and then seized by the Nigerian police.
- E. A request was received from an Attorney-General for advice as to whether certain negotiable instruments could be considered valuable securities for the purposes of a criminal prosecution. A successful prosecution resulted.
- F. The Unit was approached by the police of a Commonwealth country attempting to trace a substantial sum of money from which a nationalised industry had been defrauded. The funds were traced to another Commonwealth jurisdiction. The Unit facilitated a civil action which resulted in the freezing of the money and its return to the appropriate party.

55. Inevitably the response of the Unit and the degree of assistance it can provide will depend on the nature of the request and the circumstances in which it is made. At present the Unit has a case-load of about 40 cases and its resources are very stretched.

56. In addition to servicing these requests the Unit is required to develop an intelligence base. Given limited resources, this is done on an ad hoc basis, although on occasions it is able to produce valuable strategic and tactical intelligence for law enforcement agencies. For example, it has been possible to supply governments with intelligence which has enabled them to take effective action to prevent or minimise loss caused by fraud and other abuses without the Unit having to wait for a specific request for assistance. Naturally, the Unit exercises considerable caution and circumspection in both the development of its intelligence and in its deployment. Considerable care is taken to ensure accuracy, integrity and confidentiality in both its handling and its deployment.

57. The Unit is also charged with facilitating training in the field of commercial crime law enforcement. The Unit has organised, in association with the Secretariat of the International Chamber of Commerce, four international symposia on commercial crime at Cambridge University. Each symposium concentrated on practical law enforcement issues with a programme extending over a working week. As this programme is residential it has afforded delegates a unique opportunity to develop personal contacts and relationships which facilitate and foster international cooperation. At the most recent symposium participants numbered over 200 and came from 53 jurisdictions. Additionally, the Unit, in association with the Crown Agents, has held regional economic crime workshops in a number of jurisdictions. The Unit hopes to develop a programme for regional workshops either alone or in association with other agencies, although resource constraints render the precise timing of this programme uncertain. Regional workshops provide an important opportunity for bringing awareness and specialised training to officers who would not normally be afforded the opportunity to attend the annual symposium, and furthermore, the specific problems of the region can be highlighted.

58. The Unit has also provided training courses directly to Commonwealth governments. It has provided intensive courses for India and Zimbabwe on economic crime investigation, and for Malaysia on combating money laundering. Officers from Unit have also participated in training courses organised by other organisations and governments. In addition, officers from various agencies in several Commonwealth countries have been seconded to the Unit for on-the-job training. This has proved most valuable. In three instances it has been possible to secure funding for this from the British Council and ODA.

59. The Unit has also prepared documents and materials which have facilitated training in various courses and programmes already in existence. It has also helped officers from other countries to attend such courses, and in some instances has assisted in exchanges of personnel. The Unit has advised on the curriculum for training courses and has offered advice to governments on training generally.

60. The Unit has the responsibility of conducting and commissioning studies in areas relevant to commercial crime and related subjects. Papers on a wide variety of subjects germane to commercial crime law enforcement. have been prepared and circulated to Commonwealth governments.

61. The Unit has participated in a number of studies by other organisations including expert committees of both the UN Division of Narcotic Drugs on the forfeiture of assets associated with organised crime activity; the WHO Programme on integrated national drug policies; and an encyclopaedia of laws relating to the forfeiture of assets associated with organised crime, prepared by ICPO-Interpol. At the request of Commonwealth governments, the Unit has been able to provide evidence and submissions to governmental and other official enquiries. Members of the Unit have also directed research projects by individual members of various agencies including the Metropolitan Police Force, the Royal Hong Kong Police Force, the Independent Commission Against Corruption (Hong Kong), the Singapore Police Force and the Malaysian Government.

62. The Unit also assists in the identification of experts and has on a number of occasions facilitated the secondment of officers with a particular expertise from one government or organisation to another. Members of the Unit have themselves been assigned for short periods to member governments to advise on matters related to economic crime. For example, an officer from the Unit advised the Government of Zimbabwe on the establishment of a National Economic Conduct Inspectorate.

63. At the heart of the Commonwealth initiative in combating commercial crime lies a determination to prevent and to minimise fraud and economic abuse. Thus the Unit's role involves much more than simply rendering assistance towards securing a conviction before a court. In the vast majority of cases the timely provision of information, by the Unit has successfully prevented a fraud or other crime from taking place. However such are the demands on the Unit and the nature and number of requests it receives that inevitably its ability to develop more general loss prevention programmes is severely circumscribed. It is hoped that as its intelligence capability develops it will be able to service member governments more efficiently and effectively without having to respond to each request on an essentially ad hoc basis. Particularly in this the area in regard to off-shore and shell banking operations - a facet of our work which has been the subject of favourable comment by UNCTAD among a number of international organisations.

Human Rights Unit

64. Since Ministers last met, a Human Rights Unit has been established within the Secretariat's International Affairs Division. It is the subject of paper LMM(86)14.

Chief Justice of Commonwealth Africa

65. We were delighted to be invited by the Chief Justice of Gambia to assist him by identifying resource people and paper writers, to help with the agenda and to arrange financial assistance for delegates to the first-ever Meeting of Chief Justices of Commonwealth Africa, held in The Gambia in May 1986. In addition the Division was represented at the meeting.

International Legal Activities

66. The primary thrust of our legal activities lies in the area of municipal law, and we have consciously eschewed invitations which would draw us into legal activity which is more appropriately or more effectively undertaken by other organisations. However, there are some activities in which there has been a clear Commonwealth interest and a definable role for us. One such organisation is the Hague Conference on Private International Law; another is the Asian-African Legal Consultative Committee: our relationship with each is close and cordial. Discussed elsewhere in this review are aspects of our recent work with the AALCC, while the association with the Hague Conference is well-known to Law Ministers. Also relevant to our work and reported upon elsewhere, is our relationship with ICPO-Interpol. More recently we have been exploring with UNIDROIT suggestions that we might develop a relationship similar to that enjoyed with the Hague Conference. We also worked to good effect with the Committee of Experts of the Council of Europe, which developed the European Convention on the Transfer of Sentenced Offenders and upon which the eventual draft Commonwealth Scheme was based.

67. In particular, we have worked both with the AALCC and the Arab League together with the Hague Conference to develop model forms of bilateral agreements for mutual assistance in legal matters.

68. Regular and personal contact has also been maintained with the Secretariats of other international agencies concerned with crime prevention. These have included ICPO-Interpol; the International Maritime Bureau; the United Nations Division on Narcotic Drugs; and the United Nations Crime Prevention Office.

Commonwealth Legal Advisory Service

69. We have continued our useful and friendly cooperation with the Commonwealth Legal Advisory Service (CLAS) of the British Institute of International and Comparative Law (BIICL), established in 1962 before the Commonwealth Secretariat came into being.

70. We are careful to avoid duplication of effort, as the resources both of the CLAS and of ourselves are slender.

Commonwealth Legal Education Association (CLEA)

71. The CLEA was founded in 1971. There are approximately 500 members, 200 institutional and 300 individual. The Director of the Legal Division serves as its Honorary Secretary and the CLEA is housed within the Legal Division. Forty two Commonwealth countries are represented within the membership. Its objects are:

- (i) To foster and promote high standards of legal education and research in all Commonwealth countries.
- (ii) To encourage the provision of the facilities required to achieve high standards of legal education and research in all Commonwealth countries.
- (iii) To promote, maintain and strengthen contacts and cooperation between individuals, institutions, organisations and associations interested in legal education and research in the Commonwealth.
- (iv) To disseminate information and literature concerning legal education and research.

- (v) To promote and conduct research in the field of legal education.
- (vi) To maintain registers and publish directories of law schools and law teachers.
- (vii) To publish a regular newsletter or journal.
- (viii) To facilitate the exchange of teachers of law and publish vacancies.
- (ix) To facilitate the exchange of students and researchers in the field of law.
- (x) To facilitate the exchange of legal materials among law schools.
- (xi) To promote programmes of continuing legal education.
- (xii) To organise specialised, regional and general conferences of law teachers and others concerned with legal education and research.

72. The Association has several projects in hand, namely:

- access to legal education and the legal profession
- vocational training
- community legal education
- postgraduate education
- problems of publishing legal literature in small jurisdictions
- training of judicial officers
- a study of law journals and periodicals

73. In association with the University of Warwick, the Association is running a Law Teaching Workshop to be held at the University of Warwick from 14-18 July 1986 under the Directorship of Professor Neil Gold of the University of Windsor, Ontario. Law teachers from nine Commonwealth countries are to attend. The Workshop is being sponsored by the Commonwealth Foundation.

74. Under its judicial training programme the Association is organising, jointly with the Commonwealth Magistrates' Association, programmes for the training of magistrates. The first Workshop is to be held at the Commonwealth Youth Centre in the University of Zambia from the 10-24 August 1986. Fifteen magistrates from seven countries in the East, Central and Southern African region are to attend. The course Director is Mr Brian Reason, formerly training officer with the Lord Chancellor's Office, assisted by senior judges from Zambia, Zimbabwe and Kenya. It is intended to offer a similar course to six of the South Pacific countries early next year. The organiser for the South Pacific region is Professor Don Paterson, Director of the Pacific Law Unit in Vanuatu and he will be assisted by three senior judges yet to be appointed. In each case the intention is that magistrates attending the course will benefit sufficiently from the training element in the course to be able to organise such courses for their own jurisdictions.

75. The Association is sponsoring a Commonwealth Mooting Competition, the final of which is to be held at the Commonwealth Law Conference in Jamaica in September 1986.

76. At the request of the University of Dar es Salaam the Association is negotiating a link scheme between the Law Faculty at the University of Warwick under which two law teachers from Dar es Salaam will each spend one term in the U.K. undergoing supervised training and two law teachers from the U.K. law schools will spend one term each at the University of Dar es Salaam teaching postgraduate courses. The scheme will be under the sponsorship of the Commonwealth Foundation and the British Council.

Commonwealth Lawyers Association and the Commonwealth Association of Legislation Counsel

77. The 1983 Commonwealth Law Conference in Hong Kong saw the formation of two new Commonwealth professional legal organisations; the Commonwealth Association of Legislative Counsel (CALC) for legislative draftsmen (as to which see LMM(86)30) and the Commonwealth Lawyers Association (CLA) for the practising profession generally. The formation of these associations augurs well for the future. The Legal Division was closely involved in both initiatives and is committed to working with these associations on a collaborative basis. Their establishment means that the Commonwealth legal fraternity is now well catered for by four fully functioning associations, the other two being the Commonwealth Legal Education Association and the Commonwealth Magistrates Association.

78. The CLA restructures the moribund Commonwealth Legal Bureau into an association of bar associations and the law societies (funded through subscriptions from individual members) relevant to the contemporary needs of the Commonwealth legal profession. Its objects are to maintain and promote the Rule of Law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession. To this end the activities of the association may include:

- (a) facilitating and increasing the flow of professional information between Commonwealth Law Societies and Bar Associations on developments relevant to the organisation and servicing of the practising legal profession;
- (b) holding regular Commonwealth Law Conferences, open to all branches of the legal profession throughout the Commonwealth, and promoting as wide an attendance thereat as practicable;
- (c) responding as appropriate to ad hoc requests for information and assistance received from Commonwealth Law Societies and Bar Associations;
- (d) providing support for, collaborating with and generally facilitating the work of the Commonwealth Legal Education Association, the Commonwealth Magistrates' Association and other appropriate organisations concerned with matters of common interest;
- (e) generally furthering the interests of the legal profession throughout the Commonwealth with a view to improving the legal services available to and provided for the public.

79. Its activities to date demonstrate the vigour of its part-time consultant. Several issues of *The Commonwealth Lawyer* have appeared, a lively and readable journal written with the broad spectrum of the Commonwealth profession in view. In addition the CLA has:

- (i) Prepared a major survey by the Campbell McLachlan entitled "Admission of Commonwealth Lawyers" (the first definitive report on the extent to which lawyers qualified in one Commonwealth jurisdiction may be admitted to practise in other Commonwealth jurisdictions). This has been distributed to Commonwealth governments by the Commonwealth Secretariat, as well as to Commonwealth Law Societies and bar associations.

- (ii) Produced, in association with the Commonwealth Secretariat, a survey of voluntary agencies who make volunteer lawyers available to developing Commonwealth countries.
- (iii) Launched a "Book Recovery Programme" which recycles useful legal materials that are otherwise discarded. This has yielded dividends beyond all expectations. A prime example of the potential offered by this new area of activity has been the recovery of several complete sets of the older editions of Halsburys Laws and Halsburys Statutes of England, which have been distributed to institutions and jurisdictions in most need. The pilot project is based in London, but jointly with the CLA we are encouraging similar developments in Australia, Canada and New Zealand.
- (iv) Organised, with the International Bar Association, a workshop for law societies and bar associations in developing countries, to be held in Ocho Rios, Jamaica in September, 1986.
- (v) Organised a "Professional Issues" debate for the 1986 Commonwealth Law Conference in Jamaica.
- (vi) Arranged a public lecture in London by the Chief Justice of India, Justice Bahgwati.

80. The CLA is thus a lively professional organisation and one with which we have been happy to collaborate on appropriate matters of common interest.

81. CALC is a more modest undertaking, with the objective of fostering contact between law draftsmen (or, as CALC would put it, drafters). It was launched at a well-attended meeting in Hong Kong during the 1983 Commonwealth Law Conference, and is to meet again in Jamaica in September. With no income (membership is free) its useful newsletter has been made possible to date by the generosity of the Government of Australia, and it is understood that the Government of Canada has offered to host its offices for the next three years after Jamaica.

82. Again, given our deep interest in legislative drafting (and even more so, in drafters), we find CALC a most useful organisation in our work. A report by its President, Sir George Engle, is before the meeting as LMM(86)30.

83. In previous years, we have given the Organising Committees of Commonwealth Law Conferences whatever help we were able to give, and we have afforded similar assistance to the Organising Committee of the Conference to be hosted by Jamaica this September.

84. The highly successful 1983 Commonwealth Law Conference in Hong Kong followed hard on the heels of the Law Ministers meeting in Colombo. The Division was closely involved, behind the scenes, with the organisers. It was acclaimed as a professional, social and financial triumph. Its substantial profit has been paid into a trust fund established for the purpose of assisting future Law Conferences, thus putting the triennial Commonwealth Law Conferences on a sounder basis. The Director of the Legal Division is one of the trustees.

Relationships with other non-governmental organisations

85. We have also continued to assist other Commonwealth Organisations as and when appropriate. During the period under review the high level of activity maintained by pressure groups opposed to apartheid in sport has meant that assistance from the Legal

Division has been sought regularly by the officers of the Commonwealth Games Federation. We have been in close contact with the Commonwealth Human Ecology Council with whom we are collaborating on the publication of a series of annotated bibliographies on law and human ecology. We also liaise closely with such organisations as the Commonwealth Magistrates Association; INTERIGHTS (The International Centre for the Protection of Human Rights); and the International Planned Parenthood Federation. Officers of the Division also serve on a number of editorial boards of legal periodicals as well as on the Advisory Committee of the UK Government Legal Officers' course and the British Council's law advisory panel.

Internal Secretariat Work and relationships with other Secretariat Divisions

86. Work of a legal nature generated within the Secretariat itself, including the CFTC, continues to occupy a substantial amount of the time of the staff of the Division. Any international organisation with a staff of 350 or so generates a degree of work for its in-house lawyers, and in addition we are required to service the institutional needs of the CFTC, which now disburses an aid budget of £28.6 million.

87. We have always been conscious of the need to be involved in any activities of other functional divisions within the Secretariat which have legal implications. In this respect, we have worked very closely with the Women and Development Division in association with whom we arranged the publication of the "Explanatory Documentation on the Convention on the Elimination of All Forms of Discrimination Against Women" and "A Decade of Women and the Law in the Commonwealth". We have also worked closely with the Medical Division, and our mutual interest in addressing medico-legal issues is being explored and has resulted in our most recent publication, entitled 'Issues in Reproductive Health Law in the Commonwealth' which is before the Meeting as LMM(86)29. We work closely, too, with the Director of our International Affairs Division, particularly in respect of the work of the Human Rights Unit.

88. Members of the Division were privileged to be able to play some part in servicing the Commonwealth Eminent Persons Group on Southern Africa, which explored the possibilities of promoting dialogue between the South African Government and authentic black leaders so as to dismantle apartheid and introduce a non-racial democracy. Inevitably the intensity of our involvement over the past seven months has restricted the Division's resources in the run up to this Meeting.

Staff

89. The staff of the Legal Division has remained substantially the same for over ten years, despite the growth in scope and content of our activities, and the increasing number of calls made upon us for assistance. The only increase has occurred in the establishment of the Commercial Crime Unit, but this was associated with a new mandate and, despite hopes to the contrary, its personnel have been in no position to contribute to the general work of the Division. In addition to the Unit's personnel (referred to in para 52), the Legal Division comprises a professional staff of four: a Director (from New Zealand), two Assistant Directors (from Nigeria and Western Samoa), a Chief Legal Officer (from India) and a complement of four secretaries.

Future Activities

90. The basic pattern of our activities is now firmly established, but we continue to look to Law Ministers for guidance and direction. However we anticipate that Law Ministers are likely to continue to look to us for "more of the same", only more so.

91. A meeting of Commonwealth Law Reform Agencies was held in Hong Kong in 1983 and there is to be a further meeting in Jamaica this year. In addition, at Jamaica we expect to participate fully in several special interest meetings, including meetings of the Commonwealth Association of Legislative Counsel, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association. The forthcoming First Pacific Law Conference in Apia, Western Samoa, is to be chaired by one of our Assistant Directors.

92. The maintenance of close and regular contact with as many regional and International Legal Associations and Law Societies as possible has provided us with useful opportunities which we have been able to capitalise on to good effect. We intend to participate as appropriate in the activities of such bodies as the Asian-African Legal Consultative Committee (AALCC) (inter alia, on extradition) and in the 1987 Biennial Conference of the African Bar Association, where our attendance in 1985 proved essential to the Association itself. We are already working with the Organising Committee for the 1990 Commonwealth Law Conference to be held in Auckland, New Zealand.

Appreciation

93. So much of the wealth of goodwill that we have been able to enjoy - and exploit - has been due to so many of our often equally hard pressed colleagues, both in the public and private sector and spread throughout the Commonwealth, being prepared to render valuable assistance. To attempt any categorisation of this would entail unintended injustices by involuntary omission. We would simply offer our most deeply felt gratitude for all the help we have received, and from every source. However, we cannot fail to place on record our most sincere and profound thanks to Commonwealth Law Ministers, with whom it is both an honour and a privilege to work, for their unwavering support and guidance over the years. We look forward to working with them, and for them, in the years that lie ahead.

DETAILS OF THE SECRETARIAT'S LEGISLATIVE DRAFTING COURSES

1983Asia Region [Colombo, Sri Lanka]6th May 1983 - 16 December 1983

Bangladesh	1
India	1
Nigeria	2
Sri Lanka	6
Uganda	2
5 Countries	12 trainees

1984Africa Region [Harare, Zimbabwe]23 January 1984 - 20th July 1984

Ghana	1
Guyana	2
India	1
Jamaica	1
Malawi	1
St Vincent	1
Sri Lanka	1
Zimbabwe	7

1984-1985Africa Region [Harare, Zimbabwe]3 September 1984 - 22 February 1985

Bangladesh	1
Cyprus	1
Ghana	1
India	1
Nigeria	1
Sri Lanka	1
Tanzania	1
Uganda	1
Zambia	2
Zimbabwe	2

Pacific Region24 September 1984 - 27 February 1985

Fiji	3
Solomon Islands	1
Vanuatu	1
Western Samoa	1

Africa Region [Harare, Zimbabwe]

14 July 1985 - 13 December 1985]

Bangladesh	1
The Gambia	1
Ghana	1
India	1
Kenya	1
Lesotho	1
Nigeria	1
Sri Lanka	1
Tanzania (including Zanzibar)	3
Uganda	1
Zimbabwe	2
18 Countries	32 trainees

1986

Africa Region [Harare, Zimbabwe]

10th March 1986 -

Bangladesh	1
Ghana	1
India	1
Lesotho	1
Malawi	1
Nigeria	1
Sri Lanka	1
Tanzania	1
Uganda	2
Zimbabwe	2
10 Countries	12 trainees
23 Countries	83 trainees

Total:

LEGAL TECHNICAL ASSISTANCE ASSIGNMENTS PERFORMED FOR
COMMONWEALTH DEVELOPING COUNTRIES UNDER THE COMMONWEALTH FUND
FOR TECHNICAL COOPERATION

- Notes
- (1) A number of the projects listed below have been completed but many are still in operation, or under consideration or awaiting recruitment to enable training courses described in Annex 1, but does include other assistance provided under the Education and Training Programme of the CFTC.
 - (2) The reference to TAG means that the project was undertaken by the Technical Assistance Group of the CFTC (in association with other countries, on occasions).

COUNTRY/REGION ASSISTED, DESCRIPTION AND DURATION (if relevant) OF PROJECT

Africa Region

Training Course in Law Reporting, Zambia (21 days)

Asia and South Pacific Region

Meeting of CHOGRM Maritime Expert Study Group, (Fiji, Sri Lanka, Malaysia) (July and October 1983 - 7 days; February and June 1984 - 9 days).

Legal Consultant, University of the South Pacific (September 1983 - 7 months).

Caribbean Region

Caribbean Community Secretariat (Caricom)

Legal Consultant on the harmonisation of Laws (6 years - continuing)

Organisation of Eastern Caribbean States

Public International Lawyer (July 1984 - 2 years)

Legal Draftsman (August 1984- 3 years)

Advice on geothermal energy development (June 1982- continuing) (TAG)

Commonwealth, General

Legal Draftsman (October 1976 - continuing)

Course in the law and practice of copyright (October 1984 - 3 weeks)

Seychelles

Chief Justice (September 1979 - 6 years).

Expert on standards drafting for food products (January 1984 - 3 months).

Advice on joint venture fisheries agreement (July 1983 - 3 weeks) (TAG).

Assistance in negotiations with EEC on fisheries access agreement (August 1983 - 4 weeks) (TAG).

Legal Draftsman (December 1984 - 1 year).

Sierra Leone

First Parliamentary Counsel (December 1982 - 4 years)

Advice on petroleum legislation and model agreement (March 1984 - 4 weeks) (TAG)

Solomon Islands

Legal Draftsman (July 1982 - 2 years).

Tanzania

Internship in legal training (January 1985 - 6 months)

Tonga

Legal Adviser and draftsman (September 1984 - 2 years).

Tuvalu

Attorney General (August 1983 - 5 months).

Consultant on maritime legislation, company partnership and insolvency law (April 1985 - 7 months).

People's lawyer (May 1985 - 1 year).

Vanuatu

Legal draftsman (October 1981 - 3 years).

Advice on mineral, petroleum and geothermal legislation and policy (October 1982 - continuing) (TAG).

Consultant, cooperative law (March 1985 - 3 months).

Western Samoa

Attorney-General (February 1982 - 2½ years).

Zimbabwe

Legal consultant and senior inspector of primary courts (March 1981 - 5 years).

Legal consultant, training of magistrates (September 1981 - 4 years).

Legal draftsman (August 1982 - 4 years).

Legal draftsman (November 1982 - 3½ years).

High Court judge (April 1983 - 3 years).

High Court judge (August 1983 - 3 years).

Legal Draftsman (October 1983 - 2 years).

Director of legal research (January 1984 - 1½ years).

THE WORK OF THE COMMONWEALTH SECRETARIAT'S HUMAN RIGHTS UNIT

A Memorandum by the Commonwealth Secretariat

Following endorsement in principle by Heads of Government of the recommendations in the Report of the Commonwealth Working Group on Human Rights, Commonwealth Law Ministers at their meeting in Sri Lanka in 1983 considered a Secretariat memorandum on the subject (LMM(83)16). The conclusions of their discussion were expressed in paragraphs 6-8 of the Communique:

"Ministers congratulated The Gambia for taking and sustaining a Commonwealth initiative in the Human Rights area. This provided them with an opportunity to reaffirm their commitment to respect for, and realisation of, fundamental human rights in all their aspects. Each of them was deeply conscious of the special responsibilities that repose in law officers in this regard.

Welcoming the fact that Commonwealth Heads of Government agreed in principle at Melbourne in 1981 to the establishment of a Special Unit within the Commonwealth Secretariat for the promotion of human rights, Ministers urged that it be established as early as possible. They recognised the potential of the Unit for the advancement of human rights, and considered that it should take as its initial frame of reference the Commonwealth Declarations by Heads of Government at Singapore (1971), Lusaka (1979) and Melbourne (1981), and the relevant international instruments which Commonwealth countries had accepted. It could also include customary international law.

The Meeting believed that the proposal for a Commonwealth Advisory Committee on Human Rights with a good offices function was an important one which should be kept on their Agenda but considered it was not appropriate for immediate implementation."

2. With the approval of the Finance Committee for funding, the Human Rights Unit was set up in January 1985 within the International Affairs Division of the Secretariat.

3. At the Commonwealth Heads of Government Meeting last year in Nassau:

"Heads of Government reaffirmed the importance which all Commonwealth Governments attach to the observance of human rights. They welcomed the recent establishment of a Human Rights Unit in the Secretariat and looked forward to its assistance in promoting understanding and respect for human rights within the Commonwealth, in accordance with the principles enshrined in Commonwealth Declarations and the main international human rights instruments."

(Paragraph 68 of the Nassau Communique)

Mandate of the Human Rights Unit

4. The mandate of the Human Rights Unit is:

- (a) to promote human rights within the Commonwealth; it is understood that the functions of the Unit will not involve any investigative or enforcement role;
- (b) to ensure that in the Secretariat itself due account is taken of human rights considerations in the work of all its Divisions.

5. The definition of "human rights" from the Commonwealth perspective derives from the various Commonwealth Declarations and the relevant principal international instruments. Successive Commonwealth Declarations indicate the collective commitment of member States to:

- the liberty of the individual
- equal rights for all citizens regardless of race, colour, sex, creed or religious beliefs;
- the inalienable right of all individuals to participate by means of free and democratic political processes in the framing of the society in which they live;
- the right of all men and women to live in ways which sustain and nourish human dignity.

6. In addition, the rights of children have been recognised, as well as the need for special attention to be given to the problems of indigenous minorities, immigrants, migrant workers and refugees, and for measures to break the circle of poverty in which the lives of millions of people in developing countries are confined.

Activities of the Human Rights Unit

7. The Secretary-General has invited governments to nominate a point of contact to whom requests for information about the domestic procedures for promoting human rights may be sent. To date 28 States have nominated a point of contact; (See Annex I). The Human Rights Unit looks forward to receiving further nominations and is available to advise points of contact on matters relevant to the mandate of the Unit and its work programme, specifically in respect of the following:

(i) Assistance to Commonwealth Governments to Promote Human Rights

8. The Human Rights Unit serves to facilitate practical ways of assisting Commonwealth governments to promote respect for and understanding of fundamental human rights in all their aspects. Member Governments are invited to inform the Secretariat as to the particular fields in which they would envisage the Human Rights Unit providing assistance to them.

9. Throughout the Commonwealth, various national institutions and domestic procedures are evolving in recognition of the developmental significance of measures to promote equality and justice. Given the extent of comparable legal and administrative practices, those directly responsible for promoting respect for human rights can derive obvious benefits from regular exchanges of information and experiences at the pan-Commonwealth, regional and national levels. The Human Rights Unit is seeking to ascertain the possibility of advancing this process through Commonwealth mechanisms by, in the first instance, undertaking a study on the existing and prospective functions of relevant national institutions and domestic procedures within the Commonwealth.

(ii) Human Rights Clearing House

10. Commonwealth governments have expressed an interest in the Human Rights Unit serving as a "Clearing House" for information. The Human Rights Unit is accordingly establishing such a facility as part of its functions.

11. Over the years the Commonwealth Law Bulletin has regularly published details of Commonwealth human rights legislation. The Unit has been contributing further items of relevance to human rights issues, including details of human rights and international humanitarian law courses and conferences, articles on noteworthy developments in respect of Commonwealth measures to promote humanitarian concerns, and reviews of articles and books relating to Commonwealth countries.

12. Member governments are invited to indicate further kinds of information and activities which would be of interest to them and to direct specific requests for data to the Unit.

(iii) International Human Rights Instruments

13. The Unit monitors the status of the principal international human rights instruments with regard to Commonwealth governments. Priority is being given to developing appropriate explanatory documentation for Commonwealth jurisdictions on the principal instruments. To this end an "accession kit" was produced on the Convention on the Elimination of All Forms of Discrimination Against Women for the Nairobi World Conference for the UN Decade for Women.

14. A further project is underway to produce documentation on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It will examine the inter-relationship between the two instruments in light of the importance attached by the Commonwealth to the principle of non-discrimination, whether on the basis of race, colour, sex, creed or religious belief.

15. In addition, the Human Rights Unit serves to facilitate exchanges of information on various subjects relevant to the implementation of the principal international human rights instruments, including measures which States Parties have taken to fulfil their obligations, whether problems have arisen in interpreting specific articles and how States Parties meet their reporting obligations.

16. Member governments are invited to consider the value and possibilities of technical assistance to them in reviewing legislation and administrative procedures with respect to the practical implementation of international human rights instruments and the role that the Commonwealth might play in the delivery of such assistance.

Integrating Human Rights considerations into the work of the Commonwealth Secretariat

17. Importance is placed on ensuring that all Commonwealth programmes take into account the human rights dimension. There are in-house consultations taking place on ways of integrating human rights considerations into all aspects of the Secretariat's work. It is already apparent that many of the programmes being implemented serve to promote the realisation of human rights in a general sense. The Human Rights Unit co-operates closely with the Legal Division, and much can be done through the Commonwealth network of legal contacts to promote human rights.

Liaison with International Organisations

18. The Human Rights Unit monitors trends in the United Nations debates on human rights and maintains contact with the UN Centre for Human Rights. The Unit is exploring ways of liaising with other international and regional mechanisms concerned with human rights.

19. The Human Rights Unit is examining Commonwealth interest in the principal issues before the XXVth International Conference of the Red Cross to be held in Geneva in October 1986.

Concluding Comment

20. The programme of work for the Unit is designed to promote greater awareness and understanding of Commonwealth human rights ideals. These are, however, not static abstractions divorced from reality. To promote human rights is to go beyond rhetoric to practical ways by which political and economic processes can promote equality, justice and human dignity. In the long term, the programme of work for the Human Rights Unit may contribute to an exploration of how shared humanitarian concerns can be further integrated into the well-established traditions of consensus and co-operation intrinsic to Commonwealth consultations and problem solving.

Commonwealth "Points of Contact" on Human Rights

Mr Clare Roberts Solicitor-General Ministry of Legal Affairs St John's Antigua & Barbuda	The Solicitor-General Crown Law Office Government Buildings Suva Fiji
Human Rights Section International Organisations and Humanitarian Affairs Branch Department of Foreign Affairs Canberra Australia	Grenada Civil Awareness Organisation Knox House Grand Etang Road St George's Grenada
Mr Basil O'Brien Permanent Secretary Ministry of Foreign Affairs P O Box N-3746 Nassau The Bahamas	Joint Secretary (UN) Ministry of External Affairs New Delhi India
Mr Justice M A Quddus Chowdhury Secretary Ministry of Law and Justice Bangladesh Secretariat Dhaka Bangladesh	Permanent Secretary Ministry of Justice 12 Ocean Boulevard Kingston Mall Jamaica
The Permanent Secretary Ministry of Legal Affairs Marine House Hastings Christ Church Barbados	Permanent Secretary Ministry of Foreign Affairs P O Box 30551 Nairobi Kenya
The Permanent Secretary Ministry of Home Affairs Belmopan Belize	Secretary for Home Affairs and Decentralisation P O Box 75 Bairiki Tarawa Republic of Kiribati
The Director UN Affairs Division Department of External Affairs Ottawa Canada	Secretary to the President and Cabinet Private Bag 301 Lilongwe 3 Malawi
Ministry of Foreign Affairs Nicosia Cyprus	Mr Ahmed Saleem Under Secretary Ministry of Foreign Affairs Male Republic of Maldives
	Office of the Attorney General The Palace Valletta Malta

Human Rights Commission (New Zealand)
c/o New Zealand High Commission
New Zealand House
Haymarket
London SW1Y 4TQ

Federal Ministry of Justice
(International and Comparative Law Division)
Lagos
Nigeria

Principal Secretary (Planning)
Ministry of Planning and External Relations
Department of Planning
P O Box 656
National House
Victoria
Republic of Seychelles

Human Rights Centre
Sri Lanka Foundation Institute
7 Independence Avenue
Colombo 7
Sri Lanka

Crown Law Department
P O Box 85
Nuku'alofa
Kingdom of Tonga

Dr Vincent Lasse
Counsellor
High Commission of the Republic of
Trinidad and Tobago
42 Belgrave Square
London SW1X 8NT

Mr R C B Jones
United Nations Department
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Foreign and Commonwealth Office
King Charles Street
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P O Box 124
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Secretary for Foreign Affairs
Prime Minister's Department
Apia
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Ministry of Foreign Affairs
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Mr D M Zamchiya
Permanent Secretary
Legal and Parliament Affairs
Ministry of Justice, Legal and Parliamentary Affairs
Private Bag 7751
Causeway
Zimbabwe

PATRIATION OF INHERITED IMPERIAL STATUTES

A paper by Professor Keith Patchett, formerly Dean of Laws, University of Wales Institute of Science and Technology

1. The great preponderance of the jurisdictions within the Commonwealth share the inheritance of a basic system of law comprised of the common law of England and the doctrines of equity, coupled with a body of statute law, enacted by Parliament in the United Kingdom (or predecessor Parliaments², that has been given local effect. This common legal inheritance is one of the acknowledged links in shared institutions and values which maintain the strength of the Commonwealth. Although states, on independence, have acquired full autonomy with respect to the direction of legal change and development and the policy and content of legislation, there has been little inclination to replace the basic system to which they have succeeded. For that system usually provides the foundations and footings upon which subsequent legal structures have been built and with which they are intricately tied in. Replacement or substantial displacement would be a major task of legal engineering that would carry with it the dangers of insecurity and instability. In any case, there are distinct benefits in retaining such a basic law. For it makes available, most particularly through judicial precedents, the wealth and enormous variety of sophisticated legal experience which has developed over centuries in the United Kingdom and more recently in the Commonwealth.

2. Nevertheless, despite the shared ground in which the various legal systems are rooted, the nature and direction of the legal growth of each independent system necessarily must take its own form. Moreover, there is a growing belief that any appearance of dependence upon the founding legal system is inconsistent with the actuality of separate development. Accordingly, there is an expectation that, as far as possible, the original sources of the legal system will be formulated in terms that accentuate the distinctiveness of each legal system and emphasise the ability of the institutions of that system to develop those sources to meet the unique needs and objectives of the particular society.

3. Such patriation of the inherited law involves two processes. The first is designed to emphasise that the development of the received common law and the doctrines of equity³ to meet the circumstances of a particular society is the function of the courts of that society, unconstrained by any obligation to follow the dictates of the courts of another system. The second aims to identify those statutes of the United Kingdom which have been given local effect and which require local continuance and to integrate them fully into the local statute book, at the same time repealing all others that have been given such effect but no longer serve any current purpose. This paper is concerned with the second of these processes.⁴

PATRIATION OF STATUTE LAW

4. Most Commonwealth jurisdictions have inherited a body of statute law originally enacted by the Imperial Parliament. In almost all, the extent and nature of that inheritance is uncertain. There are few jurisdictions, perhaps none, for which it is possible at present to provide a definitive statement of the statutes which have been inherited and currently have local effect. Indeed, there are often serious difficulties in determining authoritatively, otherwise than through litigation, whether or to what extent a given Act of Parliament has local application.

5. Such a state of affairs has nothing to commend it. It is less than satisfactory that those who wish to follow a course of action may for this reason be unable to establish the full range of their statutory obligations and that their local statute book will usually not contain the complete texts of all the written rules which are applicable to a given subject matter. Legal systems usually operate through a general acceptance of a moral duty to comply with the law. There is also a normal expectation of security for transactions conducted in compliance with the law. If, however, there are legal rules which, if the matter comes before the court, are found to be applicable but about which there was to that time ignorance or uncertainty as to their existence or content, these important values might be thought to be at risk.⁵

6. It is partly for considerations of this kind and partly because there is rightly a wish to emphasise the autonomy of independent legal systems over all sources of local written law that the question of inherited statute law is increasingly seen as calling for particular attention. Major projects have been initiated in several of the Australian jurisdictions and in New Zealand and the subject is being carefully monitored in a number of the Canadian Provinces.⁶ A programme concerned with the matter of inherited Imperial statutes in small Commonwealth States has recently been instituted by the Legal Division of the Commonwealth Secretariat with funding from the Commonwealth Fund for Technical Cooperation.

7. In this context, satisfactory patriation of inherited statute law appears to involve the following steps:

- (i) the compilation of a definitive list of Imperial legislation that has been given effect as part of local law and the continuance of which is necessary in current circumstances;
- (ii) the repeal of any Imperial legislation that has been given local effect and still remains in force but the continuance of which is no longer needed;
- (iii) wherever appropriate, the replacement of continuing Imperial legislation by local enacted provisions which are consistent, both in form and content, with the existing body of local legislation and the current needs of the legal system;
- (iv) the integration into the local statute book, not only of the replacement provisions, but also of the complete corpus of continuing Imperial legislation, whether by reprinting or by re-enactment.

In principle, it seems unacceptable that it should be necessary to examine the statute book of one legal system in order to determine the nature and extent of current legal requirements in another.

TYPES OF INHERITED STATUTES

8. There are four principal ways in which statutes enacted in the United Kingdom have become part of the law of other Commonwealth jurisdictions. The first of these, since it is the result of the exercise of local legislative authority, may be said already to have comprised a form of patriation. It is the patriation of the other three types which is usually required.

(i) Verbatim repetition of United Kingdom legislation

9. The statute books of most Commonwealth jurisdictions contain examples of statutes which repeat, sometimes with changes of greater or lesser importance, the terms of statutes enacted in the United Kingdom usually for application to England and Wales. This practice was encouraged during the colonial era by the distribution by the Colonial Office of model legislation, notably in areas of law in which there appeared to be advantages in Imperial harmonisation. Those who prepared legislation in dependencies always paid close regard to English enactments, perhaps because of familiarity or availability, perhaps because of the benefits of having access to English case law and texts relating to the original. In many systems, basic areas of law are still governed by statutes which are modelled upon English precedents, notably criminal law, contract, company and commercial law, family law, law of torts, real property, conveyancing and succession law.

10. This practice may on occasion be open to criticism, not least where there has been an uncritical adoption and failure to make suitable adaptations⁷ or to learn from the experience in operating the original to effect improvements or to take account of relevant English amendments. Nonetheless, it has the merit of constituting local made legislation, locally available and eventually finding an appropriate place in the Revised Laws. Small jurisdictions in particular still find positive advantages in this practice, since they are unlikely to have the resources or the expertise to innovate with respect to every type of matter requiring legal regulation. Indeed, where the common law and the doctrines of equity have also been received as basic law, there are clear arguments in favour of making considered use of the legislative precedents from similarly based systems. Legislative Counsel are rightly encouraged to make discriminating and critical use of such models⁸ although today they are increasingly being sought in the statutes of those common law jurisdictions less given to convolution and dense drafting than the United Kingdom.

11. There is one respect in which these statutes may be important to the question of patriation or received Acts of Parliament. The Law Reform Commission of the Australian Capital Territory has drawn attention to the principle of implied repeal elaborated by the High Court of Australia in 1934:

"The repetition of [a section of a United Kingdom Act] by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales."⁹

The limits of this principle, as the Commission point out¹⁰ are uncertain, though there are suggestions that it may not be confined to cases of absolutely identical wording and that repetition of part may impliedly repeal the whole.¹¹ Moreover, this introduces the unusual form of implied repeal by later consistent, rather than inconsistent, legislation. This doctrine may present difficulties in reaching a conclusive decision whether a received Act has been repealed.

(ii) Referential legislation

12. Referential legislation is a further legislative device which has been practised in the Commonwealth. By this device, local enactments expressly adopt or apply United Kingdom statutes, not by repeating their content, but merely by referring to the statutes, in whole or in part, by some appropriate citation. The text of the original must, therefore, be used, usually with the assistance of provisions in the local interpretation Act, whereby formal adaptations, not affecting the substance, may be made as are necessary to render it applicable in the context to which it has been applied.

13. As a general rule, the device of referential legislation has value if it is employed to incorporate into a new setting earlier provisions enacted by the same Legislature. For it

avoids needless repetition of the same words already contained in the same statute book, it saves the time of the legislature in covering the same ground and it reduces the possibility of different legislative expressions being used in respect of matters on which uniformity is desirable.¹² But the use of this technique with respect to the enactments of another Legislature rarely confers these benefits. Rather the reverse. For the statute must be sought in the statute book of another country where it may no longer be in force in the form it enjoyed when it was incorporated. It may be difficult to construe and apply in the legal and social context to which it has been applied, as its substantive terms are usually not to be modified to suit it to local circumstances. There are also problems as to the status in the local courts of decisions interpreting the original statute rendered by the courts of the country of origin.¹³

14. Moreover, the statutory methods used in Commonwealth legislation for incorporation by reference bring their own difficulties on construction and application. The extent of the incorporation will depend upon the statutory device by which it is effected, whether it is by reference to the citation of a named statute or a more generalised reference to English statutes on a particular subject, whether it is ambulatory in effect or relates to statutes as they stood at a particular point of time.¹⁴ What Imperial statutes may be caught by these devices is not always easily determined. The technique of referential legislation may have been unavoidable in the past in order to introduce a complete or residual body of tried law into an under-developed legal system. At present, however, it often leads to reliance upon out-dated or unsuitable statutes which are frequently not readily to hand.

(iii) Statutes of paramount force

15. Certain statutes enacted by the Parliament of the United Kingdom (and its predecessors) have become part of the law of dependent territories and of independent countries of the Commonwealth whilst dependencies of the United Kingdom as a result of extension by virtue of provisions in the Acts themselves. These Acts are variously referred to as "Imperial statutes" or "United Kingdom statutes in force proprio vigore" or "of paramount force". The terminology is designed to emphasise that these statutes have become the law of a dependent territory in consequence of the exercise of the imperial authority of the Parliament in the United Kingdom at a time when it enjoyed legislative jurisdiction over that territory.¹⁵

16. These statutes must be distinguished from those that alter the law of the United Kingdom in its dealings with its colonial territories, but which are not intended to operate as part of the law of those territories. Such statutes, although they "apply" to dependencies, do not "extend" to them so as to operate as legal rules enforceable or effective in the colonial legal system. This legislation may relate to the institutions which have authority over dependencies but it takes effect only as part of the law of the United Kingdom, albeit in discharge of its colonial responsibilities. The mere fact of a reference in a United Kingdom statute to a dependency does not constitute an extension of its provisions as part of the law of that dependency. In addition to statutes of the Imperial Parliament, most former dependencies were subject to the exercise of the Crown's legislative power¹⁶ either by virtue of the prerogative¹⁷ or under the authority conferred by Imperial statute to make instruments, such as Orders in Council, to have effect as part of the law of dependencies.

17. The principal constitutional characteristic of this type of legislation is that it cannot be altered by the legislature of a dependency, since to do so would fall foul of the Colonial Laws Validity Act 1865.¹⁸ Unlike received statutes, considered below, these statutes become part of the law of a dependency by virtue of their own terms and may so extend, even though they never had application in England or any other part of the United Kingdom.¹⁹ They may be altered by the local legislation only after the constraints imposed

by the Colonial Laws Validity Act 1865 have been removed, usually by the particular independence legislation.

18. This type of legislation was extended in some cases to all the then dependencies, in others for groups of dependencies or for individual territories. Since the legislation took effect as part of the law of the jurisdictions concerned, it remains in force unless and until repealed subsequently by a legislative authority competent to pass such legislation.

19. Much of the extended Imperial legislation is obsolete, being applicable to colonial circumstances or to conditions no longer found. In many instances, however, the type of legislation has not been the subject of express repeal, either by the Imperial Parliament, when it had the authority or, subsequent to independence, by the local legislature and, thus technically it remains part of the law of the jurisdictions to which it was extended. In some cases, legislation continues as law in dependent jurisdictions to which it was extended, although it has been repealed by the Parliament of the United Kingdom for the purposes of United Kingdom law.²⁰ In yet other cases, the enactment of local legislation on a particular subject matter may raise difficult questions of implied repeal of extended statutes dealing with related matters.²¹

20. At the same time, there appears to be a substantial body of statutes of paramount force which may have important implications for independent Commonwealth States to which they were extended. So, for example, it has been common practice to give effect in dependent territories to treaty obligations undertaken by the United Kingdom, by Order in Council extending the implementing Acts of Parliament (usually with appropriate modifications). These Acts will normally continue in force after independence, even though the question of succession to the treaty by the newly independent state has not been finally resolved (as for example the Extradition Acts 1870-1935 and the Copyright Act of 1911 or 1956). Other important areas of law, as for example those relating to air navigation, merchant shipping and admiralty jurisdiction, and official secrets, continue to be governed by statutes of paramount force.

21. There is no comprehensive and up-to-date list of statutes of paramount force. Its compilation, whether in general terms or for individual jurisdictions, has never been fully undertaken.²² Identification of those statutes which expressly extend is only part of the task. For it has long been recognised that an Act may extend "by necessary intendment", if -

"a consideration of the scope and object....leads to the conclusion the [Parliament] intended to affect a colony and the words used are calculated to have that effect."²³

Unhappily, that test is far from easy to apply, especially in relation to statutes enacted before England acquired overseas possessions or in the early period of the Empire when the relevant legal rules and related legislative practices were in the process of evolution.²⁴ It is at least arguable that statutes relating to institutions which came to have authority within colonial legal systems when they were subsequently created should be treated as having paramount force. So, for example, legislation relating to the Crown and its prerogatives and possibly that governing treason ought in principle to have automatic operation in dependencies, and not be dependent upon the operation of any reception of law rules.

22. Even with respect to the period after the authority of the Imperial Parliament over dependencies was well established, it is by no means always certain whether Parliament intended to bring colonial dependencies within the ambit of particular statutes. As Piggott wrote:

"The draftsmen have not always borne the existence of the Colonies in mind but have dealt with them as the humour seized them, in some cases whimsically."²⁵

Whether a statute is extended by necessary intendment is, in the end, a matter for the courts. They have increasingly relied upon a presumption against extension, requiring the presence in the statute of "clear language, given its proper, usual and reasonable effect"²⁶, from which the intention to extend can be inferred. But in the absence of inference as to the intention from the language used, it is possible, in the view of the High Court of Australia, to infer the intention from a consideration of the relative convenience and complexities that result from holding in favour or against extension.²⁷

(iv) Received statutes of general application

23. Jurisdictions which became British possessions as a result of settlement are considered to have acquired English law as their basic law, because the settlers are deemed to have carried it with them. Those acquired by conquest or cession usually acquired it, in whole or part, by Crown grant in substitution for the non-English system which had hitherto been in force. Usually from the date of settlement or from the date of the grant, the United Kingdom statutes of general application in force in England at the time, with rules of common law and equity, had effect so far as suited local circumstances. This position is still derived from the common law in many of the early settlements, in which the date of reception is now very distant (Bermuda, 1622; Barbados, 1627; Montserrat, 1632). Most jurisdictions in the Commonwealth, however, are governed by statutory rules based upon the common law. In some, notably in the South Pacific, the reception date is much more recent (Fiji, 1875; Kiribati, Solomon Islands, Tuvalu, Vanuatu, 1961).

24. In several respects, the reception rules are easier to describe than to apply. For they contain qualifications, the application of which can only be determined by judicial ruling. Although there has been considerable case law over the years in the Commonwealth as a whole, both on the rules themselves and on their application to individual statutes, it is not easily accessible, especially to small states with law libraries made up principally of English law reports. There are relatively few cases which have come before the courts in England. In any case, decisions from another system must be used with care. For the reception of a statute must be decided upon under the rules as they apply to the circumstances of the jurisdiction in question. As this must be a matter for the courts there, it follows that any list of received statutes drawn up administratively cannot be treated as either definitive or comprehensive. Whilst it is open to the legislature to provide exact guidance, this has been attempted only rarely.

25. The legal difficulties in implementing the reception rules indicate the uncertainties surrounding predictions as to the applicability of particular statutes, and indeed in determining exactly which statutes are likely candidates for reception:

(a) the statute must be an Act of the United Kingdom Parliament

26. Implicitly at common law, usually explicitly in the statutory provisions, the enactment must be an Act of the Parliament of the United Kingdom. The term is usually taken to include enactments of the Parliaments which existed prior to the Unions with Scotland and with Ireland. It will presumably include any subordinate instruments, made by virtue of an Act of Parliament, which satisfy the other requirements set out below.²⁸ It does not extend to Church Assembly Measures or General Synod Measures, albeit that, on ecclesiastical matters relating to the Church of England, these generally have the force and effect of an Act of Parliament.²⁹ They are not technically statutes. Accordingly any changes to an Act of Parliament by such Measures will not be caught under these rules.³⁰ There are reported decisions in which parts of statutes have been held to have been received,³¹ although other sections clearly are incapable of application. This will usually be possible only where the removal of the latter does not damage the legislative scheme. In other cases, individual

provisions from an Act comprising a series of unconnected sections have been applied, when others have not.³² Generally, however, courts have been reluctant to apply individual sections from a statute most of which is not applicable.³³

(b) the statute must be one of "general application"

27. Common law and statutory reception provisions usually agree that the Act must be of general application in England. The exact coverage of the term, however, is not a matter of certainty. There is no question that statutes declaratory of, or modifying, the common law fall within the term. It is generally accepted that statutes designated as "private", "local" or "personal" do not.³⁴ At the same time, it is clear that not all those classified as "public and general" are intended. For many examples can be found of Acts of this kind which have but limited application to particular places in the United Kingdom or to identifiable persons. Unhappily, there is no clear agreement about the test for distinguishing those public and general Acts which, being essentially suited or designed for the English context, are only of limited application, from those which are suitable for export. There are suggestions in Blackstone³⁵ that penal and policing statutes³⁶ are not of general application nor are those relating to revenue³⁷ or to particular classes of persons.³⁸ It may be doubted whether any such broad conclusions can be justified in the absence of any unifying principle.

28. The purpose of this requirement, it may be suggested, is to exclude statutes the aim of which was to deal with circumstances which are exclusively found in the United Kingdom to to implement a policy which is essentially concerned with conditions which are peculiarly domestic. Accordingly, it should be asked, in relation to each statute, whether its objects and purpose were to bring about a change in the regulation of activities in England which arise out of political or social factors particularly associated with England at the time of enactment.³⁹ In this respect, Commonwealth decisions on individual statutes may be especially helpful, since all the courts will have been engaged upon the same task of seeking to establish whether those Acts were capable of being exported anywhere. Unfortunately, the same conclusions have not always been reached on the same statute in different parts of the Commonwealth.

(c) the statute must be in force in England on the reception date

29. The law which was exported was English law. It follows that the received statutes must be part of English law. An Act of Parliament which applies only to Scotland or to Northern Ireland will not be caught. On the other hand, one which applies to the whole of the United Kingdom obviously has force in England.

30. The statute must be shown to have been in force at the particular reception date.⁴⁰ Any Act or any provision thereof passed before that date but brought into force after it is not included.⁴¹ Any amendments or repeals after that date obviously are also excluded. It is essential, therefore, to determine exactly both the reception date and the date when the Act or its provisions (if different dates are used) have been brought into effect. The former task is not easy for many of the early settlements, although usually the date has been settled by the courts. Fortunately precise statutory dates are normally to be found. Whether the Act was in force may require careful research since dates of commencement, especially in recent practice, have been postponed or staggered.

(d) the statute must be capable of application to local circumstances

31. Although the statute may be found to be suitable for export, it must still be shown to be appropriate for import into the particular legal system, that is, to be capable of application in the circumstances of that jurisdiction.⁴² If the conditions of that jurisdiction are such that the legislation could not be put into effect, it will not be received, as, for example, if there are no institutional arrangements which are essential to the implementation of the statute. It appears that the courts may consider cultural and social circumstances and the state of development in the jurisdiction at the relevant time.

32. Unhappily, there is controversy as to what is the relevant time. Arguments have been made in favour of the reception date, of the date of the statute, if any, setting the reception date, the time at which the events leading to proceedings arose and the date of the proceedings.⁴³ If any date other than that of reception is used, a high degree of unpredictability arises. For all the other dates allow the possibility that statutes, incapable of application at the reception date, are attracted by subsequent changes in local conditions. There is, however, some authority both in case law⁴⁴ and amongst commentators⁴⁵, that the date is that when the subject matter of the litigation, in which the question is to be decided, arose. There can be little doubt that it is easier for a court to assess the local circumstances as they currently obtain than to enter into an examination of the past. Yet this approach hardly seems satisfactory. For, illogically, it makes it possible for a statute, held in the past not to have been received on this ground, at some later time to be ruled to be applicable. Yet a statute which has been held to have been received cannot subsequently be held to be no longer applicable because of changed circumstance.⁴⁶ If this is the case, it means that, in principle, no reliance can be placed upon a decision that a statute had not been received as unsuited to the circumstances prevailing at that time. A better view, surely, is that this line of argument should be confined to the reception of common law rules which may, as it were, lie dormant until the circumstances to which they apply emerge.⁴⁷ For statutes, it seems more appropriate to treat the reception date as the time for assessing applicability.

33. There are other difficulties with this qualification. Although a statute as a whole must be examined for its applicability, it may be held to be reasonably applicable to local circumstances, despite the fact that parts of it clearly are not. A court may, therefore, treat sections of a statute otherwise applicable as inappropriate and not to be applied. Again the degree to which this may be done is not always predictable. Whether this permits a court to alter the substance of particular provisions to make them apply when they would otherwise not must be doubted. It is common to find courts authorised by the Interpretation Act to make formal adaptations; it would require very clear words to permit the courts to exercise a legislative power over rules of substantive law.⁴⁸ In principle, it seems probable that the courts will limit themselves to the making of formal modifications or to the rejection of those sections of a statute, otherwise capable of having effect, which do not suit local circumstances.

(e) the statute must not be repugnant to local legislation

34. Express repeal of a received statute by a local enactment, though rare, will, of course, expunge it from the local statute book. Where the local legislature has dealt explicitly with the same matters as are covered by a statute of general application, the local legislation prevails to the extent of any inconsistency. But, as the South Australia Law Reform Committee has point out⁴⁹, the question of implied repeal in this context is a thorny one. For such a repeal requires a contradiction between the later and the earlier statutes. Merely because they deal with the same subject matter is not enough. For two sets of provisions can often be construed in such a way as to give effect to both.⁵⁰ The later local Act will not repeal the received statute except by express terms or to the extent to

which the former cannot be given effect because of the requirements of the latter. Again this can only be finally determined by the courts in the accidents of litigation. Local legislation may, by the apparent premises on which it is drafted, indicate that an English Act is, or is not, being relied upon as having local force.⁵¹

PATRIATION SCHEMES

35. A number of Commonwealth jurisdictions have undertaken schemes for the patriation of Imperial statutes. Most have been partial in their coverage and necessarily cautious in their approach. To date the only schemes which have set out to patriate the three types of statutes, that is, referentially applied, received and extended statutes, are: the one currently in hand in New Zealand and the Commonwealth Secretariat project. The following paragraphs describe in outline the major projects (details of the sources referred to are listed in the Appendix).

Bahamas

36. One of the earliest patriation arrangements is to be found in the Declaratory Act 1799 of the Bahamas. In addition to declaring that the common law of England is in force in the Bahamas, this statute in its original form declared some 207 statutes and Acts of Parliament to be in force there. Subsequent Bahamian legislation has reduced this number to less than 20. The text of each is inserted into the appropriate title and numbered as a Chapter in the Revised Laws. In addition, it has long been the practice to list in the various reprints of this Act those Acts of Parliament which, subsequent to 1799, have been declared by Acts of the Assembly of the Bahamas to be law in the Bahamas and which, at the time of the re-print, were still in force. The full text of these again is reproduced in the Revised Laws. These are almost all nineteenth century Acts of Parliament and now total less than 30.

37. The enumeration of the statutes in force is, however, not comprehensive. For there is a general provision in the Act that statutes relating to "the prerogatives of the crown and the allegiance of the people" and those which "declare the rights, liberties and privileges of the subject" are in full force in the Bahamas.⁵² There is no identification of these. Further, Acts of paramount force, with the exception of the Copyright Act 1956, are not included in the Revised Laws, though reference is made to some in the Table of Statutes printed for use with those Laws. The original listings of particular pre-1799 statutes are a useful indication of statutes which can be considered capable of export to the colonies.

Western Region of Nigeria

38. The Law of England (Application) Law of 1959 of the Western Region of Nigeria adopted a radical approach to patriation. Whilst the common law of England and the doctrines of equity observed by the High Court of England are stated to be in force, no Imperial statute "hitherto in force" within the Region is, after the Act, to have any force and effect there.⁵³ Such Acts as were needed were specifically continued in the form of locally enacted statutes. Whether or not any Act had been received as an Act of general application under earlier rules was no longer to have relevance with respect to future circumstances. Unless re-enacted, all such Acts ceased to have application by virtue of this repealing provision.

39. This statute, however, was silent on the question of referential legislation. Presumably, any United Kingdom statutes made part of the law of Western Nigeria by virtue of a locally enacted Law would have the effect stated by that Law. Further, this statute had no effect upon the continued operation of an Imperial Act dealing with a subject matter outside the legislative competence of the Western Nigerian Legislature.⁵⁴ Lastly, statutes of

paramount force are expressly stated to be unaffected by these requirements.⁵⁵ It is apparent, therefore, that the patriation process was only partially effective.

Gibraltar

40. By the Application of English Law Ordinance 1962, Gibraltar has undertaken patriation using a process similar in some respects to that followed much earlier by the Bahamas. Having declared that the common law and the rules of equity "from time to time in force in England" are in force in Gibraltar, subject to the usual qualifications⁵⁶, the Ordinance gives effect to a series of enactments specified in its Schedule. Originally these comprised 113 Acts enacted between 1267 and 1883. Four Acts passed between 1957 and 1972 have also been given effect by this mechanism. None of these has been reproduced in the Laws of Gibraltar. By a series of subsequent Ordinances, 26 of these have been deleted, usually following the enactment of substantive Ordinances on the subject matter in question.

41. The Ordinance also states in general terms that the Imperial statutes are in force if they have been -

- (a) "applied to Gibraltar" by Order in Council or express provision or necessary implication in the United Kingdom legislation;
- (b) applied to Gibraltar referentially by local Ordinance.⁵⁷

Appendices contain listings of "English Acts" in force by their own terms or as a result of being applied thereto by Order in Council and of Orders in Council applying to Gibraltar. These lists have no legislative force and are not claimed to be comprehensive. Indeed, they contain some Acts which "apply" to Gibraltar but which may not have been "extended" as part of the law of Gibraltar. There is no listing of referentially applied Acts nor are any of these statutes and orders reproduced in the Laws of Gibraltar.

Victoria

42. One of the most thorough enquiries into received statute law has been conducted, in two stages, in Victoria. The first, leading to the enactment of the Imperial Acts Application Act 1922, was carried out by Sir Leo Cussen of the Supreme Court of Victoria over a period of seven years. Its purpose was, by including received statutes with the Consolidated Laws of Victoria, "to make readily accessible all the enacted law over which the Parliament of Victoria has control and for the continued operation of which it therefore is responsible". This involved a detailed examination of over 7000 statutes enacted by Parliament in Britain between 1235 and 25 July 1828, the reception date established by local statutes. The resulting Act identified those enactments which were believed, free from any reasonable doubt, to have been received and to remain in force. The terms of many of these were set out in a consolidated form as directly established by the Parliament of Victoria. The latter were generally those of greatest practical importance. A large number of others which did not lend themselves to consolidation or, usually being of less importance or which appeared likely, but not certainly, to have been received, were either transcribed or merely listed by citation in the Act, leaving the question of their continuance for judicial decision. All other Imperial statutes were repealed, as far as they might be in force in Victoria within the competence of the Victoria Parliament. It was recognised that the inclusion in any of the listings was not the final word, it being open for judicial decision to hold that such statutes had, or had not, been received under the reception rules.⁵⁸

43. The legislation did not deal with Imperial statutes in force by paramount force or those operating as a result of referential adoption.⁵⁹ Perhaps not surprisingly for such an

innovatory study, it was a rather cautious approach. Although it made accessible the text of many Imperial Acts that were clearly in force, it did not set out to provide an authoritative or definitive statement of all received statute law.

44. Provisions and listings in the 1922 Act were repealed on a number of subsequent occasions as the Parliament of Victoria introduced legislation of its own on various subject matters. By 1973, it had become clear that many of the statutes included in the Act had little or no utility in current circumstances. Accordingly, a further enquiry was undertaken by Mrs Gretchen Kewley for the Victoria Law Foundation with a view to retaining only those English Acts "which are undoubtedly in operation in Victoria, or with which the Victorian law is so inextricably bound, that to repeal them would be impossible". Mrs Kewley was able to recommend complete repeal, or replacement in modern terms, of a substantial number of the Acts. It was re-emphasised that Acts of paramount force fall outside the competence of the Victoria Parliament.

45. Two Acts of the Victoria Parliament followed. The first, the Imperial Law Re-enactment Act 1980, had as its principal purpose the re-enactment of certain Imperial Acts hitherto listed in the 1922 Act, in a form allowing consolidation with existing Victoria statutes. The second, the Imperial Acts Application Act 1980, listed 13 Acts that were known to have been received and which were to continue, usually by reason of their historical or constitutional importance. The terms of these were transcribed. All other received statutes were repealed. As with the 1922 Act, the Governor in Council was empowered to add by proclamation any statutes which should have been included.⁶⁰ Subject to this, the Act is now definitive and authoritative on the question of received statutes. Its importance has been greatly reduced by the gradual replacement of received statutes by locally enacted legislation.

New South Wales

46. The Law Reform Commission of New South Wales reported in 1967 upon the application of Imperial Acts in that State. It set out to provide a comprehensive account of the Imperial Acts received up to 25 July 1828 and still in force in New South Wales. It did not tackle those Acts referentially acquired, those of paramount force, although some of the latter were mentioned, or any other received laws that were outside the legislative competence of the New South Wales Parliament. This report was followed by the enactment of the Imperial Acts Application Act 1969.

47. The 1969 Act took a rather different approach from the first Victoria statute. It identified a series of statutes in force in England on 25 July 1828 which appeared to have been received in New South Wales, to have continued in force and to be required still. These were declared to have been in force in New South Wales from 1828 by virtue of the reception requirements, thereby putting their status beyond doubt.⁶¹ Most of these, however, were repealed as law of New South Wales, but equivalent provisions, set out in the Act, were substituted for them. The remainder were continued in force by reference, without reproduction of their text. Most of this latter group were constitutional enactments of little day-to-day importance, whilst others, concerned with treason and piracy, were likely to receive early modernisation: their transcription was thought to be unnecessary. All other statutes (except those of paramount force) were repealed as far as they were part of the law of New South Wales, subject to the power of the Governor by proclamation to revive an Act in an appropriate case.⁶²

Australian Capital Territory

48. The Law Reform Commission of the Australian Capital Territory produced its proposals relating to Imperial Acts in 1973. Legislation in implementation of its proposals is at present under consideration. As with earlier State schemes, the Commission favoured repeal of all applicable Imperial Acts except those which retained continuing value. Those which could be so repealed were identified in the Report and will be dealt with by general repeal provisions. The Commission identified two sets of Imperial Acts, those received up to 25 July 1828 and still in force and applicable to the Australian Capital Territory and those of paramount force that are applicable to that Territory and were passed before 3 September 1939 when the Statute of Westminster 1931 came into force with regard to Australian law. Of the Acts to be continued, some, those of major constitutional and historical significance but rarely cited, should not, the Commission thought, be restated in modern terms, especially where those provisions were in force in the other States and Territories, and need not be transcribed. Others, however, were recommended for repeal and replacement by provisions in modern terms set out in the patriation statute. In principle the exercise, as those in the States, did not involve itself with possible reforms which touched upon policy.

South Australia

49. The Law Reform Committee of South Australia is at present completing its series of studies concerning inherited Imperial statute law. Its enquiries have not extended to statutes of paramount force, as they are outside the competence of the South Australia Legislature or to those referentially adopted by South Australian Legislation. The Committee concentrated upon those statutes in force in England on 28 December 1836 that have been received into the law of South Australia. Rather than proceed "by general considerations repealing all, or all except a few, statutes", as in other jurisdictions, the Committee set out to consider every statute enacted for England before the reception date and to make recommendations, whether for repeal or for preservation, or for repeal with amendment of local legislation. In consequence, their reports, which, in some cases, look at the statutes that relate to particular topics and, in others, chronologically, contain comments upon each individual Act of Parliament enacted between 1225 and 28 December 1836. They represent a useful beginning for any enquiry seeking to establish which Acts in force in England appear capable of export to the colonies. The South Australian approach is a salutary reminder that decisions taken about reception, continuance and repeal in one jurisdiction may not be appropriate for others which have different reception dates and legislative histories, and the dangers of repealing, perhaps by oversight, statutes which, though rarely invoked in specific terms, relate directly to foundation doctrines in the particular systems of law.

New Zealand

50. A project relating to Imperial Laws application has been under way in New Zealand for several years.⁶³ Towards the end of the 1981 session of the New Zealand Parliament, a draft Imperial Laws Application Bill was introduced to give notice that legislation dealing with this subject was in contemplation. Further work on the drafting of the legislation is currently being undertaken. It is already evident that this project will be the most far-reaching yet undertaken. For it will extend to:

- (i) Acts in force in England on 14 January 1840, so far as applicable to the circumstances of New Zealand and in so far as they have not been repealed;
- (ii) Imperial Acts of Parliament of paramount force which continue to have effect as part of the laws of New Zealand;

(iii) Acts of Parliament declared to be in force in New Zealand by express words or necessary intendment of some New Zealand Act and continue to be in force;

(iv) Unrepealed Imperial subordinate legislation extending to New Zealand.

51. It is expected that the legislation will provide for the repeal, in relation to New Zealand, of all Imperial legislation that no longer serves a necessary or useful purpose, the enactment of a definitive list of Imperial Acts which are to continue to have effect as the law of New Zealand and the enactment, in appropriate cases, of substituted provisions for certain of these Acts. It is possible that in some cases the latter may be more conveniently undertaken by separate Bills concurrently enacted. The ultimate aim is to absorb, as soon as possible, the continued legislation into the New Zealand statute book by re-enactment or reprinting. This is a much more ambitious programme than any carried out elsewhere to date. It is, indeed, a complete patriation project.

Tuvalu

52. The project recently instituted for Tuvalu by the Commonwealth Secretariat has objectives similar to those adopted in New Zealand. They are:

- (a) to establish as definitively as possible which United Kingdom statutes have been inherited;
- (b) to determine which are still required and should be continued as Tuvalu law; and
- (c) to develop and implement arrangements whereby these statutes can be fully incorporated into the corpus of Tuvalu law. This will clear the way for the publication of a statute book for Tuvalu that will be complete.

53. The emphasis of the project will, however, differ from the Australian schemes in a number of respects. Thus the cut-off date for statute reception is 1 January 1961, thereby requiring examination of statutes enacted for England over a much more extensive period, during which a substantial proportion of the statutes currently in force in England were passed. There are significant difficulties in determining how much of current English statute law, designed for an advanced industrial and commercial society, is suited to the circumstances of a state comprising nine islands of 23.96 square kilometres and some 9,000 people. Further, the local statute book comprises some 108 Ordinances, suggesting that many more areas of law are likely to be governed by received statutes than is the case in previous projects. Tuvalu has also inherited paramount United Kingdom statutes enacted up to late 1978, a period of 40 years longer than New Zealand. Lastly the Tuvalu Ordinances contain a number of referential clauses incorporating English law and practice in broad and rather imprecise terms. It is apparent that the results of previous projects, which, in the main, have been concerned with rather different legal conditions, must be taken with caution. It is, however, probable that the results of this project will be of particular benefit to other jurisdictions with legal circumstances analogous to those of Tuvalu.

54. The Tuvalu project will concentrate upon those subject areas in respect of which English law will have been inherited and continues to be needed (certain subject matters, notably those relating to lands, are not significantly affected by received law). To implement this approach the following steps will be necessary:

- (i) examination of United Kingdom legislation between 1225 and 1960 to determine those which may constitute "statutes of general application in force in England on 1 January 1961";

- (ii) a listing of such of these statutes as seem capable of having been received into Tuvalu as compatible with the circumstances of Tuvalu and to have continued in force to date consistently with Tuvalu statutes;
- (iii) determination of Imperial Acts enacted for Tuvalu by the United Kingdom Parliament prior to the independence of Tuvalu in 1978 and which of these still continue in force;
- (iv) ascertainment of those United Kingdom Acts that have been introduced referentially by the terms of Tuvalu legislation;
- (v) determination of which of the inherited statutes are still required, in whole or part, in present Tuvalu circumstances and which, though necessary, appear in need of substantial reform;
- (vi) preparation of legislation to bring to an end dependence on imported statutes, to repeal inherited statutes no longer required, to replace required legislation by equivalent Tuvalu statutes, as far as is practicable, to continue them by reprinting them as part of the Tuvalu statute book.

PROBLEMS FOR SMALLER COMMONWEALTH COUNTRIES IN PATRIATING IMPERIAL STATUTES

55. There are many technical problems in ascertaining which Imperial Acts are candidates for continuation which will arise wherever a patriation exercise is undertaken.⁶⁴ However, there are special, perhaps peculiar, difficulties facing the small jurisdictions of the Commonwealth wishing to patriate imperial legislation.

56. Many of these jurisdictions have been subject to the authority of the United Kingdom for a very long period of time and usually until quite recently: some still are so subject. Independence and legislative autonomy have come rather earlier for larger communities. Accordingly, the latter have had longer, post-independence, (and often substantially greater resources) to provide a body of locally enacted law which, in practical terms, has displaced many of the inherited statutes. Therefore, one finds in force in smaller states a substantially greater number of the more recent Imperial Acts which were originally applied to them as dependencies. Again, for several small states, especially in the South Pacific, the date of reception of United Kingdom statutes of general application is very recent. In consequence, a far larger number of such statutes has been received than in most larger (and admittedly many medium sized) systems where the reception date is in the nineteenth century or even earlier. Moreover, since their legislatures tend not to be in constant session, the statute books of smaller jurisdictions are, by and large, of moderate size, thereby giving latitude to the argument that there are areas of activity untouched by local statutes which may be governed by inherited statutes. Several of the South Pacific jurisdictions again are in this position.

57. It is in these systems too that little assistance will be found from local litigation and from the law reports which are available, on the extent of the inheritance. Not only are very few cases dealing with particular statutes reported locally, but such cases seem rarely to have been argued. This may be the consequence of tiny and rather unsophisticated legal professions and a lack of adequate source materials, characteristic marks of many small jurisdictions.

58. The special position of small states is most evident in relation to their capacity to deal with the problems to which inherited statutes give rise. Those larger jurisdictions which have tackled them have usually done so through active law reform agencies and with considerable input from public service lawyers, especially Legislative Counsel. They have

invariably had access to well-developed research amenities. Few small states have the resources or the available personnel to undertake a project which calls not only for a determination of the exact nature of the inheritance but for restating it in terms which fit with locally enacted legislation, and thus for careful and lengthy legislative drafting. If this work is to be done in these states, it will necessitate a deliberate decision to allocate sparse resources, to seek technical assistance or to share the effort with others whose legal circumstances are analogous. Unfortunately, it is an exercise which, in cases where there are inadequate local collections of necessary materials, will often have to be undertaken outside the jurisdiction. Indeed the determination of what is involved in any project may be beyond local resources of time and expertise. Further, in many countries, there is only a limited possibility that these demanding enquiries can be undertaken within the country's programme of legislative preparation of law reform. Few have personnel available to provide the concentrated commitment called for. For these reasons, it seems inevitable that, as in the case of Tuvalu, the work will have to be commissioned from an outside expert.

CONCLUSION

59. In countries where a substantial inheritance is involved, it seems improbable that the process of integration of that inheritance into the local statute book can be completed as a single exercise. For it will often be found that the content of the continuing legislation, when compared either with local statutes or those currently in force in the United Kingdom, calls for re-consideration. Indeed the very process of establishing what has been inherited will point up areas in which legal changes may be needed. Former benefits from the availability of judicial decisions and texts relating to inherited statutes are gradually being reduced as the original statutes cease to be in force elsewhere. The replacement of out-of-date provisions, which may involve in some instances a deliberate decision to follow the terms of the current legislation of another jurisdiction, is a distinct exercise which should follow upon patriation.

60. Little has been said about the steps which might be taken to ensure that the proposals for the continuance of particular inherited statutes satisfy local expectations of what is required. In countries with established law reform systems, it is usual to enter into a formal consultation process, involving the issue and circulation of reports and recommendations. In many small states where there is likely to be a substantial body of received law, there may not be a well-tried system of public participation in law reform. Nonetheless, it remains desirable that opportunities be provided for at least the legal profession, the judiciary and the concerned Ministries to comment upon the proposals before legislation is put before the Legislature. In many respects, patriation is a matter of technical law, but its implications for the proper operation of the legal system clearly have a public dimension.

NOTES

1. Some sections of this paper use material from K W Patchett, "Inherited Imperial Statutes in Small Jurisdiction", Report of the Meeting of Law Officers of Small Commonwealth Jurisdictions, Vanuatu, 1985 forthcoming.
2. Ie, the Parliament of England prior to the Union with Scotland in 1707, and that of Great Britain prior to the Union with Ireland in 1801.
3. For details of reception provisions in individual jurisdictions in the Commonwealth, see K Roberts-Wray, *Commonwealth and Colonial Law*, passim. A selection of commentaries on the matter is set out in Appendix, below, section C.
4. For a recent discussion of the judicial treatment of Constitutional provisions patriating the common law in Papua New Guinea, see D K Srivastava & D Roebuck, (1985) 34 ICLQ, 850-857.
5. Lon L Fuller, *The Morality of Law*, 2nd ed, (1973), at 39, suggests that a man can have a moral obligation to obey a legal rule that is.....kept secret from him".
6. Sources for these and other projects are set out in Appendix, below, sections A & B.
7. For an example of uncritical copying, see *Barclays Bank DCO v Vermot* (1965) 8 WIR 250, where an English provision on estate duty was copied in Jamaica, although different rules relating to the devolution of real property applied.
8. G C Thornton, *Legislative Drafting*, 2nd ed, (1979), at 118-120.
9. *Hazelwood v Webber* (1934) 52 CLR 268, at 275.
10. (1973) CwIth Aust PP Vol 7.4, at 3.
11. J E Cote, (1977) Alberta L Rev, 29, at 82.
12. Thornton, *op cit*, at 123; E A Driedger, *The Composition of Legislation* 2nd ed, (1976) at 125.
13. Whilst decisions on the original statute prior to its incorporation may be binding (Roberts-Wray, *op cit*, at 568), at the best, decisions rendered thereafter are to be treated as persuasive. Where the provisions of a statute have been repeated in a local statute, there is authority that the decisions of the House of Lords and the English Court of Appeal are binding in the construction of words in *pari materia*: *Robbins v National Trust Co Ltd*, above; *Trimble v Hill* (1879) 5 App Cas 342 (PC), affirmed in *Nadarajan Chettiar v Walauwa Mahatmoe* [1950] AC 482 (PC). But the recent trend is to treat these too as persuasive only: *Bitumen and Oil Refineries (Australia) Ltd v Commission for Government Transport* (1954-1955) 92 CLR 200, at 211 (HCA); *National & Grindlays Bank v Dharamshi Vallabhji* [1967] 1 AG 207 (PC).
14. For a fuller account of these arrangements, see K W Patchett, (1973) Jamaica LJ, at 55-60.
15. This jurisdiction has usually been terminated, on the achievement of independence, by United Kingdom legislation. The position of Canada, Australia and New Zealand is different, as the result of the Statute of Westminster 1931. See now, Canada Act 1982 and Australia Act 1986 (UK).

16. For example, the constituent power (to provide for the constitution) came to be exercisable by Order in Council.
17. For example, pursuant to the Foreign Jurisdiction Act 1890 or under the British Settlements Act 1887-1945. Other statutes, such as the Copyright Acts of 1911 and 1956, authorised the making of Orders in Council to bring dependencies within the scheme established by the Imperial Act.
18. S.2 provides that a colonial statute repugnant to any prior Act of Parliament extending to the colony or to any Order or regulation made under the authority of such an Act or having force and effect of such an Act "shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative".
19. For example, where the statute extends only to dependencies, either in general or as are specifically designated.
20. This is particularly the case following the enactment, on the recommendation of the Law Commissions, of a series of Statute Law (Repeals) Acts in 1969, 1971, 1973, 1974, 1976, 1977, 1978 and 1981.
21. See below, para 34.
22. For some compilations, see Appendix, below, section C. These usually contain disclaimers concerning their comprehensiveness and authority.
23. *Callender, Sykes & Co v Colonial Secretary, Lagos* [1891] AC 460 (PC), at 467.
24. J E Cote, (1977) *Alberta L Rev*, 29, at 33-34.
25. *Imperial Statutes Applicable to the Colonies*, introduction. See similarly, Blackstone, Kerr B1, 4th ed, 1876, vol 1, at 75.
26. *Federal Bank of Australia Ltd v White* (1895) 21 VLR 451, at 466, per Madden CJ.
27. *Bisticic v Rokov* (1976) 135 CLR 552 (HCA).
28. Cote, loc cit above, at 60-61, cites *Reynolds v Vaughan* (1872) 1 BCR (pt 1) 3, where a statutory reception provision was held not to apply to subordinate legislation.
29. Church of England Assembly (Powers) Act 1919, s 4; Synodical Government Measure 1969, s 2(2).
30. Eg, Ecclesiastical Jurisdiction Measure 1963 (No. 1). The extent to which ecclesiastical law and statutes relating to the Church of England have been inherited is in some cases unclear: Cote, loc cit above, at 59-61.
31. Cote, loc cit above, at 79.
32. Eg, Fires Prevention (Metropolis) Act 1774, s 86: *Hunter v Walker* (1888) 6 NZLR 690.
33. Cote, loc cit above, at 79
34. In recent times, these have been enacted by a special Parliamentary procedure.
35. *Commentaries*, Bk 1, 107.

36. The terms probably mean no more than statutory regulation of social conditions: *Quan Yick v Hinds* (1905) 2 CLR 345 (HCA). Cote, loc cit above, at 78.
37. Eg, *R v Mann* (1884) Legge's Rep 182. Cote, loc cit above, at 77.
38. Eg, *Shaik Sahied v Sockalingam Chettiar* [1933] AC 342 (PC) (moneylenders).
39. *Attorney-General v Steward* (1816) 2 Mer 143, at 160; *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, at 310; *Quan Yick v Hinds*, above; *Leong v Lim Beng Chye* [1955] AC 648 (PC).
40. Cases can be found requiring merely that the Act should have been passed before the cut-off date. A few reception provisions do not contain this qualification at all.
41. See Supreme Court Act, Laws of Fiji, c 13, s 22(2), making an exception to this principle to cover the Judicature legislation, enacted in England before, but coming into force after, Fiji's reception date of 2 January 1875.
42. *Jex v McKinney* (1889) 14 App Cas 77 (PC).
43. *Roberts-Wray*, op cit at 546-7; *Allot*, op cit, at 92; Cote, op cit above, at 63-67; *R S O'Regan*, (1971) 20 ICLQ, 342-347.
44. *Cooper v Stuart* (1889) 14 App Cas 286, at 292.
45. See note 43, above; *State Government Insurance Commission (SA) v Trigwell* (1979) 53 ALJR 656 (HCA), at 658, per Gibbs J.
46. *Ibid*, 657, per Barwick CJ.
47. *Dugan v Mirror Newspapers* (1978) 53 AJLR 166 (HCA), at 168, per Gibbs J. See also on this view, *O'Regan*, loc cit above, at 344-345.
48. This may be authorised in some cases by the inclusion in the reception provisions of such words as "subject to such qualifications as local circumstances render necessary": *Nyali v Attorney-General* [1956] 1 QB 1 (CA). But it must be doubted that this permits alterations to render a statute, not otherwise suitable, fit for local use.
49. 54th Report (1980), at 5-6, referring in particular to *Hazelwood v Webber* (1934) 52 CLR 268, at 275-6.
50. It is only exceptionally that Statute Law (Repeals) Acts of the United Kingdom are extended to dependencies. Eg, the Act of 1973 was extended by SI 1976/54.
51. Cote, loc cit above, at 75.
52. Declaratory Act, c 2, s 4.
53. Law of England (Application) Law, c 60, s 4.
54. *Ibid*, s 7.
55. *Ibid*, s 6.
56. Application of English Law Ordinance, c 5, s 2.

- 57. **Ibid**, s 3(1).
- 58. The enactments "shall continue to have in Victoria....such force and effect, if any, as they had at the commencement of this Act": Imperial Acts Application Act 1922, No 3270, s 4.
- 59. **Ibid**, s 5.
- 60. Imperial Acts Application Act 1980, No 9426, s 6; (cp 1922 Act, No 3270, s 8.
- 61. Imperial Acts Application Act 1969, No 30, s 5.
- 62. **Ibid**, s 11.

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VOLUNTEER LAWYERS: THE UNTAPPED POTENTIAL

A Report by CAMPBELL MCLACHLAN LL.B (Hons.) (V.U.W.),
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A. The need for legal services and the use of volunteers

1. This report grew out of a belief that the use of lawyers on a voluntary basis was a response to the legal needs of many Commonwealth countries which had been largely neglected and unexplored, and which deserved further attention. It seemed to be largely a matter of requesting governments, volunteer organisations and potential volunteers failing to join forces. Governments had not considered lawyers as a volunteer group, nor had they considered the use of volunteers as a way of meeting their legal needs. This report, then, examines the ways in which lawyers could serve Commonwealth governments. It provides, in Part B, a select directory of organisations which have had some experience with selecting lawyer volunteers or which have indicated their willingness to help in the future. Part C suggests some decisions which Commonwealth Law Ministers may wish to take.

2. The background to this initiative is the undeniable and continuing pressing need for legal services, especially in small Commonwealth jurisdictions. The reports prepared in 1979-80 for the Secretariat by Dr. G.P. Barton (Some Pacific Jurisdictions), Professor K.W. Patchett (Bermuda and the Caribbean) and Mr. G.C. Thornton (East, Central and Southern Africa, Mauritius and Seychelles) indicate the frequency with which similar needs are identified in small states in all parts of the Commonwealth. While these studies lay great stress on improving self-reliance, there is a considerable amount of work which calls for assistance from other countries, both in the short-term with the direct provision of legal services, and in the long-term with the establishment of new programmes and the training of local people.

3. Basic domestic legal needs which are often still unmet include:

- (i) Legislative Drafting
- (ii) Law Reporting
- (iii) Law Reform (including specialised and technical subject areas)
- (iv) Law Revision (the preparation of consolidated reprints of the statute book and the reform of outdated laws)

4. A second area of equal, if not more compelling urgency is in the international arena. Political independence has brought to the small states of the developing Commonwealth a number of international responsibilities and the need to negotiate with highly sophisticated outside interests. The following areas merit special mention:

- (i) Treaty succession: the need to determine exactly which international obligations a state has already undertaken by virtue of succession to international treaties entered into on their behalf when they were dependencies.

- (ii) International Organisations: membership of several key international organisations such as the United Nations and the International Monetary Fund is essential and entails sophisticated legal advice.
- (iii) Treaty Negotiation: many modern treaties vitally affect the economic and other interests of small states and require legal assistance in the formulation of policy at the negotiation, ratification and implementation stages. The U.N. Convention on the Law of the Sea is a case in point.
- (iv) International Commerce: legal skills are a vital component in the negotiation of international contracts. Countries with a high degree of external economic dependence are vulnerable to exploitation by foreign governments and companies if they lack the requisite legal expertise. This consideration also applies to the litigation or arbitration of disputes. It is equally important for para-statal corporations as for the government itself.
- (v) A modern commercial law: the domestic law of a state can have a major bearing on international commercial negotiations, if antiquated it can both discourage potential investors and encourage the unscrupulous.

5. A third critical area is the provision of legal resources to the impoverished members of society. This may take a number of forms:

- (i) Legal Aid: the provision of legal advice and representation in court both as defence counsel in criminal matters and in civil matters.
- (ii) Community Legal Education
- (iii) Empowerment of local groups: the establishment of rural cooperative societies for the production and marketing of produce and the management of resources.

6. In all these areas it cannot be emphasised too strongly that law provides an essential infrastructure and tool for economic and social development. For too long insufficient attention has been given to it as a priority in the allocation of resources, both at the domestic level and at the level of international cooperation. The development of legal resources must be seen as a priority. The scarcity of funds makes the use of volunteers an attractive option.

7. In his comprehensive report for the 1983 Meeting of Commonwealth Law Ministers, Professor Keith Patchett examined the options for assistance to small states to meet their legal needs. Amongst other things, he suggested (para.25) that volunteer programmes merited closer attention, especially as a way of covering the responsibilities of local legal personnel when released for training or of providing a legal input to fledgling non-government activities.

The Survey

8. The writer of the present report therefore set out to gauge the existing level of use of lawyers on a voluntary basis and the possibilities for expansion. The three interested groups are Commonwealth Governments, Volunteer Organisations and Commonwealth Lawyers who may potentially serve as volunteers.

9. A letter was sent to the Attorneys-General of 30 Commonwealth countries which seemed likely to have a shortage of legal manpower. Replies indicated relatively little experience with this type of assistance. Of the 17 States which replied only 4 reported any previous volunteer legal assistance (Kiribati, Malawi, Solomon Islands and Western Samoa). However several states expressed a keen interest in the potential of this kind of assistance (Belize, Papua New Guinea, Tuvalu, Cook Islands, Virgin Islands).

10. The second group surveyed were the volunteer organisations. Attention was directed to organisations from Commonwealth countries, as well as a few from the United States and those of a clearly international orientation. A questionnaire was sent to 33 such organisations and replies received from 23. Nine of those organisations indicated some previous experience with lawyers in Commonwealth countries over the period 1980-1985. An analysis of the types of assignments is instructive:

- (i) Overseas Service Bureau (Australia) - 1 Practitioner for a two year assignment (1984 - 1986) as legal adviser for the Provincial Government of New Ireland, Papua New Guinea.
- (ii) United States Peace Corps - 4 Recent Graduates and 4 Practitioners for periods of two years service each (1983 - 1987) as legal advisers to the Provincial Governments of the Solomon Islands.
- (iii) Volunteer Service Overseas (United Kingdom) - Provision of a series of practitioners to fill the posts of Social Welfare Solicitor, Solomon Islands and Peoples' Lawyer and Legal Assistant, Kiribati.
- (iv) United Nations Volunteer Programme - One lawyer to Grenada (1979-1981) to undertake a comprehensive law revision project and one to Lesotho (1980-1982) to provide legal assistance to LDCs in customs union, trade agreements and policy planning. In 1985, UNV is supplying a legal volunteer to Papua New Guinea and two legal draftspeople to Dominica for law revision.
- (v) Canadian Crossroads International - 4 assignments involving 2 law students and 2 recent graduates in the Gambia (preparing contracts, developing a copyright standard for the Ministry of Education) and in St Vincent (1985), and Sri Lanka (1984).
- (vi) Volunteer Service Abroad (New Zealand) - Provision of a legal officer in the Central Administrative Department of Niue (1979-81); establishment of the People's Lawyer in Kiribati (1980-81); and three posts in the Solomon Islands as Social Welfare Solicitor, Public Solicitor and legal adviser to a Provincial Government. Currently recruiting for a further three positions in the Solomons.
- (vii) Canadian Executive Service Overseas - One retired lawyer to produce the first series of law reports in Western Samoa.
- (viii) CUSO (Canada) - One practitioner placed in Papua New Guinea.
- (ix) British Executive Service Overseas - A Legal Draftsman to draft legislation to establish a National Park in Antigua; a review of the regulations in Zimbabwe governing hire purchase and leasing; reform of the statute and regulations governing the Electricity Authority of Cyprus and the supply and distribution of electricity; a complete revision of the laws of the Cayman Islands; training and advice in commercial negotiation for the National Development Corporation of Lesotho. Two projects currently under

consideration are the drafting of new Supreme Court Rules for Fiji and a legal librarian to reorganise the High Court library in Papua New Guinea.

11. These examples illustrate the wide range of assignments to which volunteer lawyers can usefully be applied. Two innovative projects deserve particular mention. The first is the development of Government grass-roots legal aid services in the Solomon Islands (the 'Social Welfare Solicitor', later the 'Public Solicitor') and Kiribati (the 'Peoples' Lawyer'). The Solomon Islands scheme began with volunteer assistance in 1974 and has now developed into a fully-fledged (and Constitutionally protected) office, staffed partly by salaried employees and partly by volunteers. The office exists to provide legal advice and representation in court to all persons unable to afford a lawyer. Not only has the office increased the ability of the ordinary Solomon Islander to defend criminal charges and take civil claims, but it has also dramatically improved the standards of criminal prosecution. In addition to its professional functions, the office has also participated in a number of educational projects: training magistrates, prosecutors, government officials and general community legal education. A similar scheme was established, also with volunteer assistance, in Kiribati in 1982.

12. The second project which deserves highlighting is a recent initiative by the University of Toronto Law School which provided a research team of senior law students, assisted by members of staff, to work with the Government of St. Kitts-Nevis on specially requested briefs dealing with such subjects as international financial agreements, tax treaties, development finance and arrangements with the United Nations. The project was warmly received by the St. Kitts Attorney-General, and the Law School sees further possibilities for the same kind of project in other countries.

13. Volunteer organisations were invited to comment on the suitability of lawyers for voluntary projects. While only 2 organisations reported that they had been unable to meet requests for legal services, 9 organisations said that they had received applications from volunteers with legal training, whom they had been unable to place. Some noted that they had to place lawyers in non-legal positions, because no requests for legal experts were forthcoming. These involved the related areas of administration, conclusion of trade agreements etc. Most organisations were very positive about the experience which they had had with legal volunteers.

14. Potential volunteer lawyers themselves were a more difficult group to survey. What is significant is the number of organisations which reported lawyers on their books whom they had been unable to place. Discussions with Volunteer Service Overseas and British Executive Service Overseas in London suggest that there are large numbers of lawyers prepared to undertake a voluntary project. Interest has been expressed not only by recent graduates, but also by highly qualified and experienced practitioners who are prepared either to take a break from practice or to contribute on retirement. The development in many partnerships of sabbatical leave is giving more practitioners the freedom and flexibility to consider a period as a volunteer. The recently-formed Commonwealth Lawyers' Association, which links the Law Societies and Bar Associations of the Commonwealth, now has over 400 individual members, who are aware of the legal needs of other parts of the Commonwealth. Having surveyed the potential place of volunteers in the provision of legal services in developing Commonwealth countries, it is now possible to provide some details on volunteer organisations especially equipped to deal with lawyer volunteers.

B. Profile of volunteer organisations

15. Agency for Personal Service Overseas
J. W. Jackson (Chief Executive)
29 Lower Baggot St
Dublin 2
Ireland
Tel: 761571

The Agency for Personal Service Overseas (APSO) is the principal Irish volunteer organisation. In 1983 it had some 193 volunteers working in 46 countries. The majority of these volunteers were placed in Commonwealth countries, including large programmes in Kenya, Lesotho, Nigeria, Tanzania, Zambia and Zimbabwe. The Agency has not as yet had any experience with posting volunteers to legal posts.

Its contracts are organised on a two year basis, with APSO providing return airfares, insurance, accommodation, a volunteer allowance and resettlement grant.

16. Australian Executive Service Overseas Programme
R.D. Cheatley (Executive Director)
P.O. Box E14
Queen Victoria Terrace
A.C.T. 2600
Australia
Tel: (062)732311

The Australian Executive Service Overseas Programme (AESOP) was founded in 1981 by the Confederation of Australian Industry and the Australian Development Assistance Bureau. It is one of the growing number of 'executive services' designed to provide short-term high-level assistance by senior professional people. At present AESOP has 40 volunteers working in 10 countries, including the Commonwealth countries of Fiji, Papua New Guinea, Solomon Islands, Tonga, Western Samoa, Kiribati, Malaysia, Nauru, Singapore, and Vanuatu. It has not yet had any experience with providing volunteers to legal posts, but has legally qualified persons on its register.

The organisation provides return air fares, insurance, out of pocket expenses associated with preparing for the project and spouse allowance. The 'client' business, organisation or institution is expected to provide accommodation and a subsistence allowance.

17. British Executive Service Overseas
Gordon Wilson (Director)
London SW1X 8PH
United Kingdom
Tel: (01)2350991

BESO is also an executive service, and has had a growing experience with legal volunteers. It is enthusiastic about the possibilities of this type of work, and the necessity of providing legal resources to promote economic development. BESO assignments are short-term - a maximum of six months - and it draws on a register of retired or serving executives. Working in some 63 countries, BESO undertook a total of 129 assignments in 1983/4.

BESO pays return air travel, insurance, out of pocket expenses, a spouse allowance and a small weekly allowance. The requesting organisation meets the costs of local living expenses and transport during the assignments.

Services are provided to companies, para-statal corporations, governments and other organisations.

18. CUSO
135 Rideau Street
Ottawa, Ontario
Canada K1N 9K7
Tel: (613) 563-1242

A major Canadian volunteer organisation, CUSO had some 800 volunteers working in 36 countries in 1985. Especially large programmes in Commonwealth countries include: Botswana, The Gambia, Ghana, Nigeria, Papua New Guinea, Sierra Leone, Vanuatu and Zambia. Although they have only had one legal placement (in Papua New Guinea), this worked out positively.

CUSO pays air fares to and from the assignment, medical expenses, insurance and settling-in and termination allowances. The host country pays salaries at the local rate and provides accommodation.

19. Canadian Crossroads International
31 Madison Avenue
Toronto, Ontario
Canada M5R 2S2
Tel: (406) 967-0801

Canadian Crossroads International provides overseas volunteers as part of a comprehensive programme which also includes training people from developing countries in Canada and educating Canadians about development issues.

In 1985 it had 160 volunteers working in 31 countries around the world, including many Commonwealth countries. It has had experience with lawyer volunteers.

Canadian Crossroads International demands a three-year commitment from its volunteers for overseas placement. The first six months are spent preparing to go overseas through personal orientation activities and local, regional and national orientation activities. The second half of year one is spent on placement overseas which runs from four to six months. In the following two years, participants are expected to spend at least 200 hours educating Canadians about development and development issues.

CCI provides a return air ticket, housing and food and a basic allowance to cover project related living expenses.

20. Canadian Executive Service Overseas
Suite 200
1867 Young Street
Toronto M4S 1Y5
Canada

CESO, another 'executive service', considers lawyers very suitable for applicable projects, although its experience so far has been limited to one assignment in Western Samoa. During 1984 it had 331 projects in 45 countries, and its roster includes 1800 personnel.

Consultants have their economy flights, medical and accident insurance paid by CESO, and the host client provides accommodation, meals and local transportation.

21. Overseas Service Bureau
71-75 Argyle Street
(P.O. Box 350)
Fitzroy 3665
Australia
Tel: 419-1788

The major Australian volunteer programme, O.S.B. now has 200 volunteers working in 21 countries. Major projects in Commonwealth countries include: Malaysia, Papua New Guinea, Solomon Islands, Tonga, Vanuatu and Western Samoa. The Bureau considers lawyers to be as suitable as any other professional group for inclusion in its programme, although to date they have only sent one lawyer (to Papua New Guinea).

O.S.B. makes appointments for two years, and requires applicants to be at least 20 years old with at least two years work related experience. It provides return air fares, settling-in and resettlement grants and insurance. Once assigned the Volunteer Development Worker works for the overseas employer, who will provide a salary, paid at the same rate as a similarly qualified local person, or a volunteer allowance. Accommodation is also arranged by the employer.

22. Service Civil International
International Secretariat
13 Wincheap
Canterbury
Kent CT1 3TB
United Kingdom
Tel: (227)450318

United Kingdom branch:
International Voluntary Service
Ceresole House
53 Regent Road
Leicester LE1 6YL
United Kingdom
Tel: (0533)541862

Service Civil International is the coordinating office for a number of volunteers working in 50 countries, with major Commonwealth programmes in Bangladesh, Botswana, Ghana, India, Lesotho, Malaysia, Mauritius, Sierra Leone, Sri Lanka, Swaziland and Tanzania. Its United Kingdom branch, International Voluntary Service, works in 3 Commonwealth countries: Botswana, Swaziland and Lesotho. The service has not yet had any experience with lawyer volunteers.

23. Transfer of Knowledge through Expatriate Nationals
Mr Rustam Lalkaka
Co-ordinator, TOKTEN
United Nations Development Programme
1 U.N. Plaza
New York, New York 10017
United States of America
Tel: (212)754-2902

TOKTEN represents a novel form of volunteer scheme. The idea is to tap the knowledge of highly -qualified consultants who are expatriate nationals of developing countries for the benefit of their homelands.

At present TOKTEN has projects in 18 countries, including the following Commonwealth countries: Bangladesh, Dominica, Grenada, Guyana, India, Pakistan, Saint Lucia, Sri Lanka and Trinidad and Tobago. It also has a regional Africa project.

Experts are provided on short-term consultancies. Travel and living expenses are paid through the national U.N. Development Programme indicative planning figure - the amount of assistance UNDP allocates to a country over a five-year planning cycle.

TOKTEN receives the support of the U.N. family of agencies in organising its programmes.

The programme has not as yet had any experience in the legal field.

24. United Nations Volunteer Programme

Palais de Nations
CH-1211 Geneva 10
Switzerland
Tel: 985850

The United Nations Volunteer Programme, founded in 1970, is the major U.N. agency involved in posting volunteers. It now has 1017 volunteers working in 86 countries, including many from the Commonwealth. There are major Commonwealth programmes in Bangladesh, Botswana, Jamaica, Kenya, Lesotho, Tanzania, Uganda, Western Samoa and Zimbabwe. Although it does not include lawyers on its list of professional categories, UNV has sent lawyers on its projects. The organisation comments that the relatively few small number of lawyers sent is because of few requests from developing countries, and some lawyers are channelled into non-legal posts.

A large proportion of the total number of UN Volunteers are themselves nationals of developing countries. This constitutes a concrete expression of the UN policy of technical cooperation among developing countries.

UNV maintains a roster of 1500 candidates - who tend to be young but highly qualified professionals. UNV assignments last for an initial period of two years.

UN volunteers are assigned either to projects initiated directly through the UN system or to domestic governments. They also provide support for such domestic development services as national volunteer services and development youth schemes.

The UNV programme assumes the entire legal and administrative responsibilities for the assignment of a UN volunteer. The contracts are established and signed between the UNV programme and the volunteer concerned.

The costs involved for each volunteer assignment comprise;

- (i) travel to and from the country of assignment
- (ii) health and life insurance
- (iii) settling-in grant
- (iv) monthly living allowance
- (v) free modestly furnished simple housing
- (vi) resettlement allowance.

Funding is derived from the indicative planning figures developed by the UN Development Programme, and the Special Voluntary Fund.

25. United States Peace Corps
806 Connecticut Avenue N.W.
Washington D.C. 20526
United States of America
Tel: (202)655-4000

The Peace Corps is an enormous United States Volunteer Organisation: 5,400 volunteers are currently working in 60 countries around the Commonwealth and the world. The only legal project which they have undertaken in the past five years is with Solomon Islands provincial governments. Previously other work had been undertaken, for example to staff fledgeling law faculties in East Africa.

Peace Corps provides complete health care; transportation to and from the country of service; a living allowance to cover basic expenses of food, housing, clothing, local transportation and three months of pre-service training.

26. Volunteer Service Abroad
31 Pipitea Street
P.O. Box 12-246
Wellington
New Zealand
Tel: 725-759

Volunteer Service Abroad has serviced some innovative projects of a legal nature, with a high level of satisfaction being expressed by both the volunteers and their employing authorities.

VSA works in 13 countries in the Pacific and South-East Asia.

It provides return airfares; insurance; initial, midterm and resettlement allowances. The employing authority provides a standard living allowance or a local salary plus furnished accommodation.

27. Volunteer Service Overseas
9 Belgrave Square
London SW1X 8PW
United Kingdom
Tel: (01)235-5191

VSO is the largest British volunteer organisation working in Commonwealth countries. It had 1000 volunteers overseas in 1983. VSO has undertaken a number of legal projects in the Pacific and is enthusiastic about further development and the possibilities of securing volunteers of high legal calibre.

The organisation meets travel expenses, insurance and small grants at the beginning, mid-term and completion of service. Accommodation and a living allowance are provided by the employer overseas, which are based on the same rate as local people in equivalent jobs.

Volunteers under VSO undertake a minimum of two years' service.

C. Utilisation within the Commonwealth

28. To summarise:

- Developing Commonwealth countries have pressing needs for the provision of legal services
- Legal services need to be given higher priority because law provides the infrastructure and the tools for development
- Overseas assistance will have to play a part in this process, at least until sufficient local people can be trained
- Volunteers provide a source of assistance which has been left largely untapped until now
- The available evidence of past experience with volunteers on legal projects shows that lawyers can and will serve on a voluntary basis just as efficiently and successfully as any other profession
- A number of volunteer organisations have been identified which may be able, through their existing structure and processes, to respond to requests for legal services from member governments of the Commonwealth and, indeed, from other organisations in Commonwealth countries

29. Therefore it is submitted that relevant Commonwealth Law Ministries consider a review of their existing legal services and examine areas in which volunteers may serve a useful function.

30. It is anticipated that member governments will contact the selected volunteer organisation directly when requesting volunteer lawyers. Many organisations maintain field offices in developing Commonwealth countries, but requests may also be made to the head office. Naturally the Legal Division of the Commonwealth Secretariat and the Commonwealth Lawyers' Association will be pleased to act as intermediaries where necessary.

31. A final note - the volunteer organisations included in this survey are committed to supplying volunteers with a high degree of skill and experience and sensitivity to the environment in which they will be working. Volunteers are placed where they can complement and enhance the work of local people (including, in the legal context, the local profession.) However the use of volunteer lawyers from other countries cannot be the total answer. It must fit into a comprehensive pattern of legal development.

COURSE FOR GOVERNMENT LEGAL ADVISERS

A memorandum by the Commonwealth Secretariat and a paper by Sir William Dale, Director of Studies, formerly Legal Adviser, Commonwealth Office, and General Counsel, UNWRA

From the time of its inception in 1969, the Legal Division of the Commonwealth Secretariat has enjoyed the closest co-operation with the Director of Studies of the United Kingdom Government Legal Officers' Course (as it used to be called) and it has been customary for the Director of the Legal Division to serve as a member of the Course Advisory Board. The present Director was one of the moving spirits behind the inauguration of the Commonwealth Law Bulletin.

2. The course is funded by the Overseas Development Administration of the United Kingdom Government through the British Council for the benefit largely of Government Legal Officers from developing Commonwealth countries.

3. The subjects covered at the course include a number of areas in which the Commonwealth Secretariat shares a mutuality of interest, and it has been the practice for the course participants to spend some time in the course of their studies with the Director and professional staff of the Legal Division. In this way, too, the Legal Division is able to strengthen its unique network of contacts so essential for its work, both within and outside the Commonwealth.

4. Ministers may wish to consider the desirability of encouraging the use of this excellent training facility to sharpen the professional skills of their legal staff.

Legal Division
Commonwealth Secretariat

May 1986

COURSE FOR GOVERNMENT LEGAL ADVISERS

A paper prepared by Sir William Dale, Director of Studies

This Course is held annually, from the end of February to mid-June, at the Institute of Advanced Legal Studies, University of London. It offers to Law Ministers the opportunity of procuring for members of their staffs the special training government lawyers require. Established in 1964, the course has been attended by over 400 legal officers, many later becoming Minister of Justice, Attorney-General, Chief Justice, member of the International Law Commission.

2. The subjects covered are:

(i) Public International Law

Some 70 hours of lectures and discussion are given to the many branches of this subject, including training in the drafting of a treaty. The treaty is then considered at a week's Model International Conference at the Foreign and Commonwealth Office. Visits are made to the International Court of Justice at The Hague, and to the Hague Convention on Private International law, where lectures and discussions take place.

(ii) Legislative Drafting

Tuition is given, and several exercises set, each followed by a critical examination and discussion of the drafts. About forty-four hours are thus occupied.

(iii) Other subjects of Public Law

These include International Trade and Economic Law, International Civil Processes, International Crime, Negotiation of International Agreements and Arbitration Clauses, the International Covenants on Human Rights, Criminal Prosecutions, Administrative Law, Computers and the Law, and the English Law Officers and their work.

Course participants also attend the two-day Commonwealth Law Students Conference arranged annually by the British Institute of International and Comparative Law on a topic of current interest e.g. in 1984 on Development of Energy Sources: The Legal Framework (in London); in 1985 on Treaty Law and Developing States (at Christ's College, Cambridge), in 1986 on The Law of the Sea and Developing States (at St Edmund Hall, Oxford).

Teaching

3. Strong emphasis is put on the practical side of a government lawyer's work. The lecturers are experts in their subjects and for the most part professors at the universities with practices in the international law field, or government legal advisers. The Director of Studies is Sir William Dale, who was himself Legal Adviser to the Commonwealth Office and later General Counsel to UNWRA, and has since done original work in the field of legislative drafting. There is an excellent library at the Institute, and participants are encouraged to do their own research there.

Management and Finance

4. The course is under the general management of the Institute, advised by a board presided over by the Legal Adviser to the Foreign and Commonwealth Office. The Overseas Development Administration provides financial support for the course, which counts as 'developmental' for aid purposes, by payment of the fees of applicants nominated and accepted for awards under the Technical Co-operation Training Programme. This fee, which covers tuition, residence, expenses of visits, a daily allowance and a book allowance, amounts at present to about £7,600. The residential arrangements and care of the participants are in the hands of the British Council.

Application for a training award

5. An applicant must possess a professional qualification, and intend to follow a career in the service of his Government. Application for a training award should be made by the Law Minister, or other appropriate Head of Department, to the department of government responsible for allocating available United Kingdom aid funds. The process of settling the aid programme begins early in the year. To help the department plan the use of funds, and to secure the best chance of obtaining an award, early application should therefore be made, by February if possible, one year before the course aimed for. Final application for a place is made by the government on Form A2, obtainable from the local representative of the British Council, or where there is none, from the British Diplomatic post.

Applications in respect of candidates to be financed from sources other than the British aid programme should be made direct to the Director of Studies at the Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR.

New Developments

6. The syllabus of the course is not static, and is revised every year to take account of new developments. For example, International Development Agreements and Arbitration, and Computers and the Law, are at present requiring and receiving particular attention. Course participants also attend conferences on current topics, for example in 1985 the meeting of government representatives at The Hague to revise the Convention on the Taking of Evidence Abroad and in 1986 the two-day conference between French and British drafting experts to discuss the drafting of statutes.

7. The Director of Studies is always glad to hear from Law Ministers with any suggestions they may have for improving the usefulness of the course.

THE FORMATION AND SUBSEQUENT PROGRESS OF THE COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

A memorandum by the Commonwealth Secretariat and a paper by Sir George Engle,
First Parliamentary Counsel, England and Wales and President of the
Commonwealth Association of Legislative Counsel

While the problems which have long been associated with the acute dearth of trained draftsmen throughout the Commonwealth have persisted, the subject of legislative drafting has continued to receive the attention it deserves at successive Law Ministers' Meetings.

2. It was doubtless in recognition of the importance Ministers attached to legislative drafting and the pivotal role played by legal systems in promoting economic and social advancement that they have, over the years, given strong support to the CFTC funded programme for the training of legislative draftsmen, in consequence of which some progress has been made in bridging the gap in the shortage of trained draftsmen.

3. It was therefore significant that at the beginning of the second decade of the inauguration of the CFTC training programme, which coincided with the Colombo Meeting in 1983, Ministers should have had placed before them a paper co-authored by two eminent draftsmen which, among other things, canvassed ways in which the training, career structure, and the retention of draftsmen might be enhanced. Ministers supported the early formation of "a Commonwealth Association of Parliamentary Counsel and Law Draftsmen", in the knowledge that such an association would promote co-operation among draftsmen themselves. They saw the association as a desirable extension of the non-governmental organisation concept already well developed and established in the Commonwealth over a wide spectrum of professional activities.

4. It was, too, hoped that the Association might help in relieving some of the pressures on the Legal Division of the Commonwealth Secretariat by servicing some of the more routine requests and needs of individual draftsmen throughout the Commonwealth, a function it will be well placed to perform through the valuable lines of communication which, it is gratifying to note, it has already established between its members in the short time of its existence.

5. Ministers may therefore wish not only to take the opportunity at the Meeting of wishing the Association success in its endeavours but may also wish to encourage their drafting staff to join the Association and to participate, to the fullest extent possible, in its activities.

Legal Division
Commonwealth Secretariat
June 1986

THE FORMATION AND SUBSEQUENT PROGRESS OF THE
COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

A paper by Sir George Engle, First Parliamentary Counsel, England and Wales
and President of the Commonwealth Association of Legislative Counsel

At their meeting in Colombo in February 1983 the Commonwealth Law Ministers passed a resolution supporting the formation of a Commonwealth Association of Parliamentary Counsel and Law Draftsmen and accepted the offer by Australia to act as headquarters for the Association and to provide editorial services for a regular newsletter for the Association. It was agreed that the proposed Association should, if possible, be launched at the 1983 Commonwealth Law Conference in Hong Kong; and arrangements to that end were initiated by the Attorney General of Hong Kong.

2. A draft constitution prepared by Mr G K Kolts QC (First Parliamentary Counsel, Commonwealth of Australia) with the assistance of the Commonwealth Secretariat was circulated to a number of other Drafting Offices for comment; and a revised version, embodying changes approved by the majority of those consulted, was adopted at an inaugural meeting of Commonwealth draftsmen held in Hong Kong on 21 September 1983 under the chairmanship of Mr G P Nazareth QC (as he then was).

3. The name agreed on was the Commonwealth Association of Legislative Counsel (giving the acronym "CALC"), and a seven-member Council was elected, consisting of a President (Sir George Engle of the United Kingdom), a Vice-President (Miss M Barnes of Trinidad and Tobago), a Secretary (Ms S Power of Australia), Mr G P Nazareth of Hong Kong and three other Council members from Africa, Asia and the Pacific respectively. At the first Council meeting it was decided to adopt a loophole as the logo of the Association; and ties and headscarves bearing this logo have since been produced and sold to members.

4. Membership has now grown to over 350 members. Some 80 different jurisdictions are represented. The Association has no funds, and there is no admission fee. All persons in the Commonwealth who are or have been engaged in legislative drafting or in the training of legislative drafters are eligible for membership.

5. The main activity of the Association has been to circulate newsletters designed to keep members informed of matters of interest to them in their capacity as legislative drafters. The first newsletter, and the letters to new members notifying them of their admission to membership, have all contained copies of the Constitution of CALC. The names of new members and, from time to time, complete membership lists have been supplied to members.

6. Attempts have been made to keep members informed of current drafting problems, such as the requirement imposed on some drafters by their Governments to draft legislation so as to avoid so-called "sexist" language. The developments in Australia concerning the use of extrinsic material in the interpretation of legislation were also canvassed. Another current problem raised was the increasing criticism that legislation is not written in "plain English".

7. Members were also informed in newsletters of the on-the-job training that was proposed to be undertaken by the various legislative drafting offices in Australia for drafters from developing countries. In 1986, such training will have been given to drafters from Zimbabwe, Tanzania, Tonga, Western Samoa and Vanuatu.

8. Notices have been published in the newsletters seeking the names of experienced drafters who would be interested in carrying out drafting assignments. There has been little response to these invitations. Only two persons have indicated their interest and only one of these has substantial legislative drafting experience.

9. Several requests were received by the Secretary for assistance in connection with miscellaneous matters related to drafting. The Chief Parliamentary Counsel in a jurisdiction in the Caribbean sought information about drug laws, particularly in relation to the Seizure and forfeiture of property acquired from drug trafficking. The Secretary was able to supply copies of some existing and proposed legislation relating to the confiscation of profits derived from drug offences.

10. A request was also received for assistance in the proof-reading of a reprint of the statutes of one jurisdiction. This request was notified in the newsletter, and there was a very good response from highly qualified people with some years of experience in legislative matters. As it turned out, the work was able to be performed within the jurisdiction concerned, but it was clear that the newsletter had been very effective in this matter. As a by-product of the notice, the jurisdiction seeking assistance was put in touch with another jurisdiction that was currently engaged in finalising its proof-reading for a supplement to its laws, and a useful exchange of ideas and information took place.

11. A further request for assistance was made by another jurisdiction in relation to the possibility of obtaining the services of an expert in connection with the possible conversion of the existing edition of the revised laws of the jurisdiction to a loose-leaf system. The services of a professional indexer were also sought. The request was notified in the newsletter, but the results of the notification are not known to me.

12. The Commonwealth Secretariat recently drew the Association's attention to the existence of several volunteer organisations that could assist in making the services of drafters available to developing countries. As a result, a list of these organisations is about to be published in a newsletter with a suggestion that -

- (a) any member wishing to undertake drafting work as a volunteer outside his or her own country should consider applying to any of these volunteer organisations that is based in that country; and
- (b) if a need for the services of a drafter arises in a Commonwealth country, CALC members in that country could alert their Government to the fact that a likely source of assistance exists in volunteer organisations based in other countries.

These volunteer organisations have resources available for funding this form of assistance.

13. In July 1983 there was published in the Commonwealth Law Bulletin an article by David Hull analysing the information obtained in response to a questionnaire sent to Commonwealth jurisdictions concerning the terms and conditions of service of legislative drafters. The questionnaire had been sent out by the Legal Division of the Commonwealth Secretariat before the establishment of CALC; but by the time David Hull's analysis appeared, CALC was on the scene and ready to profit from this extremely valuable survey of conditions throughout the Commonwealth which provides, so to speak, a satellite picture of the different ways in which drafting services are organised and rewarded in different jurisdictions. A newsletter subsequently drew attention to David Hull's article, and publicised the fact that off-prints could be obtained by CALC members from the Commonwealth Secretariat on request. It also set out the main conclusions reached by him with respect to "the continuing and substantial shortage of law draftsmen in developing countries" revealed by the survey.

14. In accordance with its constitution, the next general meeting of CALC will be held during the forthcoming Commonwealth Law Conference in Jamaica. On Wednesday 10 September,

the day of the Conference reserved for specialist meetings, there will be a full CALC programme comprising the following items:

- (i) **Electronic Aids in Legislation** - presentation by Canadian legislative drafters, followed by other contributions, a discussion, and a display of electronic equipment.
- (ii) **A CALC lunch** presided over by Mr Justice O.D. Marsh (First Parliamentary Counsel, Jamaica).
- (iii) **Statute law: Consolidation, Publication and the Keeping of Published Texts Up to Date** - contributions followed by a discussion.
- (iv) **General meeting of CALC.**

15. The association has maintained closed and cordial relations with the Legal Division of the Commonwealth Secretariat throughout the period since its formation in 1983. It has established valuable lines of communication between its members, and has given legislative drafters in different jurisdictions throughout the Commonwealth a sense of community as fellow-specialists within the legal profession.

THE CHALLENGE OF INTERNATIONAL WHITE COLLAR CRIME: THE NEED FOR IMMEDIATE CONCRETE COUNTER-MEASURES

Memorandum by the Government of Zambia

We find ourselves again discussing international crime and, in particular, the cancer of illicit trafficking in drugs and all the hardship and harm that this evil causes. Law Ministers have discussed these issues before and, I dare say, will have occasion to do so again. Let us hope, however, today that our words will not be 'chaff in the wind' but will see some result.

The Commonwealth has set its hand against economic crime and now recognises that today most economic crimes are simply a manifestation of or part of some other serious crime or abuse. The relationship between economic crime and certain types of organised crime are well known and well documented. Commonwealth Heads of Government meeting last November in Nassau emphasised the relationship between drug trafficking, economic crime and destabilisation. The vast amounts of money that are generated by serious crime are laundered and this very process often involves economic crime. This leads to the undermining and destabilising of the economic and social institutions of a state. Criminals also resort to economic crime to generate funds and investments necessary for the perpetration of other forms of crime such as drug trafficking and even terrorism.

The Commonwealth's initiative against economic crime is an important and indeed unique recognition of the problems and the responsibility of states in an interdependent world to stand together against a common evil. Sadly, our best intentions in taking the initiative and recognising the evil have not resulted in appropriate action to combat the situation.

Various Commonwealth Governments draw attention to the destabilising effects of economic crime in papers presented to the Law Ministers Meeting in Winnipeg, Canada in 1977. Ministers expressed grave concern about the extent and implications of serious international and organised commercial crime and the apparent inability of traditional law enforcement agencies and ICPO Interpol to satisfactorily combat these problems. They called upon the Commonwealth Secretary-General to initiate a Commonwealth programme. The common traditions, administrations, legislations etc. enjoyed by Commonwealth nations, which characterise this unusual Association, make the Commonwealth uniquely able to respond to the challenge. Out of diversity of experience comes strength! Law Ministers, receiving two reports on economic crime from the Chief Commonwealth Fraud Officer, Dr. Rider, at their meeting in Barbados in 1981, resolved that the Commonwealth Secretariat should take positive action as a matter of priority and urgency. Ministers specifically recognised the inadequacy of existing legal and investigatory procedures and called for the setting up of a commercial crime unit within the Secretariat to co-ordinate and assist Commonwealth efforts in the fight against these insidious criminals. The unique facet of this initiative is the clear recognition that prevention is better, more effective, and cheaper than cure.

As Law Ministers at Sri Lanka in 1983 we reviewed the working of this Unit - which had only consisted of a single officer. Impressed with the very positive results we stressed to the Secretariat - again as a matter of urgency and priority - that this facility should be strengthened and expanded, especially by allowing it to develop an effective loss prevention role through the creation and maintenance of a viable intelligence base. Again we recognised the threat facing all our nations and the need for urgent and effective preventative action.

Law Ministers outside our regular triannual meetings have also entreated the Secretariat to respond to our political concern. Law Ministers of the smaller Commonwealth states meeting in the Isle of Man in 1983 and more recently in Vanuatu in 1985 have asked the Secretariat to take a more meaningful stand and to properly resource the Unit. It was recognised that often the smaller jurisdictions are most susceptible to international criminals as transit points for contraband and to wash their dirty money. Ministers called upon the Secretariat to develop an effective intelligence base to monitor 'doubtful' off-shore and shell banking operations. No such development is yet apparent.

The plight of Small States and developing economies was noted in a report prepared by a special expert working party of the Secretariat on small States. Other Commonwealth forums have voiced the same concern. (For example, Commonwealth Ministers of Finance and participants of the Seventh Commonwealth Law Conference in Hong Kong). Outside the Commonwealth at meetings such as the General Assembly of ICPO - Interpol, the International Chambers of Commerce and UNCTAD, the Commonwealth's initiative in establishing the Commercial Crime Unit has been endorsed and commended.

Our Heads of Government have cast a heavy responsibility on us. In Nassau, recognising the serious dangers facing all of our countries, both developed and developing, from drug trafficking and the resultant vast profits, Law Ministers were instructed to devise a suitable strategy. We must not evade or avoid this as time is running out.

We must now examine the outcome of our concern in the past. We have spoken in terms of 'utmost priority' and 'grave concern' but what has been the response? Today the Commonwealth Crime Unit still only consists of two professional officers, an executive officer and a secretary. It operates on a very small budget which must substantially impede the services it can offer. It cannot possibly undertake to perform the obligations that we have thrust upon it. If we are serious we must see that our resolutions and recommendations are effectively implemented. The Secretariat must be financially enabled and then required to respond to the charges and obligations we place upon it.

It is said that money is finite and resources will never be sufficient. Of course this is true - we in Zambia know this as well as anyone in the third world. We have heard the same arguments rehearsed in the context of economic sanctions against racist regimes. However, there must come a time when priorities reflect the essential moral and social issues which bind us together as a Commonwealth - with a common heritage. The Secretariat has been told by us, and our Heads of Government, on several occasions, that we do regard these matters as warranting priority. Priority means what it says! If there are constraints to our resolutions - let us examine them to enable an effective response.

Perhaps we must contemplate institutional changes within the Secretariat. We wonder if it is appropriate for the Commercial Crime Unit to function as a 'fly caught in amber' within the Legal Division. Perhaps there could be a new Criminal Justice Division subsuming the functions of the Commercial Crime Unit, mutual assistance in criminal matters programme, forfeiture of property associated with serious crime and whatever initiative we take in regard to drugs. We would like to see this done - as a matter of urgency. We all know that in many organisations the problems are often ones of institutions rather than initiative. Let us provide a proper vehicle before we criticise the drivers.

I feel somewhat qualified to speak so bluntly with my brothers from Hong Kong, Singapore, Bermuda, Zimbabwe, Kenya and others. We have been the staunchest supporters of the Commonwealth's initiative against economic crime. Zambia has been one of the main clients of the Commercial Crime Unit and indeed has seconded a senior officer of its Special Investigation Team (Economy and Trade) to Marlborough House. This has resulted in our awareness of both sides of the problem. Furthermore, our recent experience in Zambia has convinced us of the size and seriousness of the problem.

In Zambia we have been fortunate in that we do not have a drug problem. The country has, however, been used for the transit of huge amounts of Methaqualone (Mandrax) in tablet form emanating in Europe and India for ultimate sale in South Africa. Recently Zambia has played a preventative and effective role in cutting this supply line but we have been severely hampered by the inability to identify and confiscate the very large sums of money accumulated overseas from the sales of these drugs. It has to be recognised by us all that drug traffickers must not continue to benefit from their nefarious activities. The President of Zambia, His Excellency Dr Kenneth Kaunda has a deep hatred for the evils that stem from drugs. It is within the capabilities and resolve of the Commonwealth to take positive and resolute action by the enactment of suitable legislation and it is at this meeting that I hope the first real steps will be taken.

Since our independence in Zambia there have been fifty seven separate attempts by spurious lending houses, banks and individuals offering large sums and aid for projects within Zambia. Again, we have been fortunate in preventing many of them from coming to fruition. This has been achieved through the actions of our combined Customs Officers, the Police Force and Special Investigation Team (Economy and Trade) with very great support from the Commercial Crime Unit.

It must be recognised that countries which enjoy a free economy can take the time to bring the economic offender to justice. In Zambia, however, and I am sure in order developing countries, the situation is immediate. We cannot afford to allow even one of these individuals to succeed. Therefore, we must be more diligent in so far as the prevention role is concerned as this, for us, is much more desirable than protracted investigation and prosecution.

Offences against the economic order of a developing country are sometimes viewed by countries enjoying free economy as no more than contraventions of domestic regulations. They are certainly not viewed in the same light as international crime but if, in Zambia for instance, we were to allow the uncontrolled outflow of hard currency from our country the results would be disastrous. It must be recognised that economic crime in the ultimate has a much more damaging and far reaching effect on a country like Zambia than the readily identifiable crimes of robbery, thefts, etc. Once again, prevention is better than cure.

In all the circumstances what are we to do? We have a new scheme for mutual assistance in criminal matters and we are in agreement that attacking the assets of organised and serious crime is an important weapon. We are also dedicated to strengthening the initiative against commercial crime. But we are also bound to initiate action against drug traffickers.. Let us build upon our successes. I propose three inter-related programmes orientated to the long, medium and short term.

LONG TERM

We must immediately consider developing within our own domestic jurisdictions laws and procedures for effectively combatting serious organised crime and especially illegal trafficking in drugs. These laws should provide for the tracing, identification and seizure of property which is directly or indirectly derived from such crime. Such legislation should also specifically be able to accommodate requests for assistance from other jurisdictions - this is an international problem and we need to maintain an international perspective.

MEDIUM TERM

We should immediately explore the ways in which existing procedures both domestically and internationally can be refined and improved. Of course, many Commonwealth countries are already doing this but this is a process which needs to be encouraged at a Commonwealth level. The Commonwealth Secretariat could play a vital role in co-ordinating information and providing advice in this regard.

SHORT TERM

The mandate of the Commercial Crime Unit should be specifically extended to the co-ordination of inquiries relating to the assets of organised crime. The Unit - more adequately resourced - could provide a vital and unique role in collating data and co-ordinating inquiries into the laundering of illicit funds. It has a special and proven expertise in the area and stands in a unique position to be able to do this. It cannot be left entirely to Police Agencies as such inquiries are often beyond the jurisdiction and competence of the Police (as we have clearly recognised before and stated in our communiques). Building on experience in other areas the Unit could, in appropriate cases, convene a 'task force' of officers from different relevant Commonwealth agencies on an ad hoc basis to pursue a particular operation. The Unit would provide an essential Secretariat and liaison function ensuring continuity and expertise. This has already been done in the field of economic crime and to apply the same approach to drug traffickers would be an immediate and positive step. The Unit could co-ordinate action against such assets using, when appropriate, whatever resources a particular jurisdiction has available - both in the civil and criminal law. In many cases it is possible to seize and forfeit such property through civil rather than criminal procedures.

Although perhaps contraversially, I would also raise the impending need for the Commonwealth to develop urgently a facility for monitoring any economic sanctions to be imposed against South Africa. We need to be ready for such a development. The Secretariat may be the obvious place to make a start through the Commercial Crime Unit.

Perhaps I have spoken too long - but what could be more important than the security and peace of our own nations. We are discussing matters which directly challenge the very institutions and ideals we as lawyers must stand and protect. We must not allow our words and resolutions to carry on unheeded. We are not alone in our resolve. Commonwealth Ministers of Finance meeting last year have similarly recognised the need for co-ordinated and effective Commonwealth action. We have now been bidden in clear terms by our Heads of Government. Let us not be found wanting.

If we are agreed that we fight these evils - let us today give specific instructions to the Secretariat for our resolutions to be implemented without delay.

The Law of Copyright and Computer Software

PROTECTION OF COMPUTER SOFTWARE

A paper prepared by Denis De Freitas, OBE, MA

In today's age of technology, with every day witnessing a new application, it is probably the computer, in all its manifold forms, which increasingly affects our daily lives to a greater extent than any other technological skill which human ingenuity has devised in this century. In the home, in the office, in the factory, in the shop, on the ground, in the air, and over the seas, the computer enables us to perform functions in a flash which formerly took an age or could not be performed at all. Like all brilliant advances the concept on which computer technology rests is simple: it processes information, which of course is what human judgement and reason has been doing for all time; but by combining the use of electricity and the electron with the simple logic of a binary system, the process takes place at the fastest speed known to man - i.e. the speed of light.

2. Whether a computerised system be large, such as those used for operating a worldwide system of air traffic seat reservations, or a miniaturised system controlling the functioning of a digital watch, the system consists of two parts - in the jargon of the technology, the hardware and the software. The hardware consists of the circuits through which the activating currents pass; the discs, the tapes and the other physical devices which hold or carry the information to be processed recorded thereon in the form of electro-magnetic impulses; and the peripheral equipment for presenting the results in a form perceivable by human beings, such as words, figures, symbols or pictures, displayed on a screen or printed on paper. The software consists of the instructions which cause the hardware to process information in such a way as to produce the desired result. In concept, the software is intangible, just as the command of a sergeant-major to his platoon is intangible, but to be effective the software must be expressed in some form which is readable by the hardware.

3. In relation to intellectual property law, computer technology gives rise to three important questions:

- (i) Where the information processed by a computer consists of a work protected by copyright, is the use of that work by the computer under the control of the copyright owner, and if not, should it be?
- (ii) Where a computer has been used to process information in such a way as to produce a work of a kind normally protected by copyright - for example, the processing of statistics so as to produce them in tabulated form designed to serve a particular purpose, or the use of a "synthesiser" to produce music - who is to be regarded as the "author", and hence the copyright owner, of the resulting literary or musical work?
- (iii) Is the software, often the product of great intellectual creativity (backed by considerable financial investment) protected against unauthorised use by others under any existing legal system such as patent law, copyright, breach of confidence, trade secrets, and so on; and if not, should it be, and if so, under what kind of system?

This memorandum addresses only question (iii); but for the sake of completeness the following two paragraphs contain a brief account of the answers to questions (i) and (ii).

4. For the last two decades all three questions have been the subject of extensive, and intensive, study both nationally and internationally; and there has been general agreement as to what the answers to questions (i) and (ii) should be. These studies have disclosed no significant dissent from the view that the use by means of a computer of a work protected by copyright should be subject to the control of the copyright owner and, more specifically, that the input of the work into a computer system resulting in its being held in the data base of the system for subsequent processing, should be an act restricted by copyright. This view forms part of the conclusions of a Committee of Governmental Experts from thirty states at a meeting convened by the World Intellectual Property Organisation (WIPO) and UNESCO in Paris in June 1982 to consider copyright problems arising from the use of computers for access to, or the creation of, works¹. In some countries the existing law of copyright is regarded as already providing the recommended protection; and in others specific amendments have been made to put beyond doubt that the protection exists. For example, in the United Kingdom the Committee under the chairmanship of Whitford J. appointed by the Government in 1974 to review the Law of Copyright and Designs, recommended that an appropriate amendment be made²; and in 1984 by the enactment of a Private Member's Bill, supported by the Government, provision was made that

"References in the Copyright Act 1956 to the reduction of any work to material form, or to the reproduction of any work in a material form, shall include references to the storage of that work in a computer."³

5. Question (ii) was also considered by the Committee of Governmental Experts at the meeting convened by WIPO and UNESCO in Paris in 1982, and their findings may be summarised as follows: no matter how sophisticated a computer may be, it is only a tool, and the author of a work produced by the aid of a computer is the person who conceived the product which the computer was used to bring into being, and who gave the programmer and the technician the instructions to take the steps necessary to bring about the result conceived by him. Neither the programmer who designed the program needed to operate the computer for the purpose of producing that work, nor the technician who operated the computer when carrying out the task, would be regarded as the author or a joint author; save that where the work of the programmer amounted to collaboration with the originating creative person to such an extent that the programmer contributed creatively in settling the form of the final product, he might be regarded as a co-author. From this analysis the Committee concluded that no change to either the copyright conventions or national laws appeared to be necessary. At the national level in the United Kingdom the question was addressed both by the Whitford Committee⁴ and by the Government in its 1986 White Paper -Intellectual Property and Innovation⁵, and the same conclusion - i.e. that no change in the law was necessary, was reached, though perhaps not quite by the same analytical reasoning on which the WIPO/UNESCO Committee based its conclusions.

6. Before examining question (iii) in detail, it may be helpful to emphasise, even at the cost of some repetition, the dimensions of the subject matter with which the question is concerned.

7. Today the computer is an indispensable tool in the life of modern society, whether it be an industrial or a developing country. It is vital to the efficient operation of industry; to the functioning of modern financial institutions - banking, insurance, stock exchanges; to the accounting, stock holding and market activities of commerce; to the production and distribution of newspapers, journals and books, including the provision of efficient library services; it is essential for the operation of railway systems and airlines. In addition to its indispensability to large scale operations, in miniaturised form through integrated circuits and micro-chips, the computer is an essential component in mini-calculators, word processors, video games, digital watches, automobiles, ovens, telephones, radios, television sets, washing machines, and a host of electronic and other

apparatus in every day use. In short, the computer in one form or another, is an integral part of virtually every section of the infrastructure of contemporary society.

8. Computers need programs to operate them; programs also come in myriad forms, but essentially they constitute a set of instructions devised by human beings capable of activating a computer so as to produce a desired result. In the Copyright Act 1976 (as amended) of the United States, a computer program is defined as

"... a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result."⁶

In Australia the statutory definition is somewhat more detailed but differs little in meaning from the US one

"Computer program means an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following:

a) conversion to another language, code, or notation;
b) reproductions in a different material form,
to cause a device having digital information processing capabilities to perform a particular function."⁷

9. The swift advance of the computer technology and its ever widening scale of application has led to an enormous, and growing, investment of resources, human and financial, in the production of computer programs. In the United Kingdom the Computing Services Association estimated that the annual revenue of its 216 members for 1984/85 was £1,149m, and the number of persons employed by the member companies totalled 34,147⁸. These statistics do not include the "in-house" computer departments of industrial and commercial companies. The United Kingdom Government Statistical Service estimated that the value of computer services production for trade by all firms for 1984 was £2,300m⁹. The diversity of computer programs is infinite. A program for a simple task may take only a few minutes to formulate and express in a suitable computer language; and its cost - and commercial value - will be correspondingly modest. But a program for the control of a complex commercial operation may require hundreds of man-hours of creative activity by systems analysts and programmers involving large financial investment. The programs for the computer system used for the clearance of incoming cargo at London Airport consist of 250,000 instructions in 800 separate modules, with associated documentation in 35 volumes held in 180 binders; the development cost of which exceeded £1m¹⁰.

10. There is universal agreement that those who have contributed intellectually, and those who have invested financially, in the production of this new form of human creativity, should be protected against the unauthorised and unfair use of their product by others. Although the case for protection is probably manifest, it should be stated. In the first place, it rests on common justice; just as society has recognised for centuries that if an author writes a book, and a publisher invests in producing and distributing copies, it cannot be fair that others, without the permission of either author or publisher, should reproduce that book and sell it for profit. Similarly with a computer program; it cannot be fair that the programmer who has devoted his professional time and talents in devising a program, or the business enterprise which has invested in employing or commissioning a programmer to produce a program, should be unable to control the use of it by others, or at very least, is not to be paid for such use. In the second place, and just as important, if not more so, talented individuals will not be attracted to the profession of programming, and business enterprises will be deterred from investing in the production and application of computer software, if they are not protected against unauthorised appropriation by others; with the end result that the public interest which benefits from the development and application of technology, will suffer.

11. For at least the last two decades this question of protecting computer software has been the subject of detailed examination and discussion in many countries and at many international meetings. The examination of this subject, principally organised by WIPO, sometimes in association with UNESCO, began effectively in 1970 and continued up to the present, involving governments as well as representatives and experts from the private sector; the principal meetings, and the relevant reports, are listed in Appendix 1 to this memorandum. By 1985 not only had a general consensus emerged that, subject to some qualification, protection should be given to computer software under the copyright system, but in a number of countries this view was being implemented in practice, either through judicial decisions or by specific legislative enactment. This consensus is recorded in the report of the meeting of a Group of Experts on the Copyright Aspects of the Protection of Computer Software, convened by UNESCO and WIPO in Geneva in February/March 1985. In addition to the nine experts invited by UNESCO/WIPO, those attending and participating in the meeting included representatives of 39 states, both industrial and developing; the representatives of 6 intergovernmental organisations; and observers representing 26 non-governmental organisations. The report of the meeting, together with the working document produced by the WIPO/UNESCO Secretariats for the meeting summarise the situation in almost all the countries where the computer/software industry is in a developed state, and the two documents can fairly be regarded as reflecting contemporary informed thought and opinion on this subject.¹¹ The following paragraphs of this memorandum present a brief account of the 1970-1985 studies; a summary of the consensus which had emerged by 1985, illustrated by examples from several countries; and a brief set of comments on the suitability of copyright for computer software protection.

The 1970-1985 Studies

12. Initially, the principal participants in these studies were almost exclusively from the computer industry itself, and more particularly from the hardware section. For this reason, perhaps, the discussions focused at first on the possible application of patent protection, with which the computer hardware industry would be familiar, and the possibility of copyright protection did not initially receive detailed consideration.

13. Prima facie, there are attractions in the idea of protecting computer software by the grant of a patent. A patent gives its proprietor a monopoly: the exclusive right, for a limited period of years, to use his invention; it is a property right and, like other forms of property, may be sold, licensed, mortgaged or given away; and the proprietor may attach whatever terms he chooses to any of these transactions so that, during the life of the patent, he may exploit it commercially and thus generate income and capital. At the end of the life of the patent, the invention falls into the public domain and anyone is free to use it. In Abraham Lincoln's words - "The patent system added the fuel of interest to the fire of genius".

14. Although there is no worldwide patent treaty, similar to the Berne Union or the Universal Copyright Convention, creating a more or less harmonised network of national laws with standard provisions, there are three principles which are common to most systems. To be patentable, an invention must normally satisfy three criteria -

- (i) novelty
- (ii) inventiveness
- (iii) capability of industrial application

Illustrating these criteria by reference to the current law of the United Kingdom, the Patent Act 1977 (which was drafted so as to conform to the European Patent Convention), "novelty" means, under s.2(1), that the invention does not form part of the "state of the art" which in turn is defined in s.2(2) "to be all matter which has at any time before the priority date been made available to the public either in the United Kingdom or elsewhere". Thus a program

seeking patent protection would have to be tested for novelty against all products, processes, information about products or processes, and anything else that has been made available to the public anywhere in the world either orally or in writing. In practice, most programs would fail this test because, no matter how clever or sophisticated they might be, they would normally not be new but would be regarded as simply applying existing technical knowledge. Moreover, the administrative work required of the Patent Office in examining the application to ensure that it met this criterion, would be considerable involving costs and delays that would be unacceptable.

15. The "inventiveness" criterion is defined by s.3 of the United Kingdom Act, as a step which is not obvious to persons skilled in the art. Thus, a program seeking patent protection would be judged by asking the question whether a computer scientist or programmer skilled in the art of programming and with access to all the existing literature and information, would regard the design of the program as obvious or not; and it is apparently the view of those who are knowledgeable about the art of computer programming that "the great majority of programs contain nothing but obvious steps that would occur to any programmer skilled in the art"¹².

16. The third criterion is that the program be capable of industrial application, which by s.4 of the United Kingdom Act means that it shall be capable of use in any kind of industry, including agriculture. Whether "and kind of industry" includes commerce generally - e.g. creating the software for presenting a video game - is not entirely clear, but it is thought that the term "industrial" would be given a wide interpretation by the courts.

17. Although computer programs might generally meet the third criterion, it seems clear that few if any would satisfy the other two. In the United Kingdom, and indeed in Europe, the matter goes further than the mere inherent ineligibility of software programs for patent protection. The Report of the Banks Committee in 1970¹³, which led to the enactment of the Patent Act 1977, made an unequivocal recommendation that a computer program should not be patentable in whatever form the invention is presented. Moreover, in Guidelines for the Examination of European Patents, issued pursuant to the European Patent Convention, there is a section dealing with "programs for computers" which, in effect, virtually excludes computer programs from patentability.

18. In addition to the considerations of impracticability and ineligibility described in the preceeding paragraphs, the procedure for seeking and granting a patent involves public disclosure which, in practice, has serious disadvantages. Once the details of a computer program are disclosed, before it has been clothed with protection, it is difficult to ensure that unauthorised use is not made of it.

19. During the 1970-1985 period, consideration was also given to the possibility of protecting computer software under the legal principles relating to breach of confidence and trade secrets. These related areas of law are not, to any significant extent, contained in statute, but have been developed by judicial decision, and the resulting jurisprudence may vary from country to country, or at least between groups of countries with different legal traditions. However, so far as the Commonwealth is concerned, it may be helpful to give a brief outline of the principles which appear to have been established in the United Kingdom. The underlying basic principle is that in certain circumstances, a person may bring an action for breach of confidence so as to restrain another person from using or disclosing information, or for damages where the offending use or disclosure has already taken place.

20. Where there is a confidential relationship between the parties the matter can be regulated by appropriate terms in the contract. Moreover, certain relationships carry implied terms imposing on the parties duties of confidentiality. Perhaps the most obvious case would be the relationship of employer and employee - e.g. the contract between a

software house and its employed systems analysts and programmers. Such a contract may, indeed, be adequately effective as between the parties, but the problem arises when the material, be it "know how", scientific data or details of a software package, comes into the hands of a person who is not a party to a contract with the person whose interests are at stake. It does, however, seem to be accepted law now that third parties may be subject to breach of confidence actions provided certain conditions exist. These are set out in a helpful analysis of the law in the judgment of Megarry J. in Coco v A.N. Clark (Engineers) Limited, (1969) RPC 41.

21. The first requirement is that the information or material must be confidential or, to use the term more commonly used in the United States, "a trade secret". There is no accepted definition of what, for the purposes of an action for breach of confidence, would be regarded as "confidential information"; the only guide is a negative one, that information which has already been disclosed to the public cannot be confidential. Consequently, a computer program which has been described in an article or a text book could not be protected against commercial exploitation under the principle of breach of confidence.

22. The second condition required to found an action for breach of confidence is that the defendant must have received the material under circumstances which clearly imported an obligation of confidence. Again, there is no established set of guidelines for determining whether such circumstances exist in any given case. The relationship between the parties would obviously be relevant; thus, as between employer and employee, or between principal and agent, information received by the latter in each case from the former relating to the former's business, would be regarded as having been imparted under a seal of confidence.

23. The third requirement is that the defendant has without the plaintiff's permission disclosed or used the confidential information, or there is evidence that he is about to do so.

24. While there is a body of case law demonstrating that actions for breach of confidence in respect of the unauthorised disclosure or use of confidential information or material have been successfully brought, the availability of the action in any given case may be difficult to determine with certainty; and this difficulty is aggravated when the offending act has taken place, or is threatened to take place, in a foreign jurisdiction. But quite apart from these shortcomings of this method of protecting those who have an interest in a computer program, the principal defect is probably that it is simply a negative or preventative form of protection; that is to say, it does not give the person who produced the program property rights as do the patent and copyright systems. The conclusion is, therefore, that a breach of confidence action is a useful supplementary measure available to producers of software, but it is inadequate as the principal means for protecting the legitimate interests of the producers of computer programs. Moreover, the protection of computer software by breach of confidence rules, or by specific contractual terms which treat it as a trade secret, approaches the problem in the wrong way. It is generally in the public interest that there should be as much disclosure as possible of information, consistent with the safeguarding of legitimate interests. This is best achieved by clothing software with a copyright-type of protection which does not need to rely on secrecy for its efficacy.

25. The considerations briefly outlined in the preceding paragraphs are more fully discussed and described in the reports of the First and Second Sessions of a Advisory Group of Non-Governmental Experts on the Protection of Computer Programs, organised by WIPO, which took place in Geneva in June 1974 and in June 1975¹⁴, and also in the introductory commentary accompanying the Model Provisions on the Protection of Computer Software published by WIPO in 1978¹⁹.

A Summary of the Conclusions by 1985

26. By 1985 the national and international studies of the need, and suitable measures, for protecting computer programs, had resulted in a general consensus which may be summarised in the following way:

- (i) there was a need, which became more urgent each year, for effective protection of computer programs;
- (ii) there was universal agreement that patent protection was not appropriate, and, in most cases, was expressly inapplicable under the terms of the relevant treaties and national laws;
- (iii) while there was a body of opinion, held both by a number of governments as well as the secretariats of WIPO and UNESCO, that the special characteristics and needs of computer programs required a sui generis form of protection, the time which would be needed to establish a new international convention for this purpose and to draft and enact national laws, made this approach an impracticable one;
- (iv) the only existing system which was currently available to provide the protection needed was the copyright system; and many countries had adopted this solution either by court decision or by specific amendments to the national copyright law.

27. The considerations which led to the general adoption of the copyright solution to the problem of providing protection for computer programs may be summarised as follows:

- (i) The copyright system existed in almost all countries of the world and, through the membership by the majority of those countries, in either one or both of the two copyright conventions - Berne and the Universal Copyright Convention - there would be a large measure of uniformity of treatment within the network of national copyright legislation.
- (ii) Although there has not emerged any general agreement that the expression "literary and artistic works" in the Berne Convention unequivocally includes computer programs, with the consequence that member states would be required to apply their copyright laws to computer programs, it appears to be accepted that the expression is flexible enough to permit a member state to treat computer programs as included if it decides, as a matter of policy, to do so. Thus, the United Kingdom, by providing by legislation that a computer program is to be treated as a literary work appears, by implication, to treat programs as within the ambit of the Convention; whereas France, by applying a regime of protection to programs which, in some respects, is not in accordance with Berne rules, appears to treat a program as not being within the Berne expression "literary and artistic works" (see para. 30(vi) below).
- (iii) More specifically, courts (for example, in Australia, Canada and the United Kingdom, as well as in a number of non-Commonwealth countries), had specifically ruled that a computer program was a form of "literary work" and entitled to protection under national copyright law as such.
- (iv) With one possible exception (see para. 28(v) below), the ambit of protection given to a work protected by copyright, was regarded as adequate to safeguard

the interests of those who produced computer programs; and this was the view generally held, and powerfully advanced, by the computer software industry itself.

- (v) Because of the world-wide membership of one, or both, of the copyright conventions, not only would a large measure of standard treatment be achieved through the copyright system, but programs originating in a country which is a convention member would be automatically entitled to protection throughout the other states belonging to the convention; subject to the reservations mentioned in sub-para.(ii) above.

Appendix II contains a list of Commonwealth countries where it is known that copyright protection has been given to computer programs.

The Suitability of the Copyright System for Protecting Software

28. Notwithstanding the general agreement to use copyright for protecting computer programs, the copyright system does not appear in all respects to be entirely suitable for this purpose. First, there is a conceptual difficulty. A computer program is undoubtedly an example of intellectual creativity involving, very often, a high level of intelligence and imagination which, it may be argued, is equally characteristic of literature, music and art - the traditional subject matter of copyright protection. But there is a fundamental distinction between a computer program and the traditional categories of copyright protected works. Literary, dramatic, musical and artistic works are all forms of communication between one human being and another human being conveying information or ideas; a computer program is not a communication between two persons but an instruction from one human being directed to an electronic machine so that it activates the machine to carry out a desired function. The practical significance of this distinction will become apparent when some of the other features of copyright are considered in relation to computer programs.

- (i) The Term of Protection

Under the Berne Convention the minimum term of protection (subject to exceptions in one or two special cases, such as photographs) is the life of the author plus 50 years; which in practice may mean that a work is protected for 100 years or more from the date when it was created; and, under some laws¹⁶ where a work has not been released to the public before an author's death, it remains protected until the end of 50 years after the date of first release - which in effect means perpetual protection for unpublished works. In the computer field, most programs are out of date within 10 years or less; and the concept of "classics" common to literary works, music and drama, has no relevance to software. Many experts consider, therefore, that it is inappropriate for a computer program to be protected for such a long period and that 25 years from the date of its first practical application would be adequate.

- (ii) Droit Moral

This is the right, established by Article 6 bis of the Berne Convention in the following terms:

"Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."

As computer programs are usually written with a particular functional objective, it would seem inappropriate that the author (ie. the programmer) should be able to invoke his moral rights so as to prevent a modification of his program in order to improve its efficient application. There is a view, therefore, that the unqualified operation of the author's moral rights in relation to computer programs is inappropriate.

(iii) Fair Dealing

This is the concept, in the United States known as "fair use", that there are certain situations where it would be "fair" for a work to be used without the necessity for obtaining the copyright owner's permission. The specific cases where this concept may be invoked vary somewhat from country to country but many national laws contain provisions that fair dealing with a literary, dramatic or musical work is permitted if it is for purposes of "research or private study", "criticism or review", or "reporting current events"¹⁵. There are no statutory definitions of "fair dealing" and little clear judicial guidance, so that the copyright owner and user are always uncertain what their respective rights are. In the case of computer programs produced by one software house, the use by a competing house of the program for "research" could be commercially prejudicial to the producer of the program; and it seems desirable that the law should be clear that the fair use exception should not apply to such situations.

(iv) Ownership

One of the general principles of copyright is that the ownership of a work protected by copyright vests initially in the author. In some countries there are exceptions to this general principle; for example, in certain cases copyright vests initially not in the author himself but in the employer of the author, or in the person who commissions an author¹⁷. Authors universally object to these exceptions, and they are not usually found in the laws of countries other than the United Kingdom, the United States, and certain Commonwealth countries which have modelled their laws on United Kingdom legislation. In the case of computer software, however, a high proportion of programs will be produced by employed programmers for specific functional objectives set by their employers; and in these cases it does not seem unreasonable that, in the absence of agreement to the contrary, the program should belong to the employer. But the incorporation in the general provisions of copyright law of such exceptions would set a precedent which could be prejudicial to authors of the traditional categories of works protected by copyright.

(v) Ambit of Control

The extent of the control which copyright gives to the author or his assignee covers:

- (a) the reproduction of the work, ie. the making of copies, which may take the form of written or printed copies, or audio or visual copies on discs, tape, or film or other carriers;
- (b) publishing the work - ie. issuing copies to the public;
- (c) performing the work in public;
- (d) communicating the work to the public, either by wireless means (ie. radio or television broadcasting), or by transmission via cable systems;
- (e) making an adaptation of the work - ie. a translation, or the conversion of a play into a film, or the arrangement of a musical work.

It is another basic principle of copyright that the system does not prevent the use of ideas; it protects the form of expression by which an author

expresses his ideas, but not the ideas themselves. Thus, the author of a book of recipes may prevent anyone from making copies of his book, but not from using the recipes in it; and the ambit of control which the copyright system gives to the copyright owner is consistent with this basic principle. But in the case of a computer program, it is precisely its unauthorised "use" which requires protection and which, without specific modification, the copyright system does not expressly provide under the prescribed code of control described above.

29. The drafting and enactment of a comprehensive new intellectual property code, providing up-to-date copyright protection for all categories of works and other subject matter protected under the copyright and neighbouring right system, with a special code of protection for computer programs, inevitably requires the allocation by government of considerable resources, and would take considerable time - measured in years rather than months - to carry out. It is therefore understandable, and acceptable, as a stop-gap measure in order to provide the protection which is urgently needed, to apply existing copyright law by, for example, simply declaring computer programs to be a form of literary work; as has been done in Australia and in the United Kingdom. It is to be noted that in the case of Australia the Government expressly declared that the measure did not necessarily represent the Government's final decision on what was the best method to protect computer programs. Also as mentioned in para. 8 above, the Australian amending Act contains a definition of a computer program, as well as a special exception permitting the making of "back-up copies"; neither of which are in the United Kingdom Copyright (Computer Software) Amendment Act 1985. In the United Kingdom a comprehensive new copyright law is being prepared by the Government for introduction into Parliament in the late autumn of this year, and it had been hoped in most copyright circles that the opportunity would be taken to deal with computer programs by a special code carefully designed to meet the special characteristics and needs of this new form of human creativity, but the Government has apparently decided to perpetuate the simple treatment given by the Copyright (Computer Software) Amendment Act 1985 (see Chapter 9.5 of the 1986 White Paper).

30. The Australian and United Kingdom approach may be contrasted with that adopted by the French Government. In July 1985 a major copyright Act was passed in France supplementing the principal copyright law, the Act of 1957, by adopting new provisions on a range of matters, including in particular a special code of provisions governing the application of the copyright law to computer software. The salient features of this code are:

- (i) the period of protection for computer programs is 25 years from the date of the creation of the program;
- (ii) subject to an agreement to the contrary, when an author has assigned rights in software created by him, he may not exercise his moral rights subsequently so as to prohibit adaptation within the limits of the rights he has assigned, nor may he exercise any right to revise the program;
- (iii) the author's rights in a computer program include not only control over the specific rights such as reproduction, but over "any use" of the program;
- (iv) save for the making of a "back-up copy" by someone who has lawfully acquired access to a program, there appears to be no "fair dealing" exception to the copyright owner's right of control;
- (v) where a computer program is created by an employee in the exercise of the duties of his employer, the copyright in the program belongs to the employer unless otherwise provided by contract;

- (vi) the special protection in the code for computer programs created by French authors is extended to computer programs by foreign authors on the basis of reciprocity - ie. on condition that the law of the country of which the foreigner is a national or resident provides protection for the software created by the French nationals and residents; but this rule is expressly stipulated to be "subject to the international conventions". The effect of this proviso is unclear; as the duration of protection provided in these new provisions is less than that required by the Berne Convention, of which France is a member, it would appear that the French view is that the Berne Convention does not apply to computer software, and France is therefore free to adopt a special code of protection not necessarily in accordance with Berne rules.¹⁸

31. It is perhaps too soon to judge how well these provisions will work in practice. One initial comment is that it may prove to be difficult to establish the date of the creation of a program. Subject to these reservations, the code, especially tailored for computer software, seems a sensible package; and it is, in the writer's view, unfortunate that the United Kingdom Government has apparently decided not to provide protection for this most important category of intellectual property on similar lines.

32. The high technology of the 20th century is based upon more and more sophisticated use of computers. Countries with high technology industries are increasingly concerned about the security of, inter alia, the computer software needed for the use of technology when it is made available to other countries. Any country, particularly developing countries, wishing to establish or improve its industrial, commercial and communications infrastructure, must make use of modern computer technology, but will be hampered in attempts to do so if it does not provide adequate protection for computer programs.

33. It should therefore be a matter of high priority for the Government in each Commonwealth country to examine its intellectual property legislation and ensure that computer programs are adequately protected, and while the simple solution adopted in the United Kingdom must obviously be carefully considered, it would be prudent to examine also the specially designed solution adopted in France.

34. It may be of interest to mention that as a result of the reservations regarding the suitability of copyright protection voiced in a number of quarters during the 1970-1985 studies, the Secretariat of WIPO prepared a draft treaty for the special purpose of providing protection for computer programs on an international basis; and Appendix III reproduces the draft. Moreover, in 1978 WIPO published a set of model provisions for national legislation on the protection of computer programs¹⁹. However, for the reasons explained in para. 26(iii) above, these initiatives were not pursued.

35. This discussion paper has dealt with the protection of computer software in the form of a program as described and defined in para. 8 above. But the technology races ahead, and by 1985-1986 a new computer application has emerged - the integrated circuit or semiconductor chip. In the words of a draft directive issued in 1985 by the Commission of the European Economic Community

"Integrated circuits and similar semiconductor products are formed from semiconducting, conducting and insulating material. These combine to form the transistors, diodes and other components required to make up an electronic circuit. The configuration of the various layers of an integrated circuit can be determined in several different ways, for example, by directing a pattern of light on to a photosensitive surface, which then permits specific areas of semiconductor material to be removed, and by "doping" the material with other substances. The pattern of light

is frequently determined by the use of masks which act much in the same way as stencils. Other examples of techniques in current use include direct writing with an electronic beam on semiconductor material.

Integrated circuits are playing an increasingly important role not only in the electronics industry itself, but in a broad range of industrial sectors from motor vehicles to machine tools. High levels of investment are required to develop new, improved integrated circuits, particularly those of a more complex kind. At the same time, a circuit can be copied at a fraction of the cost of developing it from scratch. These copied products can significantly reduce the return on the investment made by the original developer and consequently adversely affect his ability to continue to invest in innovation designs.

The legal protection available to the developer of new integrated circuits is in many cases far from clear. The degree of inventiveness to secure a patent may well be absent. Copyright or design protection seems not to be available in most jurisdictions both within and outside the Community, though copyright protection does appear to be available in at least the United Kingdom and Ireland and possibly also the Netherlands."

The text of the entire directive, including an explanatory memorandum, is reproduced in Appendix IV.

36. It would overburden this discussion paper to include in it an examination of the need for protecting this new manifestation of human ingenuity; but its importance is undoubted and a government would be failing in its duty if it did not address the question; so far the only country which has specifically legislated in this field is the United States, but the fact that it has done so, and the speed with which it has enacted legislation (by contrast with the inordinate gestation period which preceded the enactment of the 1976 Copyright Act) is an indication of the importance attributed in the United States to this matter. Appendix V contains the text of the US law; and this paper ends with two brief observations on this law. It is perhaps noteworthy that the protection devised in the United States for this new form of intellectual property has been established outside the copyright system; and secondly, that the provisions in the law under which protection may be extended to foreign integrated circuits and microchips is based on the principle of reciprocity, underlining the United States' concern that in this field an international umbrella of protection needs to be brought into existence.

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12. Legal Protection of Computer Programs, p.29 (10.supra).
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Canada - Copyright Act - Revised Statutes, ch. 32, s.17(2)(a)
Ghana - Copyright Act 1985, s.18.
India - Copyright Act 1957, s.52(1)(a)(b).
Trinidad and Tobago - Copyright Act 1985, s.35(2)(a)(b)(c).
United Kingdom - Copyright Act 1956, s.6(1)(2)(3).
U.S.A. - Title 17 of the United States Code - Copyright s.201(b).
16. For example -
Australia - Copyright Act 1968, s.33(3).
Canada - Copyright Act - Revised Statutes, ch.32, s.6.
India - Copyright Act 1957, s.24.
Trinidad and Tobago - Copyright Act 1985, s.9(a).
United Kingdom - Copyright Act 1956, s.2(3) proviso.

17. For example -
Australia - Copyright Act 1968, s.35(4)(5)(6).
Canada - Copyright Act - Revised Statutes, ch.32, s.12(2)(3).
Ghana - Copyright Act 1985, s.7.
India - Copyright Act 1957, s.17 Provisos (a)(b)(c).
United Kingdom - Copyright Act 1956, s.4(2)(3)(4).
U.S.A. - Title 17 of the United States Code - Copyright s.201(b)
18. France - Law on Author's Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises (no. 85-660 of 3 July 1985) - see article 2, para.v, and articles 45-51. The law in English is published in the WIPO Journal "Copyright", October 1985, p.326.
19. Model Provisions on the Protection of Computer Software - a WIPO publication No.814(E).

APPENDIX I

Principal International Meetings Concerning the Protection of Computer Programs

Convened By	Description of Meeting	Venue and Date	Report/ Document Reference	Issue of WIPO Journal "Copyright" in which report is published
WIPO	Advisory Group of Governmental Experts on the Protection of Computer Programs	Geneva 8-12/03/71	Report dated 12/03/71 AGCP 6.	1971 March, p.35
WIPO	Advisory Group of Non-Governmental Experts on the Protection of Computer Programs - First Session	Geneva 17-20/06/74	Report dated 14/07/75 AGCP/NGO/9	1974 September, p.226
WIPO	Second Session	Geneva 23-27/06/75	Report dated 14/07/75 AGCP/NGO/II/11	1975 September, p.183
WIPO	Third Session	Geneva 17-21/05/76	Report dated 21/05/76 AGCP/NGO/III/7	1976 July-August, p.16
WIPO	Fourth Session	Geneva 1-3/06/77	Report dated 7/06/77 AGCO/NGO/IV/7	1977 October, p.271
UNESCO/WIPO	Working Group on Copyright Problems Arising from the Use of Computers	Geneva 28-31/05/79	(a) Report dated 1/06/79 UNESCO/WIPO/GTO/8 (b) Report prepared for the meeting by Prof. Ulman - UNESCO/WIPO/GTO/2	1979 July-August, p.18
WIPO	Expert Group on the Legal Protection of Computer Software - First Session	Geneva 27-30/11/79	(a) Report dated 30/11/79 - LPSC/1/4 (b) Report by WIPO to the meeting - LPCS/1/2	1980 January, p.36
UNESCO/WIPO	Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works	Paris 15-19/12/80	Report dated 20/02/81 UNESCO/WIPO/CEGO/I/7	1981 March, p.73

UNESCO/WIPO	Second Committee - as above	Paris 7-11/06/82	Report dated 13/08/82 UNESCO/WIPO/CEGO/II/7	1982 September, p.239
WIPO	Committee of Experts on the Legal Protection of Computer Software	Geneva 13-17/06/83	Report dated 17/06/83 LPCS/II/6	1983 September, p.271
WIPO	Working Group on Technical Questions Relating to the Legal Protection of Computer Software	Canberra 2-6/04/84	Report dated 30/04/84 LPCS/WGTQ/1/3	
UNESCO/WIPO	Group of Experts on the Copyright Aspects of the Protection of Computer Software	Geneva 25/02/85 - 01/03/85	(a) Report dated 8/03/85 UNESCO/WIPO/GE/CCS3 (b) Working Document prepared for meeting UNESCO/WIPO/GE/CCS/2	1985 April, p.146

APPENDIX II

Commonwealth Countries Which Expressly Protect Computer Programs Under Copyright Law

1. Australia The Copyright Amendment Act 1984, (No. 43 of 1984).
See also judgment of Federal Court of Australia for New South Wales in Apple Computer Inc v Computer Edge Pty Ltd, 29 May 1984.
2. Canada Judgment of Federal Court of Canada in Toronto in International Business Machines Corp v Ordinateurs Spirales Inc, 26 June 1984.
See also Recommendation 58 of the Sub-Committee of the Standing Committee of the House of Commons on Communications and Culture in its Report dated 10 October 1985 entitled "A Charter of Rights for Creators".
3. India The Copyright (Amendment) Act 1984 - s.2(c).
4. Trinidad & Tobago The Copyright Act 1985 - s.3(1) definitions of "computer software" and "literary work".
5. United Kingdom The Copyright (Computer Software) Amendment Act 1985 - sections 1 and 3.
See also judgments in Sega Enterprises Ltd v Richards and Another, 1983 Fleet Street Reports 73 ; Thrustcode Limited and Another v W W Computing Limited, 1983 Fleet Street Reports 502.

NB

- (1) Singapore: a Bill for a comprehensive new Copyright Act introduced in Parliament on 25 March 1985, protects a computer program as a form of literary work - see clause 7(1).
- (2) It is probable that in other Commonwealth countries, especially those where the United Kingdom Copyright Acts 1911 or 1956 are still in force, computer software would be regarded by the courts as a form of literary work, following the decisions in the Sega Enterprises and Thrustcode Computing cases in the United Kingdom.

APPENDIX III

DRAFT TREATY FOR THE PROTECTION OF COMPUTER SOFTWARE

Article 1 Definitions

For the purposes of this Treaty

- (i) "computer program" means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result;
- (ii) "program description" means a complete procedural presentation in verbal, schematic or other form, in sufficient detail to determine a set of instructions constituting a corresponding computer program;
- (iii) "supporting material" means any material, other than a computer program or a program description, created for aiding the understanding or application of a computer program, for example problem descriptions and user instructions;
- (iv) "computer software" means any or several of the items referred to in (i) to (iii);
- (v) "proprietor" means the natural person who created the computer software or any other proprietor of the rights in the computer software in accordance with the applicable national law;
- (vi) "Contracting States" means the States party to this Treaty;
- (vii) "Organisation" means the World Intellectual Property Organisation;
- (viii) "Director General" means the Director General of the Organisation.

Explanatory Notes on Article 1:

- a. Items (i) to (iv) define the protected subject matter: "computer program", "program description", "supporting material" and "computer software". These definitions are the same as those appearing in the Model Provisions.
- b. Item (v) defines the term "proprietor". This definition is necessary in order to determine the person who is entitled to the protection and whose authorisation in respect of certain acts is

relevant to establish whether the act is lawful or unlawful. It differs from the definition contained in Sections 1(v) and 2 of the Model Provisions. The definition of proprietor in the Model Provisions consists of two parts: first, it deals with the case where the software was created by a person who was not under any contractual obligation and, therefore, belongs to the creator; second, it deals with the case where the software belongs to the employer if it was created by an employee in the course of the performance of his duties and if the employment contract does not provide otherwise. For the purposes of the Treaty, such a provision could create difficulties in view of the differences between national laws as to the question in whom the right should originally rest where inventions or other creations are made by employees. It is, therefore, deemed preferable to leave this question to the "applicable national law".

- c. Items (vi) to (viii) contain general definitions which follow the practice established for treaties concluded under the auspices of WIPO.

Article 2 Principle of Protection

- (1) The Contracting States undertake to ensure that computer software is protected on their respective territories in conformity with the provisions of this Treaty.
- (2) Subject to Article 6, the provisions of this Treaty shall not affect any more extensive protection provided for in national laws or in other international treaties.

Explanatory Note on Article 2:

This Article introduces a basic principle according to which the Contracting States are obliged to protect computer software in conformity with the provisions of the Treaty (paragraph(1)), without excluding a more extensive protection under national laws and other international treaties (paragraph (2)). The latter provision has been included in order to safeguard, in particular, more extensive protection that might possibly result from the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Berne Convention").

Article 3 National Treatment

Each Contracting State shall grant to nationals or residents of other Contracting States the same protection that it grants to its own nationals with respect to computer software.

Explanatory Note on Article 3:

This Article provides that Contracting States must grant national treatment in respect of the protection of computer software, whatever the form of such protection may be.

Article 4 Protection Against Unlawful Acts

(1) Subject to paragraph (3), the Contracting States undertake to grant protection to computer software against the following acts:

(i) disclosing the computer software or facilitating its disclosure to any person before it is made accessible to the public with the consent of the proprietor;

(ii) allowing or facilitating access by any person to any object storing or reproducing the computer software, before the computer software is made accessible to the public with the consent of the proprietor;

(iii) copying by any means or in any form the computer software;

(iv) using the computer program to produce the same or a substantially similar computer program or a program description of the computer program or of a substantially similar computer program;

(v) Using the program description to produce the same or a substantially similar program description or to produce a corresponding computer program;

(vi) using the computer program or a computer program produced as described in (iii), (iv) or (v) to control the operation of a machine having information-processing capabilities, or storing it in such a machine;

(vii) offering or stocking for the purpose of sale, hire or license, selling, importing, exporting, leasing or licensing the computer software or computer software produced as described in (iii), (iv) or (v);

(viii) doing any of the acts described in (vii) in respect of objects storing or reproducing the computer software or computer software produced as described in (iii), (iv) or (v).

(2) Paragraph (1) does not apply in respect of any act which has been authorized by the proprietor.

Explanatory Note on Article 4:

Items (i) to (viii) list and define the acts against which the Contracting States are obliged to grant protection under the Treaty. Such acts are those referred to in Section 5 of the Model Provisions. If the

opinion in one of the replies to the questionnaire is followed, the provisions contained in (i) and (ii) could be omitted.

Article 5

Duration

The protection under Article 4 shall begin at the time when the computer software was created and shall continue at least until the expiration of 20 years calculated from the earlier of the following dates:

(i) the date when the computer program is, for purposes other than study, trial or research, first used in any country in controlling the operation of a machine having information-processing capabilities, by the proprietor or with his consent;

(ii) the date when the computer software is first sold, leased or licensed in any country or offered for those purposes.

Explanatory Note on Article 5:

This Article is based on the provisions of Section 7 of the Model Provisions. It provides that the protection starts at the time of the creation of the computer software and continues at least until the expiration of 20 years calculated from the earlier of the dates specified in items (i) and (ii).

Article 6

Use of Computer Software Effected on Land Vehicles, Vessels, Aircraft or Spacecraft

No Contracting State shall apply the provisions of Article 4(1)(vi) where the use of computer software is effected on a foreign land vehicle, vessel, aircraft or spacecraft, as long as that land vehicle, vessel, aircraft or spacecraft is temporarily or accidentally in that State's territory, waters or airspace.

Explanatory Note on Article 6:

This provision is based on the principle laid down in Article 5ter of the Paris Convention for the Protection of Industrial Property.

Article 7
Revision of the Treaty

(1) This Treaty may be revised from time to time by a Conference of the Contracting States.

(2) The convocation of any revision conference shall be decided by the General Assembly of the Organisation.

Explanatory Note on Article 7:

This Article follows the established practice for revision of treaties concluded under the auspices of WIPO.

Article 8
Becoming Party to the Treaty

(1) Any State member of the Organisation or of the United Nations may become party to this Treaty by:

(i) signature followed by the deposit of an instrument of ratification or

(ii) deposit of an instrument of accession.

(2) Instruments of ratification or accession shall be deposited with the Director General.

Explanatory Note on Article 8:

A State can become party to the Treaty if it is a member of WIPO or of the United Nations.

Article 9
Entry Into Force of the Treaty

(1) This Treaty shall enter into force three months after five States have deposited their instruments of ratification or accession.

(2) Any State which is not among those referred to in paragraph (1) shall become bound by this Treaty three months after the date on which it has deposited its instrument of ratification or accession.

Explanatory Note on Article 9:

This Article follows established practice.

Article 10
Denunciation of the Treaty

(1) Any Contracting State may denounce this Treaty by notification addressed to the Director General.

(2) Denunciation shall take effect one year after the day on which the Director General has received the notification.

Explanatory Note on Article 10:

This Article follows established practice.

Article 11
Signature and Languages of the Treaty

(1) (a) This Treaty shall be signed in a single original in the ... languages, all texts being equally authentic.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the ... languages, and such other languages as the General Assembly of the Organisation may designate.

(2) This Treaty shall remain open for signature at ... until

Explanatory Note on Article 11:

This Article determines the languages of the original of the Treaty, the languages of official texts of the Treaty (which are languages other than the languages of the original of the Treaty) and the period of time during which the Treaty remains open for signature. The provisions of this Article are in conformity with established practice.

Article 12
Depositary Functions

- (1) The original of this Treaty shall be deposited with the Director General.
- (2) The Director General shall transmit two copies, certified by him, of this Treaty to the Governments of all States referred to in Article 8(1) and, on request, to the Government of any other State.
- (3) The Director General shall register this Treaty with the Secretariat of the United Nations.

Explanatory Note on Article 12:

This Article follows established practice.

Article 13
Notifications

The Director General shall notify the Governments of the States referred to in Article 8(1) of:

- (i) signatures under Article 11;
- (ii) deposits of instruments of ratification or accession under Article 8(2);
- (iii) the date of entry into force of this Treaty under Article 9(1);
- (iv) denunciations received under Article 10.

Explanatory Note on Article 13:

This Article follows established practice.

The Council of the European Communities

Having regard to the Treaty establishing the European Community and in particular Articles 100 (and 113) thereof;

Having regard to the proposal from the Commission;

Having regard to the opinion of the European Parliament;

Having regard to the opinion of the Economic and Social Committee;

Whereas the functions of semiconductor products depend in large part on the topographies of such products and whereas the development of such topographies requires the investment of considerable resources, human, technical and financial, while topographies of such products can be copied at a fraction of the cost needed to develop them independently;

Whereas semiconductor products are playing an increasingly important role in a broad range of industries and semiconductor technology can accordingly be considered as being of fundamental importance for the European Economic Community's industrial development;

Whereas the topographies of semiconductor products are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas differences in the legal protection of semiconductor products offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards semiconductor products and such differences risk becoming greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the basis on which topographies of semiconductor products developed by nationals or residents of non-Member States or first commercially exploited on their territories should be protected within the Community should be such as to favour the extension of legal protection in those countries to topographies of semiconductor products developed by nationals and residents of the Member States or first commercially exploited on their territories;

Whereas the Community's legal framework on the protection of original topographies of semiconductor products can accordingly in the first instance be limited to certain basic principles by provisions specifying who and what should be protected; the exclusive rights on which protected persons should be able to rely to authorise or prohibit certain acts; and for how long the protection should last;

Whereas other matters can for the time being be decided in accordance with national law, in particular, whether Member States rely on copyright laws or on some specific form of protection and whether registration or deposit is required as a condition for protection;

Whereas however this flexibility in the Community framework for the time being needs to be balanced by provisions designed to prevent new obstacles arising to trade between Member States in semiconductor products, in particular, as regards marking of such products and, as soon as circumstances permit, a common registration and deposit procedure;

Whereas protection of original topographies of semiconductor products under copyright laws or some specific form of protection should be without prejudice to the application in appropriate cases of some other forms of protection;

Whereas further measures designed to facilitate reliance on laws granting protection to original topographies of semicon-

ductor products in the community can be considered at a later stage, while the application of common basic principles by all Member States in accordance with the provisions of this Directive is an urgent necessity;

Has adopted this Directive:

Section 1 – Definitions

Article 1

For the purposes of this Directive,

(a) a 'semiconductor product' means the final or intermediate form of any product comprising semiconducting material:

- (a) having two or more layers composed of conducting, insulating or semiconducting material, the layers being arranged in accordance with a predetermined three-dimensional pattern; and
- (b) intended to perform, exclusively or in part, electronic functions.

(b) the 'topography' of a semiconductor product means a series of related images, however fixed or encoded:

- (a) representing the predetermined three-dimensional pattern of the layers of which a semiconductor product is composed; and
- (b) in which series, the relation of the images one to another is that each image has the pattern or part of the pattern of the surface of the semiconductor product in its final or any intermediate form.

(c) 'commercial exploitation' of the topography of a semiconductor product means to sell or license or to offer for sale or licence the topography or a semiconductor product in which the topography is incorporated.

Section 2 – Protection of topographies of semiconductor products

Article 2

(1) The Member States shall protect the topographies of semiconductor products by granting exclusive rights in accordance with the provisions of this Directive.

(2) The exclusive rights may be granted either by national copyright laws or by provisions enacted for the specific purpose of protecting the topographies of semiconductor products.

(3) However, the topographies of semiconductor products shall not be protected unless they satisfy the condition that they be original or the condition that they be novel or both these conditions. (Where topographies of semiconductor products consist of elements that are known (in the semiconductor industry), they shall not be considered original or novel as the case may be unless the combination of such elements, considered as a whole, is original or novel.)

Article 3

(1) Protection shall apply in favour of the following persons:

- (a) natural persons who are the creators of the topographies of semiconductor products and who are nationals or residents of a Member State; and
- (b) natural persons who are creators of such topographies which are first commercially exploited in a Member State.

(2) However the Member States may provide that, where such topographies are created in the course of the creator's employment or under contract for a third party, the protection shall apply in favour of the creator's employer or the third party as the case may be.

(3) Member States shall extend protection to nationals or residents of other states who do not qualify for protection in accordance with the provisions of the preceding paragraph pro-

vided that the Council has decided that such states protect topographies of semiconductor products created by the nationals or residents of Member States or first commercially exploited in a Member State to substantially the same extent as provided in this Directive or to substantially the same extent as they protect topographies of semiconductor products created by their own nationals or residents or first commercially exploited on their territories. The Council shall adopt decisions under this paragraph acting by qualified majority on a proposal from the Commission.

(4) The successors in title of the persons protected in accordance with paragraphs 1, 2 and 3 shall benefit from the protection after the title has been transferred.

(5) The preceding paragraphs of this Article are without prejudice to Member States' obligations under international agreements.

Article 4

(1) The Member States may provide that protection shall apply to the topographies of semiconductor products only when one or both of the following conditions are fulfilled:

- (a) the topographies of the semiconductor products have been registered with a public authority;
- (b) material describing or exemplifying the topographies has been deposited with a public authority.

(2) Conditions prescribing the fulfilment of additional formalities shall not be admitted.

Article 5

(1) The exclusive rights referred to in Article 2 shall include the rights to authorise any of the following acts:

- (a) reproduction of the topographies in whole or in part;
- (b) the selling, offering for sale, distribution or importation of the topographies or of semiconductor products incorporating the topographies.

(2) However, the exclusive right to authorise reproduction of the topographies shall not apply to reproduction solely for the purpose of analysing, evaluating or teaching the concepts, processes, systems or techniques embodied in the topographies or the topographies themselves.

(3) The exclusive right to authorise the acts specified in paragraph 1(b) shall not apply to any such act after the topography or the semiconductor product has been put on the market in a Member State by the person entitled to authorise its marketing or with his consent.

Article 6

The exclusive rights to which reference is made in Article 4 shall come to an end in respect of a particular topography on a date at least ten years from the date on which the topography was first fixed or encoded and not later than ten years either from the date on which a semiconductor product incorporating the topography was first commercially exploited or, where registration is a condition for protection, from the date on which the topography was registered.

Article 7

The protection granted to the topographies of semiconductor products in accordance with Article 4 shall not extend to any concept, process, system or technique embodied in the topography other than the topography itself.

Article 8

Where the legislation of Member States provides that semiconductor products incorporating topographies may be distinctively marked, the mark to be used shall be a capital T in a circle as follows: .

Section 3 – Continued application of other legal provisions

Article 9

The provisions of this Directive are without prejudice to any legal provisions protecting the topographies of semiconductor products other than those referred to in Article 2(2).

Section 4 – Final provisions

Article 10

(1) Member States shall bring into force the laws, regulations or administrative provisions needed in order to comply with this Directive within 18 months of its notification.

(2) Member States shall ensure that they communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 11

This Directive is addressed to the Member States.

Elements for an Explanatory Memorandum

I – Introduction

(1) Integrated circuits and similar semiconductor products are formed from semiconducting, conducting and insulating material. These combine to form the transistors, diodes and other components required to make up an electronic circuit. The configuration of the various layers of an integrated circuit can be determined in several different ways, for example, by directing a pattern of light on to a photosensitive surface, which then permits specific areas of semiconductor material to be removed, and by 'doping' the material with other substances. The pattern of light is frequently determined by the use of masks which act much in the same way as stencils. Other examples of techniques in current use include direct writing with an electronic beam on semiconductor material.

(2) Integrated circuits are playing an increasingly important role not only in the electronics industry itself, but in a broad range of industrial sectors from motor vehicles to machine tools. High levels of investment are required to develop new, improved integrated circuits, particularly those of a more complex kind. At the same time, a circuit can be copied at a fraction of the cost of developing it from scratch. These copied products can significantly reduce the return on the investment made by the original developer and consequently adversely affect his ability to continue to invest in innovative designs.

(3) The legal protection available to the developer of new integrated circuits is in many cases far from clear. The degree of inventiveness to secure a patent may well be absent. Copyright or design protection seems not to be available in most jurisdictions both within and outside the Community, though copyright protection does appear to be available in at least the United Kingdom and Ireland and possibly also the Netherlands.

(4) To provide clearer protection for the design of integrated circuits in the United States, a Semiconductor Chip Protection Act was enacted on 8 November 1984. This creates a new and specific form of protection for the design of integrated circuits and other semiconductor products (mask works). The protection is made available to US nationals and domiciliaries as well as to foreign citizens whose states have entered into a treaty affording protection to mask works to which the US is a party. However, by Presidential proclamation, protection can also be extended to citizens of countries which the President finds extend protection to US nationals either on substantially the same basis as such countries protect their own citizens or on substantially the same basis as the US law. In addition, a transitional provision has been included in section 914 of the Act permitting the Secretary of Commerce to extend protection to

foreign producers for three years from the Act's enactment if he finds that the countries in question are making good faith efforts and reasonable progress toward entering into a treaty with the US on the subject, or enacting legislation of a kind on which the President could later rely to extend the protection of the US Act indefinitely.

(5) In 1985, the Japanese legislature also adopted a law creating a specific form of protection for integrated circuits. (To be completed.)

(6) Within the Community, in the majority of Member States, the legal protection available to integrated circuits is at best uncertain and it appears likely that a number of legislative initiatives will be taken in the near future, partly in response to the United States legislation.

(7) Representatives of the European electronics industry have already expressed their concern about the situation to the Commission and have pointed out the disadvantages and risks that could flow from inadequate or insufficiently rapid adaptation of applicable legislation in the Member States. In the absence of clear protection in their countries of origin, semiconductor products developed in the Community will not be protected in the important American market. In addition, unco-ordinated responses at national level in the Community might pose new problems for electronics firms seeking to develop their activities on the basis of a single Community-wide market. Substantial differences in national laws could directly and adversely affect the functioning of the Community's internal market in integrated circuits and similar semiconductor products.

(8) At the international level, the World Intellectual Property Organization has just begun work intended to lead to a new international treaty on the protection of integrated circuits. A committee of experts will examine a draft treaty on the subject from 26 to 29 November 1985. At this stage, however, it is not clear whether such a treaty can be adopted in the near future.

Developments at Community level

(9) In these circumstances, the Commission considered it desirable that, as a matter of urgency, a proposal for a directive be made to ensure sufficiently convergent development of the laws of the Member States in this area. The preparation of such a proposal, together with a declaration by the Council of its intent to examine it with a view to its rapid adoption, would also create the conditions in which a petition could reasonably be made on the Community's behalf under section 914 of the United States law for transitional protection for Community semiconductor producers. Accordingly, on 19 June 1985, on the Commission's proposal, the Council adopted a resolution indicating its intention to examine the Commission's future proposal for a directive with a view to deciding on its adoption as rapidly as possible, subject to whatever amendments may be necessary, in particular, in the light of the Opinions of the European Parliament and the Economic and Social Committee. On the following day the Commission petitioned the United States authorities. (To be completed.)

II – The general approach of the Commission's proposal for a directive

(10) The Commission's proposal is designed to ensure that integrated circuits and similar semiconductor products are protected in every Member State in accordance with certain common basic principles, while at the same time it leaves the Member States considerable choice as to form and methods. This framework approach seems necessary since the legal starting points of the Member States are very different, while results need to be achieved quickly if the exercise is to achieve its objectives, in particular, continued protection for Community producers in the US and Japanese markets. A search for a uniform solution or even a relatively high level of harmonisation is likely to cause considerable delay which could be damaging to the

Community semiconductor industry. The proposed directive accordingly has a framework character similar to that of a number of existing international instruments in the industrial and intellectual property field including, for example, the Geneva Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms and the Vienna Agreement of 1973 for the Protection of Type Faces and their International Deposit.

(11) In summary, the proposed directive seeks to specify what should be protected; who should benefit from the protection; which maximum formalities may be required to be fulfilled as a condition for obtaining protection; which acts should be considered infringements and which should not; and what limits should be respected as to the length of the protection. At the same time, Member States would be free to choose how they legislate for the protection, in particular, whether they rely on copyright or on some specific form of protection.

(12) In the longer term, consideration should also be given to the adoption of further measures designed to ensure that new and unnecessary obstacles to trade in semiconductor products do not arise within the Community. In particular, registration and deposit requirements in a number of Member States will clearly complicate the operations of semiconductor producers. The possibility of a single procedure, perhaps to be administered within the framework of the European Patent Organisation, should be addressed. The realisation of this objective is likely to take a considerable time. However, not least because of the need to agree on an extension of the European Patent Organisation's responsibilities, not only among Community Member States but also among the other members of the Organisation. Accordingly, it should be pursued separately from the discussion of the creation of a basic Community legal framework in the form of a directive. *A fortiori* the same applies to consideration of the adoption of a Community system for the protection of the topographies of semiconductor products or even for designs generally.

Legal basis

(13) Since divergent national legislation on the legal protection of integrated circuits and similar semiconductor products would adversely affect the functioning of the common market in those products, the appropriate basis for most of the directives is Article 100 EEC. In addition, given the reciprocity approach of the United States, it seems desirable to deal also with the question of protection for nationals from non-Member States. (Since such a provision has for its objective defining the conditions under which producers outside the Community will be entitled to protect products developed by them and accordingly has an intended effect on trade flows in such products across the external frontiers of the Community, Article 113 EEC also forms part of the proposed directive's legal basis.)

III – Particular provisions

Section 1 – Definitions

Article 1

(14) The first and second of these definitions specify the characteristics of the object to be protected, namely the 'topography' of a 'semiconductor product'. The definitions seek to be as specific as possible while at the same time not limiting the definition by reference to technical features that may soon prove to be outmoded.

(15) 'Topography' expresses the basic concept of images representing the physical configuration in three dimensions of a semiconductor product without being too closely founded on current techniques. It also appears to translate readily into most Community languages.

(16) 'Semiconductor' product is used rather than 'integrated

circuit' so as to include items that are not in fact circuits because they are not complete circuits. The product must contain semiconducting material, have a particular form, and be intended to perform some electronic functions. Products also performing other functions, such as optical functions, are not excluded.

(17) 'Commercial exploitation' is defined for the purposes of Articles 3 (persons to benefit from protection) and 6 (term of protection).

Section 2 – Protection of topographies of semiconductor products

Article 2

(18) Article 2(1) contains the basic obligation of Member States to protect the topographies of semiconductor products by granting exclusive rights in accordance with the Directive's provisions. Article 2(2) provides that these rights may be granted in one of two ways: either by national copyright law or by provisions enacted for the specific purpose of protecting topographies of semiconductor products. Protection by other means, such as the generally applicable provisions of unfair competition law, will thus not satisfy the requirements of this Article, though they may continue to apply to protect topographies of semiconductor products in certain cases as is made clear by Article 9. The exclusion of unfair competition rules from Article 2 is explained by reason of their relatively undefined character at least as far as legislative provisions are concerned. In the present context, a higher degree of legislative precision and resulting certainty of application seems required.

(19) Article 2(3) in its first sentence excludes from protection topographies that do not fulfil certain conditions. Given the framework character of the Directive, these conditions have to be formulated in the alternative. Copyright systems will tend to rely on originality as the condition for the availability of protection. Specific forms of protection may rely either on originality or on novelty or on some combination of the two. A precedent for Article 2(3) is to be found in Article 7(1) of the Vienna Agreement on the Protection of Type Faces to which reference has already been made.

(20) The second sentence of Article 2(3) seeks nevertheless to ensure a convergent approach to topographies which consist only of elements that are known. Unless the manner in which the elements are combined can itself be said to be original or novel, protection will not be available whether under copyright or a specific regime. The simple combination of known elements is thus deemed unworthy of protection.

Article 5

(21) Article 3(1)(a) confirms the principle of national treatment to be applied by Member States to creators of topographies who are nationals or residents of another Member State.

(22) Article 3(1)(b) includes the further obligation to protect topographies first commercially exploited on a Member State's territory.

(23) Article 3(2) makes it possible for Member States to grant protection not to the creator but to the person, natural or legal, who employs him or for whom he contracted to produce the topography.

(24) Article 3(3) provides a mechanism whereby the Community will be able to promote the protection of the legal protection of topographies of semiconductor products in states which are not members of the Community by ensuring reciprocal protection for their producers within the Community's external frontiers.

(25) Obligations to protect topographies of semiconductor products arguably exist already as between certain states, though the issue may be controversial. The final paragraph of Article 3 is designed to ensure that the provisions in the Directive cannot

be used to support an argument denying the existence of international obligations in the field.

Article 4

(26) Laws enacted for the specific purpose of protecting topographies of semiconductor products may well provide for registration of claims for protection and for obligatory deposit of material describing or exemplifying the topography. This Article authorises Member States to make the availability of protection subject to conditions of this type. Whether, when and on what conditions the public should have access to deposited material is left to each Member State. In this connection, it should be borne in mind that under copyright systems in the Community there will be no obligatory deposit and *a fortiori* no disclosure of descriptive or exemplifying material.

(27) No further formalities as a condition for protection are admitted. Article 8 on marking concerns legal provisions that are facultative in character.

Article 5

(28) Acts which must be considered infringements are listed in Article 5(1). Reproduction of topographies in whole or in part of a semiconductor product covers reproduction in the form of a semiconductor product. Various means of qualifying 'in part', for example, by the addition of the word 'substantial', are possible, but it is doubtful whether they clarify the text and accordingly they have not been included. Article 5(1)(b) covers both traffic in semiconductors and in topographies as such.

(29) Article 5(2) concerns the difficult problem of so-called reverse engineering. The text as it stands permits reproduction of topographies for the purposes stated, but not the subsequent commercial exploitation of a topography including a reproduction in whole or in part of the topographies that have been analysed. (Whether to do so is a matter on which the views of government experts is particularly sought.)

(3) Article 5(3) applies the principle of Community exhaustion to the protection of topographies of semiconductor products.

Article 6

(31) Article 6 requires protection to last ten years from the time when the topography is first fixed to encoded, but not longer than ten years either from the first commercial exploitation of a product incorporating the topography or, where applicable, from the date of the topographies' registration. A bracket is thus established in which the Member States have a certain flexibility but which avoids substantial distortions resulting from widely varying terms of protection.

Article 7

(32) This Article makes clear that protection is limited to the configuration of the topography of the semiconductor product and does not extend to other possible features. If these are to be protected, the protection must have some other basis, such as patent law.

Article 8

(33) Member States may wish to provide for distinctive marking of protected semiconductor products, though marking cannot be made a condition for the availability of protection. Divergent marking requirements would constitute a nuisance better avoided. The prescribing of a common symbol for those states that wish to provide for one accordingly seems sensible.

(34) The same reasoning applies of course at the international level. The United States has opted in its law for an M in a circle, linked to the law's reliance on the concept of 'mask work'. However, given the likelihood of changing techniques in the future, the desirability of relying primarily on the concept of 'mask work' is doubtful. Consequently, the M symbol also

seems questionable. The text therefore suggests a T symbol, but other possibilities also exist. If broad international agreement on a common symbol cannot be reached, another possibility would be for different symbols to be accepted on a reciprocal basis. To this end, the following might be added to the Article:

However, as regards semiconductor products produced in states that are not Member States of the European Communities, the Council may decide that a different mark, to be specified in the Council decision, may be used. For the purposes of making such decisions, the Council shall act by qualified majority on a proposal from the Commission.

Section 3 – Continued application of other legal provisions

(35) This Article makes clear that laws protecting the topographies of semiconductor products other than copyright laws or laws enacted for that specific purpose continue to apply. Patent and unfair competition laws, each within its own field of application, are both examples of laws which may have a role to play.

IV – Matters not dealt with in the draft

(36) Certain matters have not been dealt with in the draft including innocent infringement through good faith possession of an infringing semiconductor product; temporary importation; remedies and compulsory licensing. These matters have been left to the Member States with a view to limiting the scope of the Directive and thereby increasing the chances of relatively rapid agreement on a basic legal framework at Community level. (Views of government experts on the advisability of including provisions on these or other matters are particularly sought.)

Semiconductor Chip Protection Act of 1984

(Title III of Public Law 98–620 of November 8, 1984)*

Short Title

Sec. 301. This title may be cited as the “Semiconductor Chip Protection Act of 1984.”

Protection of Semiconductor Chip Products

Sec. 302. Title 17, United States Code,¹ is amended by adding at the end thereof the following new chapter.

Chapter 9—Protection of Semiconductor Chip Products

Sec.

- 901. Definitions.
- 902. Subject matter of protection.
- 903. Ownership and transfer.
- 904. Duration of protection.
- 905. Exclusive rights in mask works.
- 906. Limitation on exclusive rights: reverse engineering; first sale.
- 907. Limitation on exclusive rights: innocent infringement.
- 908. Registration of claims of protection.
- 909. Mask work notice.
- 910. Enforcement of exclusive rights.
- 911. Civil actions.
- 912. Relation to other laws.
- 913. Transitional provisions.
- 914. International transitional provisions.

* *Entry into force:* November 8, 1984.

Source: Communication from the United States authorities.

¹ Title 17 = Copyrights

§ 901. Definitions

(a) As used in this chapter—

(1) a “semiconductor chip product” is the final or intermediate form of any product—

(A) having two or more layers of metallic, insulating, or semiconductor material, deposited or otherwise placed on, or etched away or otherwise removed from, a piece of semiconductor material in accordance with a predetermined pattern; and

(B) intended to perform electronic circuitry functions;

(2) a “mask work” is a series of related images, however fixed or encoded—

(A) having or representing the predetermined, three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product; and

(B) in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product;

(3) a mask work is “fixed” in a semiconductor chip product when its embodiment in the product is sufficiently permanent or stable to permit the mask work to be perceived or reproduced from the product for a period of more than transitory duration;

(4) to “distribute” means to sell, or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail, or otherwise transfer;

(5) to “commercially exploit” a mask work is to distribute to the public for commercial purposes a semiconductor chip product embodying the mask work; except that such term includes an offer to sell or transfer a semiconductor chip product only when the offer is in writing and occurs after the mask work is fixed in the semiconductor chip product;

(6) the “owner” of a mask work is the person who created the mask work, the legal representative of that person if that person is deceased or under a legal incapacity, or a party to whom all the rights under this chapter of such person or representative are transferred in accordance with section 903(b); except that, in the case of a work made within the scope of a person’s employment, the owner is the employer for whom the person created the mask work or a party to whom all the rights under this chapter of the employer are transferred in accordance with section 903(b);

(7) an “innocent purchaser” is a person who purchases a semiconductor chip product in good faith and without having notice of protection with respect to the semiconductor chip product;

(8) having “notice of protection” means having actual knowledge that, or reasonable grounds to believe that, a mask work is protected under this chapter; and

(9) an “infringing semiconductor chip product” is a semiconductor chip product which is made, imported, or distributed in violation of the exclusive rights of the owner of a mask work under this chapter.

(b) For purposes of this chapter, the distribution or importation of a product incorporating a semiconductor chip product as a part thereof is a distribution or importation of that semiconductor chip product.

§ 902. Subject matter of protection

(a)(1) Subject to the provisions of subsection (b), a mask work fixed in a semiconductor chip product, by or under the authority of the owner of the mask work, is eligible for protection under this chapter if—

(A) on the date on which the mask work is registered under section 908, or is first commercially exploited anywhere in the world, whichever occurs first, the owner of the mask work is (i) a national or domiciliary of the United States, (ii) a national, domiciliary, or sovereign authority of a foreign nation that is a party to a treaty affording protection to mask works to which the

United States is also a party, or (iii) a stateless person, wherever that person may be domiciled;

(B) the mask work is first commercially exploited in the United States; or

(C) the mask work comes within the scope of a Presidential proclamation issued under paragraph (2).

(2) Whenever the President finds that a foreign nation extends, to mask works of owners who are nationals or domiciliaries of the United States protection (A) on substantially the same basis as that on which the foreign nation extends protection to mask works of its own nationals and domiciliaries and mask works first commercially exploited in that nation, or (B) on substantially the same basis as provided in this chapter, the President may by proclamation extend protection under this chapter to mask works (i) of owners who are, on the date on which the mask works are registered under section 908, or the date on which the mask works are first commercially exploited anywhere in the world, whichever occurs first, nationals, domiciliaries, or sovereign authorities of that nation, or (ii) which are first commercially exploited in that nation.

(b) Protection under this chapter shall not be available for a mask work that—

(1) is not original; or

(2) consists of designs that are staple, commonplace, or familiar in the semiconductor industry, or variations of such designs, combined in a way that, considered as a whole, is not original.

(c) In no case does protection under this chapter for a mask work extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 903. Ownership, transfer, licensing and recordation

(a) The exclusive rights in a mask work subject to protection under this chapter belong to the owner of the mask work.

(b) The owner of the exclusive rights in a mask work may transfer all of those rights, or license all or less than all of those rights, by any written instrument signed by such owner or a duly authorized agent of the owner. Such rights may be transferred or licensed by operation of law, may be bequeathed by will, and may pass as personal property by the applicable laws of intestate succession.

(c)(1) Any document pertaining to a mask work may be recorded in the Copyright Office if the docu-

ment filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document. The Register of Copyrights shall, upon receipt of the document and the fee specified pursuant to section 908(d), record the document and return it with a certificate of recordation. The recordation of any transfer or license under this paragraph gives all persons constructive notice of the facts stated in the recorded document concerning the transfer or license.

(2) In any case in which conflicting transfers of the exclusive rights in a mask work are made, the transfer first executed shall be void as against a subsequent transfer which is made for a valuable consideration and without notice of the first transfer, unless the first transfer is recorded in accordance with paragraph (1) within three months after the date on which it is executed, but in no case later than the day before the date of such subsequent transfer.

(d) Mask works prepared by an officer or employee of the United States Government as part of that person's official duties are not protected under this chapter, but the United States Government is not precluded from receiving and holding exclusive rights in mask works transferred to the Government under subsection (b).

§ 904. Duration of protection

(a) The protection provided for a mask work under this chapter shall commence on the date on which the mask work is registered under section 908, or the date on which the mask work is first commercially exploited anywhere in the world, whichever occurs first.

(b) Subject to subsection (c) and the provisions of this chapter, the protection provided under this chapter to a mask work shall end 10 years after the date on which such protection commences under subsection (a).

(c) All terms of protection provided in this section shall run to the end of the calendar year in which they would otherwise expire.

§ 905. Exclusive rights in mask works

The owner of a mask work provided protection under this chapter has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the mask work by optical, electronic or any other means;

(2) to import or distribute a semiconductor chip product in which the mask work is embodied; and

(3) to induce or knowingly to cause another person to do any of the acts described in paragraphs (1) and (2).

§ 906. Limitation on exclusive rights: reverse engineering; first sale

(a) Notwithstanding the provisions of section 905, it is not an infringement of the exclusive rights of the owner of a mask work for—

(1) a person to reproduce the mask work solely for the purpose of teaching, analyzing, or evaluating the concepts of techniques embodied in the mask work or the circuitry, logic flow, or organization of components used in the mask work; or

(2) a person who performs the analysis or evaluation described in paragraph (1) to incorporate the result of such conduct in an original mask work which is made to be distributed.

(b) Notwithstanding the provisions of section 905(2), the owner of a particular semiconductor chip product made by the owner of the mask work, or by any person authorized by the owner of the mask work, may import, distribute, or otherwise dispose of or use, but not reproduce, that particular semiconductor chip product without the authority of the owner of the mask work.

§ 907. Limitation on exclusive rights: innocent infringement

(a) Notwithstanding any other provision of this chapter, an innocent purchaser of an infringing semiconductor chip product—

(1) shall incur no liability under this chapter with respect to the importation or distribution of units of the infringing semiconductor chip product that occurs before the innocent purchaser has notice of protection with respect to the mask work embodied in the semiconductor chip product; and

(2) shall be liable only for a reasonable royalty on each unit of the infringing semiconductor chip product that the innocent purchaser imports or distributes after having notice of protection with respect to the mask work embodied in the semiconductor chip product.

(b) The amount of the royalty referred to in subsection (a)(2) shall be determined by the court in a civil action for infringement unless the parties resolve the issue by voluntary negotiation, mediation, or binding arbitration.

(c) The immunity of an innocent purchaser from liability referred to in subsection (a)(1) and

the limitation of remedies with respect to an innocent purchaser referred to in subsection (a)(2) shall extend to any person who directly or indirectly purchases an infringing semiconductor chip product from an innocent purchaser.

(d) The provisions of subsections (a); (b), and (c) apply only with respect to those units of an infringing semiconductor chip product that an innocent purchaser purchased before having notice of protection with respect to the mask work embodied in the semiconductor chip product.

§ 908. Registration of claims of protection

(a) The owner of a mask work may apply to the Register of Copyrights for registration of a claim of protection in a mask work. Protection of a mask work under this chapter shall terminate if application for registration of a claim of protection in the mask work is not made as provided in this chapter within two years after the date on which the mask work is first commercially exploited anywhere in the world.

(b) The Register of Copyrights shall be responsible for all administrative functions and duties under this chapter. Except for section 708, the provisions of chapter 7 of this title relating to the general responsibilities, organization, regulatory authority, actions, records, and publications of the Copyright Office shall apply to this chapter, except that the Register of Copyrights may make such changes as may be necessary in applying those provisions to this chapter.

(c) The application for registration of a mask work shall be made on a form prescribed by the Register of Copyrights. Such form may require any information regarded by the Register as bearing upon the preparation or identification of the mask work, the existence or duration of protection of the mask work under this chapter or ownership of the mask work. The application shall be accompanied by the fee set pursuant to subsection (d) and the identifying material specified pursuant to such subsection.

(d) The Register of Copyrights shall by regulation set reasonable fees for the filing of applications to register claims of protection in mask works under this chapter, and for other services relating to the administration of this chapter or the rights under this chapter, taking into consideration the cost of providing those services, the benefits of a public record and statutory fee schedules under this title. The Register shall also specify the identifying material to be deposited in connection with the claim for registration.

(e) If the Register of Copyrights, after examining an application for registration, determines in accordance with the provisions of this chapter, that the application relates to a mask work which is entitled to protection under this chapter, then the Register shall register the claim of protection and issue to the applicant a certificate of registration of the claim of protection under the seal of the Copyright Office. The effective date of registration of a claim of protection shall be the date on which an application, deposit of identifying material, and fee, which are determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration of the claim, have all been received in the Copyright Office.

(f) In any action for infringement under this chapter, the certificate of registration of a mask work shall constitute prima facie evidence (1) of the facts stated in the certificate, and (2) that the applicant issued the certificate has met the requirements of this chapter, and the regulations issued under this chapter, with respect to the registration of claims.

(g) Any applicant for registration under this section who is dissatisfied with the refusal of the Register of Copyrights to issue a certificate of registration under this section may seek judicial review of that refusal by bringing an action for such review in an appropriate United States district court not later than 60 days after the refusal. The provisions of chapter 7 of title 5² shall apply to such judicial review. The failure of the Register of Copyrights to issue a certificate of registration within four months after an application for registration is filed shall be deemed to be a refusal to issue a certificate of registration for purposes of this subsection and section 910(b)(2), except that, upon a showing of good cause, the district court may shorten such four-month period.

§ 909. Mask work notice

(a) The owner of a mask work provided protection under this chapter may affix notice to the mask work, and to masks and semiconductor chip products embodying the mask work, in such manner and location as to give reasonable notice of such protection. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of notice for purposes of this section, but these specifications shall not be considered exhaustive. The affixation of such notice is not a condition of protection under this chapter, but shall constitute prima facie evidence of notice of protection.

² Title 5 = Government Organization and Employees

(b) The notice referred to in subsection (a) shall consist of—

(1) the words “mask work”, the symbol *M*, or the symbol M (the letter M in a circle); and

(2) the name of the owner or owners of the mask work or an abbreviation by which the name is recognized or is generally known.

§ 910. Enforcement of exclusive rights

(a) Except as otherwise provided in this chapter any person who violates any of the exclusive rights of the owner of a mask work under this chapter, by conduct in or affecting commerce, shall be liable as an infringer of such rights.

(b)(1) The owner of a mask work protected under this chapter, or the exclusive licensee of all rights under this chapter with respect to the mask work, shall, after a certificate of registration of a claim of protection in that mask work has been issued under section 908, be entitled to institute a civil action for any infringement with respect to the mask work which is committed after the commencement of protection of the mask work under section 904(a).

(2) In any case in which an application for registration of a claim of protection in a mask work and the required deposit of identifying material and fee have been received in the Copyright Office in proper form and registration of the mask work has been refused, the applicant is entitled to institute a civil action for infringement under this chapter with respect to the mask work if notice of the action, together with a copy of the complaint, is served on the Register of Copyrights, in accordance with the Federal Rules of Civil Procedure. The Register may, at his or her option, become a party to the action with respect to the issue of whether the claim of protection is eligible for registration by entering an appearance within 60 days after such service, but the failure of the Register to become a party to the action shall not deprive the court of jurisdiction to determine that issue.

(c)(1) The Secretary of the Treasury and the United States Postal Service shall separately or jointly issue regulations for the enforcement of the rights set forth in section 905 with respect to importation. These regulations may require, as a condition for the exclusion of articles from the United States, that the person seeking exclusion take any one or more of the following actions:

(A) Obtain a court order enjoining, or an order of the International Trade Commission under section 337 of the Tariff Act of 1930 excluding importation of the articles.

(B) Furnish proof that the mask work involved is protected under this chapter and that the importation of the articles would infringe the rights in the mask work under this chapter.

(C) Post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(2) Articles imported in violation of the rights set forth in section 905 are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any such forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be, except that the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his or her acts constituted a violation of the law.

§ 911. Civil actions

(a) Any court having jurisdiction of a civil action arising under this chapter may grant temporary restraining orders, preliminary injunctions and permanent injunctions on such terms as the court may deem reasonable to prevent or restrain infringement of the exclusive rights in a mask work under this chapter.

(b) Upon finding an infringer liable, to a person entitled under section 910(b)(1) to institute a civil action, for an infringement of any exclusive right under this chapter, the court shall award such person actual damages suffered by the person as a result of the infringement. The court shall also award such person the infringer's profits that are attributable to the infringement and are not taken into account in computing the award of actual damages. In establishing the infringer's profits, such person is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the mask work.

(c) At any time before final judgment is rendered, a person entitled to institute a civil action for infringement may elect, instead of actual damages and profits as provided by subsection (b), an award of statutory damages for all infringements involved in the action, with respect to any one mask work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in an amount not more than 250,000 as the court considers just.

(d) An action for infringement under this chapter shall be barred unless the action is commenced within three years after the claim accrues.

(e)(1) At any time while an action for infringement of the exclusive rights in a mask work under this chapter is pending, the court may order the impounding, on such terms as it may deem reasonable, of all semiconductor chip products, and any drawings, tapes, masks, or other products by means of which such products may be reproduced, that are claimed to have been made, imported, or used in violation of those exclusive rights. Insofar as practicable, applications for orders under this paragraph shall be heard and determined in the same manner as an application for a temporary restraining order or preliminary injunction.

(2) As part of a final judgment or decree, the court may order the destruction or other disposition of any infringing semiconductor chip products, and any masks, tapes, or other articles by means of which such products may be reproduced.

(f) In any civil action arising under this chapter, the court in its discretion may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party.

§ 912. Relation to other laws

(a) Nothing in this chapter shall affect any right or remedy held by any person under chapters 1 through 8 of this title, or under title 35.³

(b) Except as provided in section 908(b) of this title, references to "this title" or "title 17" in chapters 1 through 8 of this title shall be deemed not to apply to this chapter.

(c) The provisions of this chapter shall preempt the laws of any State to the extent those laws provide any rights or remedies with respect to a mask work which are equivalent to those rights or remedies provided by this chapter, except that such preemption shall be effective only with respect to actions filed on or after January 1, 1986.

(d) The provisions of sections 1338, 1400(a), and 1498(b) and (c) of title 28⁴ shall apply with respect to exclusive rights in mask works under this chapter.

(e) Notwithstanding subsection (c), nothing in this chapter shall detract from any rights of a mask work owner, whether under Federal law (exclusive of this chapter) or under the common law or the statutes of a State, heretofore or hereafter declared or enacted, with respect to any mask work first commercially exploited before July 1, 1983.

§ 913. Transitional provisions

(a) No application for registration under section 908 may be filed, and no civil action under section 910 or other enforcement proceeding under this chapter may be instituted, until 60 days after the date of the enactment of this chapter.

(b) No monetary relief under section 911 may be granted with respect to any conduct that occurred before the date of the enactment of this chapter, except as provided in subsection (d).

(c) Subject to subsection (a), the provisions of this chapter apply to all mask works that are first commercially exploited or are registered under this chapter, or both, on or after the date of the enactment of this chapter.

(d)(1) Subject to subsection (a), protection is available under this chapter to any mask work that was first commercially exploited on or after July 1, 1983, and before the date of the enactment of this chapter, if a claim of protection in the mask work is registered in the Copyright Office before July 1, 1985, under section 908.

(2) In the case of any mask work described in paragraph (1) that is provided protection under this chapter, infringing semiconductor chip product units manufactured before the date of the enactment of this chapter may, without liability under sections 910 and 911, be imported into or distributed in the United States, or both, until two years after the date of registration of the mask work under section 908, but only if the importer or distributor, as the case may be, first pays or offers to pay the reasonable royalty referred to in section 907(a)(2) to the mask work owner, on all such units imported or distributed, or both, after the date of the enactment of this chapter.

(3) In the event that a person imports or distributes infringing semiconductor chip product units described in paragraph (2) of this subsection without first paying or offering to pay the reasonable royalty specified in such paragraph, or if the person refuses or fails to make such payment, the mask work owner shall be entitled to the relief provided in sections 910 and 911.

§ 914. International transitional provisions

(a) Notwithstanding the conditions set forth in subparagraphs (A) and (C) of section 902(a)(1) with respect to the availability of protection under this chapter to nationals, domiciliaries, and sovereign authorities of a foreign nation, the Secretary of Commerce may upon the petition of any person, or upon the Secretary's own motion, issue an order extending protection under this chapter to such foreign nationals, domiciliaries, and sovereign authorities if the Secretary finds—

³ Title 35 = Patents

⁴ Title 28 = Judiciary and Judicial Procedure

(1) that the foreign nation is making good faith efforts and reasonable progress toward—

(A) entering into a treaty described in section 902(a)(1)(A); or

(B) enacting legislation that would be in compliance with subparagraph (A) or (B) of section 902(a)(2); and

(2) that the nationals, domiciliaries, and sovereign authorities of the foreign nation, and persons controlled by them, are not engaged in the misappropriation, or unauthorized distribution or commercial exploitation, of mask works; and

(3) that issuing the order would promote the purposes of this chapter and international comity with respect to the protection of mask works.

(b) While an order under subsection (a) is in effect with respect to a foreign nation, no application for registration of a claim for protection in a mask work under this chapter may be denied solely because the owner of the mask work is a national, domiciliary, or sovereign authority of that foreign nation, or solely because the mask work was first commercially exploited in that foreign nation.

(c) Any order issued by the Secretary of Commerce under subsection (a) shall be effective for such period as the Secretary designates in the order, except that no such order may be effective after the date on which the authority of the Secretary of Commerce terminates under subsection (e). The effective date of any such order shall also be designated in the order. In the case of an order issued upon the petition of a person, such effective date may be no earlier than the date on which the Secretary receives such petition.

(d)(1) Any order issued under this section shall terminate if—

(A) the Secretary of Commerce finds that any of the conditions set forth in paragraphs (1), (2), and (3) of subsection (a) no longer exist; or

(B) mask works of nationals, domiciliaries, and sovereign authorities of that foreign nation or mask works first commercially exploited in that foreign nation become eligible for protection under subparagraph (A) or (C) of section 902(a)(1).

(2) Upon the termination or expiration of an order issued under this section, registrations of claims of protection in mask works made pursuant to that order shall remain valid for the period specified in section 904.

(e) The authority of the Secretary of Commerce under this section shall commence on the date of the enactment of this chapter, and shall terminate three years after such date of enactment.

(f)(1) The Secretary of Commerce shall promptly notify the Register of Copyrights and the Committees on the Judiciary of the Senate and the House of Representatives of the issuance or termination of any order under this section, together with a statement of the reasons for such action. The Secretary shall also publish such notification and statement of reasons in the Federal Register.

(2) Two years after the date of the enactment of this chapter, the Secretary of Commerce, in consultation with the Register of Copyrights, shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on the actions taken under this section and on the current status of international recognition of mask work protection. The report shall include such recommendations for modifications of the protection accorded under this chapter to mask works owned by nationals, domiciliaries, or sovereign authorities of foreign nations as the Secretary, in consultation with the Register of Copyrights, considers would promote the purposes of this chapter and international comity with respect to mask work protection.

Technical Amendment

Sec. 303. The table of chapters at the beginning of title 17, United States Code, is amended by adding at the end thereof the following new item:

9. Protection of semiconductor chip products 901.

Authorization of Appropriations

Sec. 304. There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this title and the amendments made by this title.

THE LAW OF COPYRIGHT AND COMPUTER SOFTWARE

Memorandum by the Government of ZIMBABWE

The law of copyright is concerned with the protection of authorship and the encouragement of intellectual creativity in literature, drama, music art and the dissemination of information. It gives those who create works (copyrighted) rights of control over the use to which the public may put those works.

This has been the basic tone of all copyright statutes from the very first - the United Kingdom Statute of Anne of 1709 - through to the international conventions - the Berne and the Universal Copyright to which most states belong.

However, the world of communication has greatly changed over the years with new technologies - radio and television broadcasting (terrestrial and by satellite), cable distribution systems, audio and video recording, reprography, and computers - coming into use. The basic copyright law has, albeit with some difficulties particularly based on definitions, managed to offer some form of protection based on the traditional restrictions against unauthorised reproduction, broadcast or performance by any of these new technologies of copyrighted works.

Most statutes have been easily amended to offer protection in the face of this technological onslaught. Even because, in the case of broadcasts, cable distributions, audio and video recordings and reprography, there was hardly any doubt that such protection fell within the ambit of copyright law.

The same cannot be said for computers and particularly computer software or computer programmes.

The use of computerised systems affects copyright in two ways:

- (a) the need to ensure that copyright owners continue to enjoy adequate protection in respect of their works when they are stored in processed by or retrieved from, computerised systems; and
- (b) whether computer programmes are by themselves proper subjects of protection under copyright law.

The first question does not present much difficulties. The input of a protected work into a computer system is to be regarded as including the reproduction of the work in a material form, and also the fixation of the work and both these acts, i.e. reproduction and fixation, are governed by both the Berne Convention (Article 9(1) and the Universal Copyright Convention (Article 4 bis (1)).

It is the second question that has been subject of extensive debate over the years and to date there is no general agreement that copyright law offers the best form of protection for computer software. The fact that the trend is protection by copyright law is perhaps based on convenience rather than its (copyright law) adequacy/appropriateness.

A computer programme has been variously defined as a sequence of instructions or commands destined for direct or indirect use in a computer so as to achieve a certain result;

or a computer statement, drafted in any desired language, to solve a problem by an EDP system. But is it the same as a mere mathematical formula which is not subject of any protection? Is the fact that programmes are useless without the computer (hardware) enough reason that they should be considered to be part of the computer and be protected as such? Because of the enormous human and financial inputs and the recognised role of the computer in communication and development the need for protection has universally been accepted.

When the need for protection was accepted early discussion were on the possible use of the patent system to protect computer software. The attraction to the patent system, particularly to the programme developers, was the right of "exclusive use". Another advantage was the shorter period of protection compared to copyright protection i.e. at most 20 years compared to 25 post mortem auctoris (Universal Copyright Convention) or 50 years post mortem auctoris (Berne). However, patent protection for computer software failed the still novelty, inventive step and industrial applicability tests required under the system. Further, the rapid development in the computer software industry combined with the long delays in processing and granting patents would result in programmes being obsolete by the time a patent is granted.

Next to be considered was the formulation of a sui generis system of protection. Most experts agree that this would offer the best form of protection considering the problems encountered with the other forms of protection.

However, because the need for protection was urgent as cases came up before the courts, it was felt that the formulation of sui generis system for the purpose would take far too much time and as the copyright system was already in existence and offered more or less the same protection needed it was to be used for software protection.

Another possibility has been the law of Trade Secrets. The law protects against the unauthorized use of secret information having industrial commercial applications. Unlike copyright law the information need to be expressed in a tangible form and there is no novelty or inventive step requirements as.

This would seem most appropriate but falls flat on the grounds that it is not binding on third parties as it is contractual between licensor and licensee or employer and employee for example.

The other view considered was to limit copyright protection for software to those computer programmes that produce works which themselves qualify for copyright protection. In contrast, if a computer programme was an integral part of a machine, causing it to perform a new function thus constituting a new invention, then it would qualify for patentability. This solution, however, left unanswered the question of what type of proprietary protection would be available for software falling outside these areas.

Trade Marks law also offers some form of protection.

Faced with all these uncertainties and the urgent need for protection resulting from pressure on governments from developers of computer software the question of programme copyrightability was left with the courts. In countries where this question has come before the courts (Australia, Federal Republic of Germany, the United States of America etc), the courts were guided by the principles embraced in the Berne and Universal Copyright Conventions that copyright protects all works of authorship. The courts have also ruled that computer programmes are works of authorship.

Following this decision a number of states, among them the U.S., Australia, France, Germany, Hungary, India, U.K., have amended their copyright statutes to extend protection

expressly to computer software. However, despite these developments the question still arises: is a computer programme "a manifestation of the author's personality" - another underlying principle of copyright law - particularly given the fact that the trend is to vest the rights of ownership not in the individual programmer who created it , but in the enterprise financing the production of the programme? Further, a computer programme is not intended to be distributed and published - quite to the contrary it is usually kept secret!

No-fault Accident Compensation Schemes

NO-FAULT ACCIDENT COMPENSATION SCHEMES — THE CANADIAN EXPERIENCE

A memorandum prepared by the Government of Canada

SUMMARY

This paper presents an overview of the various no-fault accident compensation schemes in place in Canada and highlights the advantages of such schemes over fault-based tort recovery systems.

2. Although the tort system plays a central role in the compensation of accident victims, it represents only one component of a multi-faceted system of injury reparation. In Canada, a very wide array of no-fault benefits are available under social welfare schemes operated by the federal and provincial governments. Government-sponsored and supported hospital and medical insurance plans cover virtually all Canadian citizens. Benefits are also available under government operated workers' compensation insurance plans, veterans' allowance programmes, unemployment insurance, government pension plans and other general welfare schemes. Disability benefits are also available to many Canadians under private insurance plans.

3. These sources of compensation play a very significant role in indemnifying accident victims and have helped to fill some of the gaps left by the unsatisfactory operation of tort law. It has been estimated that over five billion dollars is paid yearly under these various plans to accident victims in Canada.

4. Notwithstanding the importance of these collateral government-funded benefits, however, this Paper will focus on no-fault benefits from another important source - automobile accident insurance. Every year thousands of Canadians die and hundreds of thousands are injured in motor vehicle accidents. The tort system and no-fault insurance schemes work together in most provinces of Canada to relieve the economic dislocation resulting from automobile accidents.

5. As a federal system in which jurisdiction over most aspects of the insurance industry lies within the legislative competence of the provinces, Canada provides a most interesting subject for a study of no-fault accident compensation schemes. Each of Canada's ten provinces and two territories has an automobile accident compensation scheme. In some provinces, no-fault coverage is compulsory while in some it is optional. In several provinces, the no-fault schemes are government operated whereas in others they are administered by private insurers. In spite of the variations in amounts payable and differences in operational characteristics, the plans in all of the provinces except Quebec have one thing in common - peaceful coexistence of tort and non-tort compensation. In other words, the compensation schemes in most Canadian provinces promptly compensate everyone to some degree without regard to fault but, at the same time, preserve an individual's right to seek additional reparation in tort. The Province of Quebec is the exception to the rule. That province has introduced a pure no-fault scheme under which all accident victims are entitled to compensation for bodily injury but all rights to sue in tort for accidentally caused personal injuries are extinguished. Quebec also has a system of partial no-fault insurance for property damage. The driver who is not at fault receives compensation for his damage from his own insurer. Fault is assessed by reference to a schedule of typical accident situations.

6. The advantages of the no-fault schemes in operation in the various provinces are highlighted in the second part of this paper. Generally speaking, the Canadian experience has shown that no-fault compensation plans offer four distinct advantages over fault-based tort scheme. First, the victim does not have to wait as long to receive compensation. Second, the amount of compensation awarded is more certain and tends to be more generous, particularly in the case of serious injuries, under no-fault schemes. Third, no-fault schemes operate more equitably from the perspective of both the victim and the "wrongdoer". Fourth, in economic terms no-fault schemes operate far more efficiently than their tort-based counterparts.

No-fault Accident Compensation Schemes: The Canadian Experience

INTRODUCTION

7. The advantages and disadvantages of the tort system of accident compensation have been the subject of debate among lawyers, judges and scholars for decades. The purpose of this paper is to highlight some of the deficiencies of the operation of tort systems from a Canadian perspective and to offer comparative illustrations of how the no-fault schemes in various Canadian provinces are fairer, more efficient and more economical than their fault-based counterparts.

Timeliness of Compensation

8. One of the greatest shortcomings of fault-based tort recovery systems is the problem of delay. Although in most provinces an accident victim will receive prompt medical attention and some degree of income support under hospital insurance plans and other state-run social assistance programs, a victim must usually wait a long time for fuller compensation. The tort system moves very slowly and, unlike no-fault schemes, compensation is awarded only after a finding of liability has been made, not immediately after an accident when it is needed most. It has been estimated that in a major metropolitan centre, it takes at least two years from the date of the accident for most cases to get to trial.¹ More recent statistics indicate that it not unusual for some cases to take from two to thirteen years to "drag through" the court system.² Available data indicates that delay in receiving compensation in non-fatal accident cases increases dramatically as the severity of the victim's injuries and the amount of the loss increase.³

9. Delays are built into the tort system. Since the quantum of an award is usually crucial to the victim's future financial security and damages are assessed on a "once-and-for-all" lump sum basis, it is normal to wait until the victim's condition has stabilized and a medical prognosis can be made so that losses can be assessed as completely and accurately as possible.

10. Delay is inherent in the pleading process and is often used for tactical reasons by both sides in the adversarial process. Even if a litigant is successful in getting the claim settled or resolved at trial, further delays are often encountered in the scheduling of payments after an award is made. In a recent and much publicized Ontario decision, a youngster rendered a quadriplegic in a biking accident was awarded \$6.3 million.⁴ If the liability of the defendant municipality is upheld on appeal it has been estimated that it will be a further three or four years until the compensation is paid.

11. Delay imposes hardships on many victims. The uncertainty about whether the defendant will be found liable and the quantum of damages that will be awarded, if any,

coupled with the inconvenience and possible financial strain in the interval before a claim is resolved cause undue anxiety and may adversely affect a victim's recovery. Delay may also prejudice a deserving victim's ability to prove his case. As time passes, witnesses move away, their memories fade and it becomes increasingly difficult for a plaintiff to discharge the burden of proving that his loss was due to another's negligence.

12. Recent statistics on the operation of no-fault compensation schemes in Canada vividly illustrate how no-fault schemes minimize delay. Prior to the introduction of the government administered no-fault accident insurance scheme in the province of Quebec, sixty-five percent of victims remained uncompensated six months after the date of the accident. Under the new plan, only four percent of victims are not compensated within this period. To express this figure in positive terms, ninety-six percent of accident victims in Quebec receive compensation before the expiry of a six month period following their accident.⁵

Fairness

13. Notwithstanding that the notion of "fairness" is inherently difficult to quantify or assess, there are indications that no-fault accident compensation schemes in Canada operate more equitably from several perspectives than their tort-based counterparts.

14. One yardstick by which fairness may be measured is the percentage of accident victims who actually receive compensation. It has been estimated that under fault-based tort recovery systems as many as one-half of all victims go uncompensated.⁶ This is due partly to the fact that many victims choose not to sue. They may feel that they will be unable to prove fault or may be unwilling to bear the expense and anxiety of a lawsuit. What is "fair" about a system which compels those who do choose to vindicate their interests in the courts to gamble a sizeable initial investment in the form of legal fees and related costs against the odds of being able to prove another's fault and establish the nature and extent of the injury suffered in the hope that, in the end, the "faulty" party will have sufficient assets or insurance coverage to compensate for the loss? In many cases, the fault of another cannot be established and seriously injured victims must themselves bear the loss.

15. By way of contrast, recent statistics from Quebec reveal that under that province's no-fault accident benefits scheme, almost all victims who sustained serious injury have been compensated. A comparison between the situation before and after the introduction of the pure no-fault plan reveals that the proportion of traffic accident victims actually receiving compensation increased by approximately twenty percent.⁷

16. The tort system has also been described as "unfair" from the point of view of the "wrongdoer". Negligence takes many forms and the label describes a broad spectrum of conduct ranging from momentary inattention or an error in judgment to reprehensible disregard for life and safety. The tort system does not discriminate between these qualitative degrees of negligence in evaluating fault - the driver who skids on ice and "rear-ends" the driver ahead of him is considered to be just as culpable as a drunk driver. Not only are "wrongdoers" penalized by increased insurance premiums but a "wrongdoer" who is himself injured in an accident may be ineligible for compensation beyond limited no-fault benefits. Denial of adequate compensation may have serious financial repercussions for the injured party and his or her family. No-fault compensation systems operate more equitably since all persons who are injured in accidents are compensated regardless of who is at fault.

17. Besides leaving some victims uncompensated, the operation of the tort system also results in some plaintiffs receiving double compensation by permitting the accident victim

to receive collateral benefits from public welfare schemes in addition to full tort compensation. The rule which disallows a wrongdoer from benefitting from the collateral benefits paid to the victim in some cases results in a wasteful duplication of compensation.

18. The tort system has also been labelled "unfair" in the sense that it operates somewhat like a lottery - the amount of compensation awarded depends on a large number of variables such as the extent of the wrongdoer insurance coverage, the relative skill or ingenuity of the lawyers involved and the disposition of judges and juries. The interaction of these factors produce significant disparities between awards for similar injuries. No-fault schemes, on the other hand, quantify compensation on a much more consistent and uniform basis - a predetermined amount is paid to all victims with comparable losses. In Ontario, for example, no-fault dismemberment benefits are assessed on the basis of a fixed schedule under which all disabilities are assessed in terms of a set percentage of a total disability.

Adequacy of Compensation

19. Studies carried out in various Canadian jurisdictions reveal that accident victims commonly recover only one-third of total pecuniary losses under fault-based tort compensation schemes.⁸ In Ontario, for example, data indicates that, on the average, only thirty-seven percent of victim's economic losses were reimbursed.⁹ In British Columbia the comparable figure has been estimated at thirty-three percent.¹⁰ More significantly, it is apparent that recovery percentages decrease as the extent of the injury and resulting loss increase. Studies have shown that, generally speaking, the tort system compensates minor injuries more generously than serious ones.¹¹

20. This may be attributable to several factors. First, where injuries are relatively minor and losses are small, claims are often paid rather than disputed. Second, in the case of minor injuries, the major portion of the loss is represented by medical expenses for which most people are covered under hospital insurance plans. Where more serious injuries are involved, a larger proportion of the economic loss is comprised of loss of income which is less seldom covered by insurance.

21. While the financial strain upon an accident victim is often alleviated to some extent by collateral sources of compensation such as health insurance and various social welfare programmes, it is clear that the tort system falls short of its goal of adequately compensating accident victims for their losses. There is not a great deal of statistical information on the comparative performance of no-fault insurance schemes in other Canadian jurisdictions but a recent study conducted in the province of Quebec indicates that the average level of indemnity per compensated victim rose by fourteen percent since the introduction of the no-fault scheme¹² and that almost all victims who sustained serious injury have been compensated.¹³ These figures represent a stark contrast to the findings of a study conducted in the same jurisdiction five years before the formation of the Regie which concluded that under the tort/fault regime which existed at the time twenty-eight percent of victims who suffered economic losses were not compensated and fault-free victims recovered a maximum of sixty-percent of their total economic losses.¹⁴

Economic Efficiency

22. Tort-based compensation schemes have been criticized as being very costly and inefficient methods of providing compensation to victims.

23. The Canadian experience has shown that no-fault accident compensation schemes permit a significantly more efficient use of resources than tort recovery systems.

(i) Legal Costs

Besides being time consuming, the tort litigation process is very expensive because it requires an appraisal of the relative negligence of the alleged wrongdoer and the victim. An investigation of fault and assessment of tort damages is much more costly than a simple determination as to whether an injury occurred. The resolution of tort suits also imposes a heavy burden on the court system. It has been estimated that in the province of Ontario the trial of motor vehicle negligence cases consumes approximately forty-percent of the civil trial time of the Supreme and County courts.¹⁵

In addition to the costs expended in terms of the administration of justice, fees paid to lawyers substantially reduce compensation awarded in the tort system. In Ontario, figures reveal that legal fees consume between ten and fifteen cents of each dollar paid in insurance premiums.¹⁶ A study conducted in the province of British Columbia concluded that claimants' solicitors received, on the average, almost sixteen percent of the "total payout". In litigated cases, this figure rose to twenty-two percent.¹⁷ The proportion of an award which is subtracted for legal fees may be considerably higher in provinces where lawyers are permitted to operate on a contingency fee basis. Reports indicate that most lawyers charge a contingency fee ranging from twenty to thirty-five percent but some charge as much as forty-five percent.¹⁸

In a no-fault system, legal fees do not deplete awards made and more money reaches the hands of the injured party. The reduction of the pressure on the court system may also be substantial.

(ii) Administrative Costs

The cost of administering tort-compensation schemes is inordinately high. Statistics from British Columbia pre-dating the introduction of limited no-fault system approximately \$1.60 in insurance premiums is required to yield \$1 in compensation to a victim and that thirty-four percent of gross premiums were spent on administration.¹⁹ This is considerably higher than the ten percent spent on administration of no-fault worker's compensation schemes²⁰ and the eleven to sixteen percent spent under the Saskatchewan no-fault insurance plan.²¹ A recent study of the publicly administered Quebec scheme reveals that the ratio of expenses to net compensation in the context of personal injuries dropped thirty-six percent since the introduction of the pure no-fault reparation system in 1978. The relative cost of insurance (including administrative costs) per dollar of compensation has also significantly decreased and the relative price of insurance has dropped by a proportionate amount.²² In terms of return to the insured, the ratio of net compensation to premiums paid²³ in Quebec has risen by nine percent in Quebec since 1978 and the inverse ratio of premium paid per dollar of net compensation fell by almost fifteen percent over the same period.

APPENDIX

Overview of Provincial No-Fault Automobile Accident Compensation Schemes

BRITISH COLUMBIA

In the province of British Columbia, the automobile accident compensation scheme has been administered by the publicly held Insurance Corporation of British Columbia since 1974. This compulsory government insurance covers all motorists, their families, their passengers and people struck by them. Compensation is denied, however, where the victim is covered by Workmens' Compensation, is engaged in a race or illicit trade or is injured while attempting to commit suicide. Disability benefits will not be paid to those who sustain injury by reason of driving while impaired, while under age or while unauthorized or disqualified from operating a motor vehicle.

Disability Income Benefits²⁴

Disability income benefits are payable to wage earners in the amount of seventy-five percent of gross weekly wages to a maximum of \$100 weekly. Housewives receive \$100 per week. Benefits are payable for the duration of the disability where the victim is totally disabled. Where the disability is only partial, the insured is entitled to receive benefits for a maximum of 104 weeks.

Death Benefits

The death of the head of the household is compensated by a lump sum payment of \$5,000 plus \$100 a week for 104 weeks. Where the deceased leaves two or more surviving dependants, each one after the first is entitled to \$1,000 plus a weekly allowance of \$25 for 104 weeks. A lump sum of \$2,500 is payable upon the death of the breadwinner's spouse and, in the case of dependant children, payments are assessed on a sliding scale to a maximum of \$1,500.

Medical Payments

Medical payments are very generous. The plan covers all reasonable medical and rehabilitation expenses not covered by government schemes. The upper limit, to be stipulated in the policy, cannot exceed the third party liability coverage carried by the insured.

Dismemberment/Impairment of Bodily Function Benefits

No benefits.

Funeral Expenses

Funeral expenses up to \$1,000 are recoverable.

Minimum Third Party Liability Coverage

Coverage to the extent of \$200,000 is compulsory.

Tort Remedies Extinguished?

No

ALBERTA AND UKON TERRITORY

The compensation schemes in Alberta and the Yukon Territory are virtually identical and, for present purposes, may be discussed together. Both are administered by private insurance companies and, like the other provinces except Quebec, are characterized by a mixture of fault and no-fault benefits.

Disability Income Benefits

Partially disabled wage earners receive eighty-percent of their gross wages to a maximum of \$150 per week for 104 weeks. Where the worker is totally disabled, benefits are payable for the duration of the disability. In the Yukon Territory, a minimum of \$40 is payable weekly. In both Alberta and the Yukon, disabled housewives receive \$75 weekly for a maximum of twenty-six weeks.

Death Benefits

Upon the death of the head of the household or his or her spouse, a sum of \$5,000 is payable to the primary dependant. Where the head of the household has died leaving two or more dependants, each secondary dependant is entitled to \$1,000 plus a weekly allowance equal to one percent of the total principal sum for 104 weeks. The amount payable upon the death of a dependant child is determined according to a sliding scale to a maximum of \$1,500.

Medical Payments

Accident victims are entitled to recover up to \$5,000 in medical and rehabilitation expenses not covered by state hospital or medical plans.

Dismemberment/Impairment of Bodily Function Benefits

No benefits.

Funeral Expenses

The plans cover funeral expenses up to a maximum of \$1,000.

Minimum Third Party Liability Coverage

Motorists are required to carry a minimum of \$200,000 in liability coverage.

Tort Remedies Extinguished?

No

SASKATCHEWAN

The province of Saskatchewan is the pioneer of no-fault automobile accident insurance in Canada. In 1946, the recommendations of a special committee prompted the passage of statute which established a publicly-owned corporation to administer a no-fault insurance scheme. The government administered plan is financed from the sale of operator's licenses and premiums imposed on vehicle owners are calculated according to an elaborate schedule. Under the Saskatchewan plan, no-fault benefits are payable to everyone insured against loss resulting from bodily injuries sustained by accidental means as a result of driving, riding in or on, or operating a motor vehicle. Victims whose injuries are the result of a collision with a moving vehicle or who are struck or run over by a vehicle are also eligible for benefits. Protection of the plan is lost, however, if the injured person is under the influence of alcohol, is driving without a license or is engaged in a race or speed test.

Disability Income Benefits

A weekly indemnity of \$150 is payable to those whose injuries render them unable to work after an accident. In cases where the victim is totally disabled, the indemnity is paid for the duration of his lifetime. Where the disability is only partial, a sum of \$75 per week is paid for a maximum of 104 weeks. Homemakers are entitled to receive the same amounts but for a maximum of 104 weeks.

Death Benefits

If the insured dies within two years of the date of the accident and is the head of the household, \$7,500 will be paid to the primary dependant and \$1,500 will be paid to each secondary dependant (to a maximum of \$15,000). Where the victim is the breadwinner's spouse, the amount of the benefit is \$3,000. This payment is to be divided equally among the surviving dependants. In the case of the death of a dependant child, compensation is assessed on a sliding scale to a maximum of \$1,000.

Medical Payments

Up to \$14,000 in the form of a supplementary allowance is available to cover medical expenses not covered by government health plans.

Dismemberment/Impairment of Bodily Function Benefits

Lump sum payments assessed by reference to a complex schedule are available where the victim has been dismemberment or has suffered an impairment of bodily functions. The maximum award which may be made under this heading is \$10,000 and is payable for the loss of both arms or loss of sight in both eyes.

Minimum Third Party Liability Coverage

Motorists are required to carry a minimum of \$200,000 in third party liability coverage.

Funeral Expenses

Funeral expenses to a maximum of \$300 are recoverable.

Tort Remedies Extinguished?

No.

MANITOBA

The automobile insurance plan in Manitoba is administered by the government-run Manitoba Public Insurance Corporation. Modelled on the Saskatchewan scheme, Manitoba's "Autopac" plan provides compulsory insurance for all motor vehicles in the province, though private insurers are permitted to offer supplemental coverage. The government plan is financed by a complex premium structure which imposes licensing fees corresponding to the driver's age and sex. Additional premiums are assessed according to the number of demerit points a driver has accumulated. Additional surcharges are imposed on certain drivers who have been involved in two or more accidents during a specified period. The plan is also supported by fees paid for vehicles owner permits.

The protection of the "Autopac" plan is denied to unlicensed drivers and impaired drivers though the families of such drivers are entitled to receive death benefits and to recover funeral expenses. Compensation is also denied if the vehicle was engaged in a race or speed test or was involved in some form of illicit trade or transportation.

Disability Income Benefits

A victim who has been totally disabled is entitled to receive a weekly indemnity of \$150 or, in the case of employed persons, seventy-percent of wages to a maximum of \$300 weekly. A partially disabled victim will receive \$60 per week for a maximum of 104 weeks. A totally disabled housewife is entitled to \$150 per week for the duration of the disability. In the case of a partial disability, a weekly sum of \$60 is payable for a maximum of twenty weeks.

Death Benefits

Where the head of a household dies anytime after an accident from injuries sustained in that accident, \$10,000 is payable to the primary dependant and secondary dependants are paid \$2,000 each to a maximum of \$10,000. A sum of \$10,000 is also payable where the victim is the breadwinner's spouse. There is a \$2,000 limit on the benefits payable for the death of a dependant child.

Medical Payments

Medical and rehabilitation expenses are covered to a limit of \$20,000 beyond the amounts paid by any compulsory health insurance scheme.

Dismemberment/Impairment of Bodily Function Benefits

Benefits for dismemberment or impairment of bodily function are assessed according to a schedule. The maximum benefit is \$20,000 payable in the event of a total disability. Less serious disabilities are compensated by payment of a fixed percentage of the maximum award. Loss of a hand, for example, entitles the victim to forty-percent of the maximum figure.

Funeral Expenses

Funeral expenses to a maximum of \$1,500 are recoverable.

Minimum Third Party Liability Insurance

Liability coverage of \$200,000 is compulsory.

Tort Remedies Extinguished?

No

ONTARIO

Under the Ontario insurance plan, which is run by private insurers, the no-fault provisions cover each insured person who sustains bodily injury or death by an accident arising out of the use or operation of an automobile. In 1978 the amounts payable as benefits under the scheme were increased and the coverage of liability insurance was made compulsory. Like the other provinces except Quebec, the no-fault plan exists as a supplement to the tort system. Very recently, however, the Ontario Task Force on Insurance completed a study of the insurance industry in the province and recommended, among other things, that the government consider eliminating resort to the tort litigation system with respect to compensation for personal injury arising from automobile accidents and, in the long term, work towards a universal no-tort disability compensation plan.

Disability Income Benefits

Substantial inability to perform essential job duties entitles an individual to receive weekly disability benefits equal to eighty percent of gross weekly earnings to a maximum of \$140. To qualify for compensation, the victim must have been employed at the date of the accident and the disability must have manifested itself within twenty days of the accident. The payments will be discontinued after 104 weeks unless it can be shown that the victim's injury prevents him from engaging in any employment for which he is reasonably suited. In the case of an incapacitated housewife, the amount of the payment is \$70 per week for a maximum of twelve weeks.

Death Benefits

Where the death occurs within two years of the accident, death benefits in the amount of \$10,000 are payable in the case of a head of household or spouse and \$2,000 in the case of a dependant child under 21 years of age. If the head of the household dies leaving two or more survivors, the amount of the benefit payable is increased by \$1,000 for each survivor other than the first.

Medical Payments

All reasonable medical expenses incurred within four years of the date of the accident are recoverable up to a maximum of \$25,000. Sums covered by other insurance plans, government hospitalization or paid under workers' compensation legislation are excluded.

Dismemberment/Impairment of Bodily Function Benefits

There are no special benefits paid for these types of injuries.

Funeral Expenses

Funeral expenses are reimbursed to a maximum of \$1,000.

Minimum Third Party Liability Insurance

Motorists are required to carry a minimum of \$200,000 in third party liability insurance.

Tort Remedies Extinguished?

No.

QUEBEC

The accident compensation scheme established in 1978 by the government of the province of Quebec is a dramatic and bold innovation - a pure no-fault scheme under which all automobile accident victims receive compensation and all rights to sue in tort for bodily injury or death are extinguished. In place of the tort system, a comprehensive compensation scheme was introduced which pays generous medical, disability and death benefits. Amounts payable under the plan are adjusted annually to take account of inflation. The basic personal injury coverage is compulsory and is publicly administered by an agency called La Regie de l'assurance automobile du Quebec. A claimant who disagrees with the decision of an officer of La Regie may apply to have the decision reviewed. There is also a final right of appeal to the Commission des affaires sociales. The fund of which compensation is paid is financed by contributions from automobile owners and drivers, interest from the investment of accumulated funds and a portion of fuel taxes collected.

Private sector insurance is available as a supplement to the coverage provided by La Regie. In addition, since the government-run insurance scheme does not extend to property damage individuals are required to purchase separate property coverage from a consortium of private insurers.

Where an accident occurs outside Quebec, the owner, driver and passengers of cars registered in Quebec are fully covered. Where a car registered in a province outside Quebec is involved in an accident in Quebec, the scheme permits non-residents to receive some compensation but not the full extent of benefits payable to Quebec residents. Alberta, Ontario and Manitoba have taken steps to ensure that their residents who are involved in accidents in Quebec receive benefits from their own insurer equal to those paid by La Regie. La Regie is also empowered to take legal action to recover benefits paid out as a result of the "fault" of a non-resident.

Disability Income Benefits

Income replacement indemnities are paid in the form of indexed annuities. The amount of the indemnity varies according to the victim's employment status. Most workers are entitled to receive ninety percent of their net income to a maximum of \$33,000 per year. The minimum weekly payment is \$145.31 plus \$18.17 per dependant to a limit of \$254.33. Homemakers receive a weekly indemnity of \$272.45. Other benefits are paid to students and senior citizens.

Death Benefits

Death benefits in the form of a pension are payable to surviving dependants and are assessed by reference to the income replacement indemnity to which the deceased would have been entitled had he or she lived. Where the victim dies leaving one dependant, the payment is valued at fifty-five percent of the income benefit which the deceased would have received. The minimum payable is \$145.31 per week. The percentage of the total indemnity payable increases with the number of surviving dependants. Where the deceased has no dependants, a lump sum of \$7,432.26 is paid to his or her parents or \$3,716.13 is paid to the deceased's estate.

Medical Payments

All medical and rehabilitation expenses incurred as a result of the accident are paid by the plan.

Dismemberment/Impairment of Bodily Function Benefits

A lump sum payment assessed on the basis of a schedule to a maximum of \$36,327.06 is payable for dismemberment, disfigurement or loss of enjoyment of life.

Funeral Expenses

Up to \$2,447.42 is payable towards funeral expenses.

Minimum Third Party Liability Insurance

A minimum of \$50,000 in third party liability for property damage must be carried. There is no third party liability for death or bodily injury.

Tort Remedies Extinguished?

Yes (for death and bodily injury)

NOVA SCOTIA, NEW BRUNSWICK and PRINCE EDWARD ISLAND

The no-fault benefits payable under the accident compensation schemes in operation in the three Maritime provinces of Nova Scotia, New Brunswick and Prince Edward Island are virtually identical. The plans in all three provinces are furnished and administered by private insurance companies.

Disability Income Benefits

Wage earners who are unable to work because of injuries sustained in automobile accidents receive eighty-percent of their wages to a maximum of \$140 per week. Where the victim is totally disabled, the benefits continue for the duration of the disability. In the case of a partial disability, benefits are paid for a maximum of 104 weeks. A homemaker is entitled to \$70 per week for up to twelve weeks.

Death Benefits

Death benefits are payable where the death occurs within two years of the accident. A fixed lump sum of \$10,000 is paid where the victim is the head of the household or spouse. In addition, \$1,000 is paid to each secondary dependant. The death benefit payable where the victim is a dependant child is \$2,000.

Dismemberment/Impairment of Bodily Function Benefits

No benefits.

Funeral Expenses

The plans cover funeral expenses up to a maximum of \$1,000.

Minimum Third Party Liability Coverage

A minimum of \$200,000 third party liability coverage is required.

Tort Remedies Extinguished?

No

NEWFOUNDLAND

The province of Newfoundland is the only Canadian jurisdiction in which no-fault accident benefits coverage is not compulsory. The scheme is administered by private insurance companies.

Disability Income Benefits

The benefits payable under the Newfoundland scheme are considerably lower than those payable in the other provinces. Income benefits for a partial disability are limited to \$35 per week for a maximum of 104 weeks. The term is extended to 208 weeks where the victim is totally disabled. In the case of a housewife, the indemnity is \$12.50 per week for up to twelve weeks.

Death Benefits

Death benefits are payable if the victim dies within three months after the date of the accident. The amount payable is calculated on a sliding scale and decreases in inverse proportion to the victim's age. Where the victim is a married male under 59 years of age, an indemnity in the amount of \$5,000 will be paid. The amount decreases to \$2,000 in the case of a married male over 70. A lump sum of \$1,000 is paid to each dependant child. Indemnities payable where the victim is a married female are calculated on the same sliding scale but are valued at 50% of the amount payable in the case of their male counterparts. A maximum of \$2,500 is paid upon the death of a dependant child.

Medical Payments

Medical expenses incurred within two years of the date of the accident which are not covered by government hospital or medical plans are reimbursed to a maximum of \$2,000.

Dismemberment/Impairment of Bodily Function Benefits

Benefits are assessed by reference to a schedule.

Funeral Expenses

Funeral expenses are recoverable to a maximum of \$500.

Minimum Third Party Liability Coverage

Motorists are required to carry a minimum of \$200,000 of third party liability insurance.

Tort Remedies Extinguished?

No

NORTH WEST TERRITORIES

The automobile accident compensation scheme in the North West Territories is administered by private insurers.

Disability Income Benefits

Employed persons who are unable to work as a result of injuries sustained are entitled to receive eighty percent of their gross wages to a maximum of \$50 weekly. The minimum payable under the scheme is \$40 per week. Benefits are payable for the duration of the disability if the victim is totally disabled. In the case of partial disability, benefits are paid for 104 weeks. Homemakers are entitled to \$50 per week for a maximum of twenty-six weeks.

Death Benefits

Death benefits are assessed on a sliding scale. The scheme pays \$5,000 where the victim is under 64 years of age and is the head of the household. For victims between 65 and 69, a sum of \$3,000 is paid. Where the victim is over 70, the amount of the indemnity is \$2,000. In addition, twenty percent of the principal sum is paid to each secondary dependant. The death of the breadwinner's spouse is compensated by an amount calculated on the basis of fifty-percent of the amount payable on the breadwinner's scale. Where the victim is a dependant child, the maximum sum payable is \$1,500 depending upon the child's age.

Dismemberment/Impairment of Bodily Function Benefits

No benefits.

Funeral Expenses

Funeral expenses are recoverable to a maximum of \$500.

Minimum Third Party Liability Insurance

Motorists must carry a minimum of \$50,000 third party liability coverage.

Tort Remedies Extinguished?

No.

ENDNOTES

1. Linden, Canadian Tort Law (3rd ed., 1982), at p.626, citing Report of Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965), Chapter V, p.20.
2. Report on the Ontario Task Force Insurance (1986), vol.I, at p.99.
3. Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation (1973), at pp.14, 59; Linden, supra note 2, at p.626. See also Report of Osgoode Hall Study, supra note 2.
4. McErlean v Sarel et al. (1985), 32 CCLT 199 (Ont. HC).
5. Report of the Ontario Task Force on Insurance, supra note 3, vol. II, App.13, at p.17.
6. Ibid., vol.I, at p.99.
7. Ibid., vol.II, App.13, at p.17.
8. Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation, supra note 4, at pp.48-49.
9. Report of Osgoode Hall Study, supra note 2, chapter 11, at p.1.
10. Report of the British Columbia Royal Commission on Automobile Insurance (1968), at p.404.
11. See e.g., Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation, supra note 4, at pp.48-56.
12. Report of Ontario Task Force on Insurance, supra note 3, vol.II, App.13, at p.17.
13. Ibid.
14. Province of Quebec, Report of the Committee of Inquiry on Automobile Insurance (1974), at p.200.
15. Ontario Law Reform Commission, Report on Motor Vehicle Accident Compensation, supra note 4, at p.72.
16. Ibid., at p.15.
17. Report of British Columbia Royal Commission on Automobile Insurance, supra note 11, at p.52.
18. Province of British Columbia, Report by the Automobile Accident Compensation Committee (1983), at p.90.
19. Report of British Columbia Royal Commission on Automobile Insurance, supra note 11, at p.119.
20. Linden, Canadian Negligence Law, supra note 2, at p.627.
21. Ibid.

22. Report of Ontario Task Force on Insurance, *supra* note 3, vol.II, App.13, at pp.11-12.
23. *Ibid.*
24. The information on the benefits payable under the automobile accident insurance plans of the various provinces was provided by the Insurance Bureau of Canada and is current to January, 1986.

NEW ZEALAND'S NO-FAULT COMPENSATION SCHEME — 12 YEARS ON

A paper prepared by the Rt. Hon Geoffrey Palmer, Deputy
Prime Minister and Attorney-General and Minister for Justice
of New Zealand

(The New Zealanders) are proud of their innovations and their trials of what had been tried nowhere else; they enjoy being able to smile at the timidity of the old countries, and to believe that they are giving them lessons.

Andre Siegfried
Democracy in New Zealand (1913)

New Zealand's accident compensation scheme is now in its 12th year of operation.

2. A generation of New Zealanders has reached adulthood with no experience of any other system of compensation for accidental injury. A whole generation who have known only no-fault.

3. Accident compensation is an integral part of New Zealanders' lives. The scheme meets general community acceptance and has become an established social institution. The benefits are available to the child who falls out of a tree, the housewife who burns her hand, the jogger who falls, the professional jockey who breaks an arm, the lawyer injured in a motor accident or the waitress who strains her back. Apart from the non-earning child and housewife, all those mentioned contribute to the scheme in some way, and all benefit in many ways.

4. When the Accident Compensation Corporation celebrated its 10th anniversary, it published a brochure entitled "A Bold Experiment" designed to increase the public's awareness of the unique nature of the scheme. New Zealanders, however, are a reasonably undemonstrative lot. The fact that their country was the first in the world to establish a fully fledged no-fault Accident Compensation scheme was not regarded as cause for any special notice.

5. While being of considerable interest to lawyers, doctors, the insurance industry and trade unionists at the time of enactment, the scheme is now accepted as being simply another facet of the social security system which has been in place for nearly 50 years in New Zealand. As such it is regarded as sensible, humane and a thoroughly reasonable way of doing things.

6. The demise of the common law tort liability in New Zealand has been notable only for the complete lack of public lamentation on the matter. I can tell you that the absence of tort liability in New Zealand has neither reduced once-proud legal firms and insurance companies to penury, nor resulted in outraged would-be litigants pleading with Government to turn the clock back.

7. So, having legislated away the common law redress for accident - what have New Zealanders go to replace it?

8. What we have is the Accident Compensation Act 1982, which amends and consolidates the original Accident Compensation Act 1972.

9. The purposes of the Accident Compensation Act 1982 are set out in section 26:

- "(a) To promote safety, including occupational health;
- (b) To promote the rehabilitation of persons who suffer personal injury by accident;
- (c) To make provision for the compensation of persons who suffer personal injury by accident and certain dependants of those persons where death results from the injury."

10. It should be pointed out at this stage, that the order of priority accorded the three principal functions of the Act - namely safety, rehabilitation and compensation - is not fortuitous and indicates the philosophical genesis of the scheme of which more will be said later.

11. The Act removes action for damages in tort.

12. The main benefits available under the accident compensation scheme are:

- (i) earnings-related compensation at a level of 80% of lost earnings.
- (ii) earnings-related compensation for dependants of a deceased earner
- (iii) the reasonable cost of medical or dental treatment (Treatment in public hospitals is free for everyone in New Zealand.)
- (iv) the reasonable cost of all hospital, medical, dental or related expenditure.
- (v) reasonable transportation costs relating to medical or rehabilitative treatment.
- (vi) reasonable incidental costs of meals and accommodation incurred in respect of treatment.
- (vii) the cost of damage to artificial limbs or aids or clothings used or worn at time of accident.
- (viii) actual and reasonable expenses and proved economic losses necessarily or directly resulting from the injury.
- (ix) compensation to a member of the household for quantifiable loss of service of a domestic or household nature.
- (x) compensation for anyone who can show actual and reasonable expenses or losses incurred in helping an accident victim
- (xi) payment for reasonable cost of necessary constant personal attention following injury
- (xii) modest lump sums with statutory limits for permanent physical disability

(xiii) modest lump sums with statutory limits for pain and suffering, disfigurement and loss of amenities or enjoyment of life.

(xiv) rehabilitation and retraining assistance.

(xv) reasonable funeral expenses.

(xvi) lump sums for any dependant spouse and children if death results.

13. The scheme is administered by a State Corporation and financed by levies on:

(i) motor vehicles

(ii) employers

(iii) the self-employed

(iv) there is also a contribution from taxation appropriated by Parliament.

14. The source of funds is almost the same as those which fuelled the old tort and workers' compensation systems swept away by the new scheme.

15. Administration costs of the scheme are presently 8.4% of total income (this includes administrative expenditure on safety and rehabilitation) and the table below sets out the claims and finance of the Accident compensation Corporation since its inception in 1974:

Year Ending 31 March	Claims Received	Claims Declined	Total Income	Total Expenditure
1975	105,018	784	81,316	32,690
1976	130,657	2,485	93,810	59,250
1977	130,235	3,490	110,385	81,341
1978	132,438	5,454	127,789	89,181
1979	135,369	4,936	141,093	98,028
1980	126,391	3,991	174,087	104,411
1981	128,787	2,708	201,553	126,601
1982	131,916	1,168	242,388	192,371
1983	144,515	1,157	283,586	253,142
1984	153,259	1,005	325,336	284,577
1985	159,106	1,225	300,249	340,107

16. This year, the levy on most motor vehicles has been raised to \$43.10, but the total motor vehicle registration is still only \$90.30 p.a. This compares more than favourably with all Australian states, and in particular, those states such as New South Wales, which retains the tort system and where motor vehicle registration was \$174 p.a. as at 1 December 1985.

17. The system is speedy - the average time lag between receipt of a claim and a cheque being posted to the claimant is about 10 days. Earnings - related compensation may continue on a periodic basis indefinitely with the present maximum weekly payment being \$817.00.

18. Last year, of the 159,106 claims received, 5,896 applications for review were lodged in respect of decisions of the corporation and of these 294 appeals were lodged in respect of decisions of Review officers. (Approximately 10 per cent of review decisions favoured the applicant either wholly or in part.)

19. So, there it is. A unique no-fault compensation scheme - which gives 24 hour coverage for all New Zealanders injured by accident. It is entering its 12th year of operation with universal public acceptance and -by and large - public approval.

20. Before examining the philosophy which provided the framework of New Zealand's present no-fault scheme, it may be of interest to note that dissatisfaction with the jury trial in road accident cases was expressed at New Zealand's Fifth Dominion Legal Conference as early as 1938, when a remit was passed approving the principle of absolute liability for personal injuries in motor accident collision cases with damages to be assessed in some suitable manner.

21. In 1939 the Minister of Justice set up a Committee to examine the question but the inquiry was suspended because of the war. When the experience of other countries is considered it is significant that in New Zealand the initiative for reform tended to come from lawyers.

22. In 1962 the then Minister of Justice established a Committee to examine the issue of Absolute Liability and to examine and report to the Minister on the desirability of the introduction of some sort of absolute liability for death or bodily injury arising out of the use of motor vehicles, including the adequacy and justice of the present law and insurance practice and legal procedure.

23. While the Committee shied away from abandoning the fault system, they conceded that the common law action was indeed open to serious criticism.

24. In order to "meet the social problem of misfortune which follows accident the whole basis of the present system should be reviewed". Such an investigation was beyond the scope of the Committee's work. The chairman, Mr Wild, to become Chief Justice three years later, dissented. He said:

"A new approach is needed, viewing the matter as a social question and not as a legal contest, facing the fact that the toll of the roads, despite our best endeavours, will remain a permanent feature of life. The problem calls for compensation for misfortune rather than damages for an individual wrong. Under the conditions of modern traffic an accident is an accident and the real responsibility rests on society. Just as society has had the benefits of modern transport so it should provide for the harm that it causes. It is better both from the social and the individual point of view that everyone suffering loss by road accident should be compensated than that compensation should depend on the chance that a motorist can be made legally accountable."¹

25. Wild's view prevailed - and in 1966 a Royal Commission was established - chaired by the then Mr Justice Woodhouse.²

26. By the close of 1967, the Commission had reported. Its key paragraph said this:

"Five General Principles - We have made recommendations which recognise the inevitability of two fundamental principles -

First, no satisfactory system of injury insurance can be organised except on a basis of community responsibility:

Second, wisdom, logic, and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment. There must be comprehensive entitlement.

Moreover, always accepting the obvious need to produce something which the country can afford, it seemed necessary to lay down three further rules which, taken together with the two fundamental matters, would provide the framework for the new system. There must be complete rehabilitation. There must be real compensation - income - related benefits from income losses, payment throughout the whole period of incapacity, recognition of permanent bodily impairment as a loss in itself. And there must be administrative efficiency. the five guiding principles can be summarised as -

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency."

27. Just five years later the Woodhouse proposal had found sufficient public and political endorsement for it to be put into legislation. The Accident Compensation Act 1972 was later consolidated and amended in 1982 and it should be noted that the five principles enunciated in the original Woodhouse Report continue to be the guiding principles of the scheme.

28. In making the legal and social reforms necessary to establish a no-fault accident compensation scheme, New Zealand was no doubt assisted by its relatively small size. There were other special factors about our social history, however, which encouraged public acceptance of what was and still is a radical approach to compensation for incapacity. New Zealand has a remarkable history of innovation in social legislation.

29. Reforms at the turn of the century in the fields of industrial legislation, old age pensions and land tenure established a positive attitude towards equality of opportunity. This was later exemplified by the Social Security Act 1938, passed by the first Labour Government, which created the context for the high level of community responsibility towards individuals which is still a feature of our social arrangements.

30. The state's inevitable interest in the welfare of its citizens was described in the Woodhouse Report this way:

"Community Responsibility: This first principle is fundamental. It rests on a double argument. Just as modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since, we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community."

31. The report also made explicit the moral commitment which underpins the scheme as a whole with...

"The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a coordinated response from the nation as a whole."

32. New Zealand's historic commitment to state support for the sick, the unemployed and the elderly as well as public acceptance of the fact that because all citizens contribute to the state, all are entitled to assistance from the state, provided the context and set the scene for acceptance of the Woodhouse proposals.

33. I am also of the view that the proposed reform received relatively rapid, bipartisan political endorsement because New Zealanders are practical people who know a good idea when they see one.

34. Since its inception, the New Zealand scheme has been the subject of considerable international interest.

35. I have myself acted in various advisory capacities on the subject to the governments of Australia, Sri Lanka and Cyprus as well as lecturing extensively on it in Canada and the United States.

36. A non-stop procession of academics, lawyers, insurers and journalists have travelled to New Zealand over the past decade to examine the scheme and to assess its possibilities for transplant.

37. As stated at the beginning of this paper, the demise of the action in tort to recover damages has been wholly unlamented in New Zealand. Its removal was a key factor in the legislation set up to establish the scheme and while attracting a certain amount of opposition from the insurance industry and the legal profession, their lobby was not sufficient to do more than affect detail rather than substance.

38. I commented some years ago that although a distinguished literature has grown up cataloging the weakness of the common law as a method of dealing with accidental injury, the institution had still shown much resilience in the face of acid criticism.⁴

39. This has not changed.

40. The historic criticisms of the tort system still apply and need no detailed rehearsing. The defects of the common law remedy known by some as a "forensic lottery"⁵ are as obvious today as they ever were.

41. The system was described recently in a document released by Lord Hailsham's department as "inefficient, dilatory and expensive";⁶ the problems of the uncompensated victim, of waste and of delay are well-known.

42. I said at the end of the 1970's that the survival of the common law system then seemed doubtful. I thus find it of considerable interest today to observe that legislators in both the United Kingdom and the United States of America seem now to be directing their efforts towards attempting to modernise the tort system dinosaur, rather than undertaking any fundamental reform.

43. Being one of those who played a part in ridding New Zealand of the common law remedy, I have to say that I view any attempt to streamline or improve a system of compensation based on tort as being very much second best solution. It would be far cheaper and fairer to get rid of the tort system altogether for personal injury, not to modify it.

44. In the United States any attempts at reform in the area of tort has run up against what is held to be a fundamental principle of democracy - the belief that any citizen should have unrestricted access to the courts for redress of any grievances he might suffer.

45. Nonetheless, so out of control have damages awards for personal injury become, particularly in the field of medical malpractice, that a report prepared for President Reagan has now recommended legislation be introduced to control runaway damages awards by American juries. In addition, a very large number of state legislatures have recently seen the introduction of measures designed to deal with what is said to be a crisis in the insurance industry, and it is not surprising that most of these look to some sort of tort reform.

46. A bill now before Congress seeks both to cap pain and suffering awards at \$100,000 and to require that punitive damages be paid to a court in the form of a fine. I suspect, however, that any attempt to control awards made by American juries will be sternly resisted and may not succeed.

47. British legislators, too, seem to have flagged away any fundamental reform of their compensation system.

48. After a brief flirtation with the Pearson Commission's proposal regarding the introduction of a no-fault scheme for road accidents, the plan came to nothing and to date none of the leading recommendations of the Pearson Report⁷ have been adopted.

49. It now seems clear that the narrow view taken by members of the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Commission) of their terms of reference should have warned anyone against expecting any real change to the existing mix of compensation systems in Britain. The Commission expressed a preference for a mixed system of tort liability complementing social security and set about redefining the relationship between those two systems.⁸

50. While acknowledging the shortcomings of the tort system with expressed scepticism on the deterrent value of tort liability and concern on the expense and patchiness of compensation, it seems that the Pearson Commission was not willing to take the unpopular step of recommending the removal of a remedy to which the public had become accustomed. Indeed one member of the Commission, Norman S Marsh, QC suggested later⁹ that the Pearson Report "reflected the conflicting views of the community as to the fundamental principles on which compensation for disability should be paid". He further pointed out that there were "some in the Commission who saw in tortious liability for negligence the recognition of a moral principle which should not be weakened".

51. Even the no-fault motor injury scheme recommended by the Commission was to be a hybrid scheme which retained recourse to the courts. This was said to be in order to avoid the anomaly of "someone injured by the fault of another ... on the roads ... (receiving) less compensation than if he had suffered an identical injury, also through the fault of another, in different circumstances" (Para 302).

52. Norman Marsh has stated that all the Pearson Commission aimed to do was to suggest a "large number of individual reforms which seemed desirable in themselves and which did not appear to prejudice the possibility of, and indeed could facilitate more fundamental reform in the future".

53. But five year's work and the Commission's 188 recommendations fell on stony political ground and it now seems that far from gearing up to fundamental reform, the British system of personal injury compensation is set to remain much as it is now, with some possible fine tuning.

54. Before looking at the latest attempt of the English legal system to grapple with personal injuries litigation, it should be acknowledged that the tort system is operated in British courts in a somewhat more controlled manner than is the case in the United States of America.

55. The "tariff" system is of significance here and in his discussion of the Pearson Report, Professor Fleming of the University of California Law School put it this way:

"The courts have also contributed to keeping the tort system workable by compensating for the incremental expansion of liability rules by keeping the lid on damages. Certainly compared with American awards, British awards look niggardly. This has been a matter of deliberate judicial policy, ranging from the categorical ouster of juries to an unrealistic attitude towards inflation. Perhaps the most striking feature of the modern English tort system is the virtual adoption of tariffs for particular injuries - the bureaucratisation of damage assessments and a distinct move towards the model of social security, away from the individualistic character of the traditional common law. Similar osmotic tendencies can be discerned in other countries, especially in Scandinavia, with a parallel growth of social security mentality."¹⁰

56. It is thus not surprising to read in the recent consultation paper on Personal Injuries Litigation issued by the Lord Chancellor's Department that further attempts are to be made to control and streamline the tort system in order to head off what the document acknowledges as "public concern on the score of cost and delay".

57. The material contained in the consultation paper is of considerable interest - particularly as the results of a factual study undertaken by a firm of management consultants is something of a first in its disclosure of the costs and the delay associated with personal injury litigation.

58. The judgement made on the present system in the light of the study's conclusions is, to my mind, a model of restraint. The system is described as "inefficient, it is dilatory. And it is disproportionately expensive."

59. In contrast, I find the facts thrown up by the study to be horrendous. For example:

- (a) High Court cases take four, five, six or more years from accident to conclusion.
- (b) Even County Court cases where the amount in dispute is usually no more than £3,000 can take three years or more from accident to conclusion.
- (c) Cases which settle by agreement can take as long as those where there is a trial.
- (d) It can take three years after the accident to get a case started.
- (e) Even when the case is started it takes nearly two years in the High Court in London before the defendant is provided with details of the plaintiff's case.
- (f) And when the two sides are all set for trial it takes the best part of the year in the High Court before a judge can be made available.
- (g) In the High Court, for every £100 of damages awarded the costs add up to £50, or £70, depending on the basis of calculation.

60. I understand that the suggested options for change include a "hotted up" procedure with shortened time limitations for the commencement of proceedings, specialised qualifications for solicitor in this field, an arbitration system for straightforward claims plus publicity of potential claimant's rights to encourage early claims.

61. I shall follow future developments consequent upon the Lord Chancellor's initiative with considerable interest.

62. To return to the New Zealand scene, it should be remembered that the scheme aims at more than simply providing compensation for personal injury.

63. As set out in section 26 of the Accident Compensation Act, its principal functions are to promote safety and rehabilitation, in addition to providing compensation.

64. The Accident Compensation Corporation employs safety consultants in head and regional offices and conducts a number of safety training courses each year.

65. The Corporation is active in occupational health and safety, home safety, road safety campaigns and in promoting injury prevention in the major sporting codes. Product safety is encouraged through the Product Safety Council.

66. In addition, the Corporation pays the full operating costs of the National Ambulance Officers' Training School as well as contributing significantly to the financial support of organisations such as the Consumers Council, Standards Association, Water Safety Council and the Defensive Driving Council.

67. The vital rehabilitation work of the Accident Compensation Corporation is expanding, with the referral of accident patients for rehabilitation assistance rising from under 9,000 in 1981/82 to 14,000 in 1984/85.

68. A total of 55 rehabilitation officers are located in 22 centres. They provide liaison between injured persons and the providers of a range of rehabilitation programmes as well as rehabilitation aids and assistance.

69. Twelve years on, the framework and principles of the Accident Compensation scheme remain sound. Such problems that have emerged are now the subject of an Interdepartmental Study Team which is due to report very soon.

70. The major cause for concern is the very large proportion of expenditure (21% approximately) currently going to health care.

71. The most significant factor in health care costs is that the \$80 million a year spent in this area nearly all goes to the private sector. At a time when the Government finds itself in the position of having to curtail spending in the public health sector it is of some concern to see public money being directed through the Corporation into the funding of private hospitals, sports clinics, private physiotherapy practices and others. There is particular concern for the implications this has for manpower deployment in the health professional field.

72. Another aspect of the scheme which is being looked at is the question of whether the general practitioner should be left with sole discretion to decide whether an injury is in fact to be classified as an accident.

73. Between 1981 and 1985 the number of general practitioner treatments classified as accidents rose from 3.1 million to 4.4 million, while the total visits remained constant. There is no evidence to suggest that New Zealanders are becoming more accident prone and the suspicion is that a wider range of medical conditions are now being put into the category necessary for the Accident Compensation Corporation to foot the bill.

74. The third area which needs to be addressed is the old problem whereby the current high level of expenditure directed towards minor injuries tends to be at the expense of those suffering more serious incapacity.

75. Finally, the question of extending the compensation scheme to cover incapacity resulting from sickness and congenital disability as well as by accident remains to be answered.

76. This was addressed in the original Woodhouse Report and it was suggested there that while such an extension was logical ... "the proposal we have put forward is far-reaching and is designed to remedy a situation which at present is the subject of attention by unrelated processes which produce inconsistent and inadequate results. Moreover, there is a need for more statistical information in the area of sickness and disease before firm decisions could be taken as to the cost of a scheme which would embrace incapacities from these causes."

77. To my mind, the issue comes down to one of social equity. How can the person with cancer be treated less than the man who is hurt in a motor accident? It is impossible to find a persuasive argument against the proposition that people with similar incapacities should be treated the same way whether the origin of their trouble was accident, disease, congenital disability or is simply unknown.

78. The New Zealand Government is establishing a Royal Commission on Social Policy this year and I expect the extension of our accident compensation scheme will be one of the major items to be addressed. I hope the humanity and practicality inherent in our present system of compensating the victims of accident can soon be extended to other victims of disability.

79. Elimination of distinctions between people based on the cause of their incapacity must occur. I have no doubt that it is the most important piece of unfinished business arising out of reforming accident law in New Zealand.

The table below is taken from the Accident
Compensation Corporation's Annual Report to March 1985

It should be noted that the system of funding was changed in 1985 from a fully funded scheme to a pay-as-you-go system. This resulted in levies on employers being dropped - they now stand at 77 cents per \$100.00 of leviable income with the self-employed rate raised to \$1.00 per \$100.00 of leviable income. Levies were now set at the rate to fund four or five years of outstanding liabilities.

STATEMENT OF INCOME AND EXPENDITURE FOR THE YEAR ENDED 31 MARCH 1985

STATEMENT OF INCOME AND EXPENDITURE FOR THE YEAR ENDED 31 MARCH 1985

	1985				1984			
	Earners' Account	Motor Vehicle Account	Supplementary Account	Total	Earners' Fund	Motor Vehicle Fund	Supplementary Fund	Total
Income	\$	\$	\$	\$	\$	\$	\$	\$
Gross levy revenue	155,285,871	40,668,336		195,954,207	202,928,594	26,110,546		229,039,140
Investment income (note 7)	44,667,317	16,705,748		61,373,065	42,547,251	18,531,181		61,078,432
Other			42,921,912	42,921,912			35,218,984	35,218,384
Total income	\$199,953,188	\$57,374,084	\$42,921,912	\$300,249,184	\$245,475,845	\$44,641,727	\$35,218,984	\$325,336,556
Expenditure								
Earnings related compensation or loss of potential earnings, payable to injured persons	119,393,804	28,488,145	268,055	148,150,004	100,406,590	24,129,995	155,603	124,692,188
Earnings related compensation or remittance grants, payable to dependants	13,267,036	12,524,893	347,474	25,791,929	12,262,327	11,323,361	305,156	23,585,688
Funeral expenses and dependants' allowance	971,883	1,508,041		2,827,398	656,059	1,145,561		2,106,776
Non-economic loss	32,726,278	15,040,631	9,092,649	56,859,558	22,986,597	12,247,981	6,606,931	41,841,509
Medical treatment	21,466,765	5,843,483	23,829,908	51,140,156	17,944,601	4,835,098	19,589,148	42,368,847
Hospital treatment	8,378,271	1,224,606	2,532,989	12,135,766	6,560,932	1,079,159	2,136,127	9,776,218
Dental treatment	1,783,790	417,242	936,927	3,137,959	1,781,370	425,140	996,028	3,202,478
Conveyance for medical attention	2,466,023	1,841,460	1,519,782	5,827,265	2,535,586	2,058,840	1,653,519	6,247,945
Rehabilitation - aids, training, and grants	523,767	662,893	212,622	1,399,282	305,354	478,981	181,636	965,971
Other expenditure	1,405,014	2,303,899	1,629,823	5,338,736	1,868,474	1,735,498	1,324,092	4,928,064
Total compensation	\$202,382,631	\$69,855,293	\$40,370,129	\$312,608,053	\$167,307,830	\$59,459,614	\$32,948,240	\$259,715,684
Safety incentive bonus	1,268,555			1,268,555	1,204,202			1,204,202
Financial grants	460,763	257,031	227,083	944,877	442,930	232,531	113,405	788,866
Levy revenue collection fee	2,635,297	1,184,993		3,820,290	2,831,555	1,017,324		3,848,879
General account transfer	16,195,623	2,945,049	2,324,700	21,465,372	14,090,941	2,771,246	2,157,339	19,019,525
Total expenditure	\$222,942,869	\$74,242,366	\$42,921,912	\$340,107,147	\$185,877,458	\$63,480,715	\$35,218,984	\$284,577,157
Addition or (reduction) to account balance	(22,989,681)	(16,868,282)						

FOOTNOTES

1. Report of the Committee on Absolute Liability, Government Printer, Wellington New Zealand, 1963.
2. Then a judge of the Supreme Court of New Zealand, later President of the Court of Appeal and now Chairman of New Zealand's first permanent Law Reform Commission.
3. Compensation for Personal Injury in New Zealand, Government Printer, Wellington, New Zealand, 1967.
(Known as the Woodhouse Report)
4. Compensation for Incapacity, Geoffrey Palmer, Oxford University Press, 1979.
5. The forensic lottery; a critique on tort liability as a system of personal injury compensation, Terence G. Ison, Staples, London, 1967.
6. Civil Justice Review, Personal Injuries Litigation consultation paper, Lord Chancellor's Department, February 1986.
7. Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, 1978
8. See Fleming "The Pearson Report: Its Strategy", (1979) 42 MLR 249
9. See Marsh, "The Pearson Report on Civil Liability and Compensation for Death or Personal Injury", (1979) 95 LQR 513.
10. See Fleming, (1979) 42 MLR 251.

THE WESTERN SAMOA ACCIDENT COMPENSATION SCHEME

A Memorandum by the Government of Western Samoa

1. Introduction

Western Samoa is a small developing country in the South Pacific. It is an independent nation with a population of 160,000.

More than 20,000 are in paid employment - persons performing unpaid employment for the benefit of their family under an extended family system, number nearly 50,000. Upward of 80,000 are children non-earners under age 18 years.

2. The Scheme

The accident compensation scheme in Western Samoa is operated by the Accident Compensation Board and was established by Act in 1978.

The Scheme provides protection on a no-fault personal basis:

- to workers injured at work; and
- to victims of motor vehicle accidents

3. Persons Covered

Under the work injury scheme all workers in paid employment are covered. Not covered however, are workers who are spouses of their employers, and the self-employed

For the motor vehicle accident scheme, the total population is covered and includes non-residents, tourists, etc.

4. Contingencies Covered

Temporary incapacities, permanent disabilities and deaths to adults are covered. Children are covered only for permanent disabilities. Work accidents include occupational diseases. Presently, work accidents are compensated only if they occur in the country. Consequently employed fishermen, seafarers and airline workers whose work takes them outside territorial limits are not covered.

Motor vehicle accidents are accidents caused by or through or in connection with the use of a motor vehicle. They are thus not confined to road accidents. In general, the criteria for coverage include whether the vehicle involved was a motor vehicle operating with fuel on which fuel levy had been paid. A motor vehicle accident to a worker during the course of his/her employment is however classified as a work accident.

No benefits are payable for self-inflicted injuries or for death due to suicide.

5. Funding

Funding of the work injury scheme is by way of a 1% levy on the payroll, paid by the employers. This levy is collected by the National Provident Fund as agent for the Accident Compensation Board.

For the motor vehicle injury scheme, funding is by a levy of 5 sene (cents) per gallon on all imported motor fuel, i.e. diesel and petrol. The levy is collected by the Customs Department for the Board. Levies paid in respect of motor fuel used for non-motor vehicle purposes, e.g. for industrial use, are refunded by the Board to the consumers concerned.

6. Benefits

The Scheme provides compensation

- (a) for economic loss, and this amounts to 60% of the injured person's loss of earnings but not less than \$10 a week or more than \$75 a week;
- (b) for permanent loss of bodily function, an amount ranging from \$20 up to \$2,000 (100%) depending on the degree of permanent loss; and
- (c) for death, a sum of up to the equivalent of 4 years' earnings but not more than \$7,500 is paid to dependants.

The above benefits are payable in respect of the injured or deceased on whom others are dependent, thus children, students and a few other non-earners do not qualify for income replacement of economic loss or for death compensation. They do however qualify for compensation to permanent disability. Persons on unpaid work for the benefit of their extended family, do qualify the value of such unpaid work is assessed by the Board and is deemed to be earnings for purposes of compensation.

In addition to the above benefits, expenses are also payable for the immediate conveyance of an injured person to a hospital, or to a medical doctor and then to a hospital or to his/her home. And where death occurs, funeral expenses up to \$200 are payable as well as a sum of up to \$100 to help with medical expenses. Funeral expenses apply to earners, non-earners and children alike.

The reasonable cost of damages to natural teeth or to any artificial aid worn at the time of the accident are likewise payable.

As part of its rehabilitation function, the Board provides for the reasonable cost of any artificial limb, aid, physiotherapy or other treatment considered necessary for full rehabilitation of a person injured by either a motor vehicle or work accident.

7. Waiting Period

No compensation is payable in respect of any injury which does not incapacitate a person for at least 5 days from earning full wages or from earning assessed wages in the case of unpaid family workers. However, if the incapacity lasts 5 days or more, compensation is payable in respect of the total period of incapacity.

Periodic payments of compensation for temporary incapacity is presently limited to an aggregate period of 3 years.

8. Operational Statistics

	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>
Accident Claims received (No.)	457	458	434	381
Of which Work Accident Claims:	222	234	218	181
and Motor Vehicle Acc. Claims.	<u>235</u>	<u>224</u>	<u>216</u>	<u>200</u>
Deaths: To workers	<u>7</u>	<u>14</u>	<u>12</u>	-
Non workers	<u>20</u>	<u>23</u>	<u>18</u>	19
Total deaths	27	37	30	19
Income (\$'000):				
From Payroll Levy	435	434	487	
From Fuel Levy	<u>155</u>	<u>170</u>	<u>199</u>	
Total Levies	590	604	686	
Investment Income	<u>178</u>	<u>275</u>	<u>434</u>	
Expenditure (\$'000):				
Benefits, Work Accidents	103	99	73	
Benefits, Motor Veh.				
Accidents	<u>66</u>	<u>51</u>	<u>72</u>	
Total Benefits	169	150	145	
Administration	91	100	138	
Work Accidents	48	56	74	
Motor Vehicle				
Accidents	43	44	64	
Total Expenditure	<u>260</u>	<u>250</u>	<u>283</u>	

Trends indicate that accidents (and claims) for 1985/86 will likely remain below the 500 level. Minimal increases are expected on income from levies. Benefits expenditure however, will remain at the present relatively low level but it is anticipated that moderate to significant increases will be evident in 1986/87.

9. Accident Prevention

The Board works in close cooperation with the occupational health and safety inspectorate of the Labour Department whose function is the enforcement of health and safety standards at workplaces. The Board also contributes financially to other activities designed to prevent or minimize work and motor vehicle accidents, e.g. first aid instructions for workers at work places, road safety programmes to schools, drivers programmes, etc.

10. Some Experiences

(a) Duration of Weekly Compensation Claims:

There is an expected but nonetheless striking difference between the average duration of weekly compensation (temporary incapacity) claims under the two schemes described above (for the period 1978-83):

Average duration of Incapacity

Work accident 25 work days

Motor vehicle accident 79 work days

These average durations are from day one for incapacities which last at least five working days. It is evident that the severity of motor vehicle accident injuries is over three times the severity of work injuries.

(b) Claim Frequencies:

For the work accident scheme, the 1978-83 average claim frequencies (per 10,000 insured persons) are:

Temporary incapacity	92
Permanent incapacity	8
Death	4

It is felt that the combined male and female frequency of temporary incapacity benefits of 92 per 10,000 insured workers is low. Deaths however, is sensed to be high.

For motor vehicle accidents, a frequency of accidents (other than commuting accidents) causing personal injury to covered workers would yield a figure of the order of 130 per 10,000 covered workers, or about twice that of Switzerland. When measured in terms of accidents involving personal injury against the number of motor vehicles registered, Western Samoa with about 580 per 10,000 motor vehicles registered, is something like four times greater than that of Italy.

(c) Severity of Injury Lump Sum Claims:

The percentage incapacity for injury lump sum claims which have been settled to December 1983 are tabled below, for males and females combined.

	<u>Degree of incapacity</u>			<u>Total</u>
	<u>Under 20%</u>	<u>20-39%</u>	<u>40% or more</u>	
Work accidents	42	29	10	81
Motor vehicle accidents				
- adults	32	15	15	62
- children	37	5	6	48

It can be seen from the above that approximately one half of the permanent incapacities resulting from work injuries and motor vehicle accidents incurred by adults are under 20%. For children, over three-quarters of those who suffer permanent incapacity incur less than 20% permanent incapacity.

The average age at the time of the accident of adult permanent incapacity claimants with degrees of incapacity of 20% or more, is 33 for incapacities arising from work accidents and 38 for incapacities arising from motor vehicle accidents.

(d) Average Benefit Amounts:

The average benefits related to earnings of accident victims, for the two-year period 1982/83, are tabled below.

<u>Average Benefit Amounts</u>			
		No.	<u>Average Amount (\$)</u>
Work Accidents:			
Weekly compensation	M	363	19.44
	F	30	13.75
Death	M	15	5,756
	F	3	6,188
Motor vehicle accidents:			
Weekly compensation			
- unpaid workers			10.00
- paid workers	M	20	26.10
	F		28.56
Death			
- unpaid workers			1,248 ⁽¹⁾
- paid workers	M	4	6,180
	F	3	6,248

(¹) Increased to \$2,080 from September 1984

It may be noted from the above benefits on work accidents that the average earnings of injured females appear to be about 70% of the male average.

While the above data appear limited to draw any firm conclusions, the average weekly earnings of paid workers receiving weekly compensation due to a motor vehicle accident seem to be higher than the earnings of those receiving weekly compensation due to a work accident. This could well be the situation since motor vehicle accidents will tend to be relatively more randomly distributed throughout the working population than work injuries which tend to be concentrated in the more hazardous occupations, e.g. construction, logging, etc. which have large numbers of low-paid unskilled workers.

The minimum adult wage in 1978 at commencement of the scheme was \$10 for a five-day 40-hour week. The minimum weekly compensation also stood at \$10 per week. For the period 1982/83, the minimum weekly wage was \$18, increasing to \$22 for 1984/85. The minimum weekly compensation remains at \$10.

11. The Future

Possible changes would likely include the extension of the scheme to also cover workers injured in the course of work outside territorial limits. Also under consideration is whether or not workers should be covered on a 24-hour basis so as to include injury by non-work accidents.

Likely to be modified, is the earnings related compensation to tourists and other temporary visitors to the country. Presently, a tourist injured in a motor vehicle accident is entitled to weekly compensation based upon his/her earnings in the country from which he/she comes. As a result, such people when injured invariably qualify for the maximum amounts.

Also under consideration is a report on a recent actuarial valuation of the Fund from which it is indicative that many of the benefits can be increased. A complete review of these matters is hoped to be finalised by 1986.

12. Miscellaneous

The present workers' scheme replaced a previous system of workers' compensation based on employer-liability. That system, in operation from 1960, was not compulsory.

Present day, personal accident insurance is available through insurance companies. Likewise third party insurance for motor vehicle accidents is also available.

Nothing in the national scheme affects the civil liability of an employer or any person to sue for negligence, breach of statutory duty or other fault. And any worker or injured person or dependant can proceed both under the present Accident Compensation Act or independently of the Act. But where judgement is obtained independently of the Act, all compensation entitlements under the Act are forfeited.

Extra-territorial Jurisdiction claimed by the Courts of the United States

THE IMMUNITY OF STATES FROM THE JURISDICTION OF FOREIGN COURTS

A paper prepared by the ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

INTRODUCTION

A good deal of attention has been focussed in recent years in several countries including those in the Commonwealth on the question of the scope, extent and application of the doctrine of sovereign immunity in regard to claims to immunity by states from the jurisdiction of foreign courts. While the doctrine in its traditional form, based on the principle of par in parem non habet imperium, has been adhered to by a number of states over a long period, there has been a growing trend in some countries towards a restrictive application of the doctrine by carving out certain exceptions where immunity from jurisdictions were to be denied. This trend, which first became noticeable in the pronouncement of the courts the continental Europe in isolated cases even before the First World War, gradually gathered momentum in European practice in the inter-war years and more so during the past three decades with the progressive increase in state activities in the sphere of trade and other areas which could not be regarded as governmental functions in the traditional sense. Even in the common law countries, which had consistently recognised and applied the doctrine in its absolute form, a growing degree of public opinion had begun to emerge during the 'fifties about the need for a fresh look at the question faced with the phenomenal rise in the activities of states in the private law sphere. The question that came to be debated were basically three, namely:

- (i) Should the doctrine of sovereign immunity continue to apply in the traditional form in the modern context having regard to the extension of state activities in numerous spheres?
- (ii) If the doctrine is to be applied in a restrictive fashion, what should be the scope and ambit of exceptions where immunity would not be admissible? and
- (iii) Should, and if so, to what extent, the property of a sovereign state be subject to attachment and execution if immunity were to be denied in certain classes of actions?

2. The United States government as early as in 1952 came out in favour of a restrictive application of the doctrine as enunciated in a letter from the Acting Legal Adviser of the Department of State to the Department of Justice popularly known as the Tate Letter. The issue of immunity, however, continued to be determined by the executive branch of the government with the courts being guided by such determination following the decision of the Supreme Court in the case of Republic of Mexico vs Hoffman¹ in 1945. However the enactment of the Foreign Sovereign Immunity Act in 1976 has now placed the matter squarely in the hands of the judiciary. In the United Kingdom the question of immunity was based on the common law as determined and applied by the Courts, and although individual judges had begun to express doubts about the applicability of the doctrine in its absolute form² it was not until 1981 that the House of Lords finally pronounced itself

in favour of the doctrine of restrictive immunity.³ Legislation, however, was enacted in 1978 providing for a restrictive application of immunity on the basis of certain exceptions as specified in the Act.⁴ Legislation on similar lines has also been enacted in Canada,⁵ Singapore,⁶ Australia,⁷ Pakistan⁸. In Western Europe the restrictive doctrine became firmly embeded in the practice of states with the conclusion of the European Convention of Sovereign Immunity in 1972. The matter was also discussed in the Asian African Legal Consultative Committee (AALCC) in 1960 soon after its establishment, and the Committee by a majority recommended certain exceptions being made in regard to the classes of cases where immunity ought not to be claimed.⁹ 1

3. Notwithstanding this growing trend towards a restrictive application of sovereign immunity in Western Europe and the United States, the view has continued to prevail in the Soviet Union, socialist countries and also in some developing nations that there ought not to be any encroachment on the question of immunity, which they regard as an essential element of state sovereignty itself. Notwithstanding the two divergent schools of thought, no firm position appears to have been taken by a vast majority of the members of the international community, especially those in Asia, Africa and the newly-independent states in other regions. There is little evidence of state practice and a paucity of judicial decisions, presumably due to the fact that may not have been many occasions when the executive branch of government or the judiciary has been called upon to express views on the issue of immunity within the relatively few years of their independence.

4. It is primarily for these reasons that the International Law Commission decided in 1977 to study the subject with a view to its progressive development and codification. The Special Rapporteur appointed by the Commission has until now presented seven reports containing a formulation of 28 articles out of which 17 articles have so far been provisionally adopted by the Commission. The draft articles proposed by the Commission generally follow a restrictive pattern for the grant of immunity, but the debates before the Sixth Committee on the draft have clearly shown that the divergence of views among those states which favour absolute immunity and those who do not, continues to persist. In the light of this it is felt that the Commission's work, even when completed, may not lead to anything more concrete than a set of recommendations by an authoritative body which will help in the formulation of governmental policies by nations who have yet to decide on a line of approach.

5. Whilst the matter continues to be pending before the Commission, certain developments have taken place during the past five years which have caused a degree of anxiety and concern about the possible impact of the restrictive doctrine on the state sovereignty itself. This is primarily in relation to the interpretation and application of the United States legislation entitled 'The Foreign Sovereign Immunity Act 1976', which was brought in force in 1977. This incorporates the restrictive doctrine and sets out a series of exceptions where immunity from jurisdiction would not be admissible. One such exception is actions in relation to commercial transactions. The expression 'commercial transactions' as defined in the Act has a wide connotation, and the nature of a transaction is to be judged from what it appears to be on the surface without any reference to the purpose for which a transaction has been entered into.

6. Furthermore the legislation contemplates that jurisdictional immunity of a foreign state will not be admissible in an action brought before the courts of the United States in respect of 'commercial activity' of a foreign state, even outside the territory of the United States, if any act in relation to such activity takes place in the United States or causes direct effect in the United States. This means that if a sovereign state enters into a contract with a company or corporation in the United States for such matters as construction of a plant or factory in its own territory, the courts in the United States can assume jurisdiction in an action arising out of such a contract. Such jurisdiction may well be assumed on the basis that a contract has been signed in the United States or on

the ground that it has a direct effect on the United States in as much as the profits are intended to be repatriated to the United States.

7. The type of cases where jurisdiction may be exercised is illustrated by two recent reported decisions, namely, the Texas Trading and Milling Corporation v Federal Republic of Nigeria¹⁰ and Harris Corporation v National Iranian Radio and Television¹¹. In the group of cases against the Federal Republic of Nigeria, jurisdiction was assumed on the basis of a certain nexus in the United States, namely, the opening of Letters of Credit in the United States. In the second case, where an injunction was granted against National Iranian Radio and Television, jurisdiction was exercised on the basis of the financial consequences of the transaction being in the United States. 10,11

8. The matter was brought before the AALCC when the United States Supreme Court by its decision in the case of Verlinden vs Central Bank of Nigeria¹² delivered on 23 May 1983, affirmed the jurisdiction of United States courts in regard to suits relating to transactions to be performed outside the jurisdiction on the basis of the remotest nexus and even at the instance of foreign plaintiffs. In that case the jurisdiction of the courts in the United States was sought to be invoked in respect of a dispute concerning a sale of cement by a Dutch Company to the Nigerian Government. This had no connection with the United States except that a bank guarantee was opened by the Central Bank of Nigeria through the Morgan Guarantee Trust Company in New York. The Verlinden case thus sought to place the seal of approval on the hundreds of actions where jurisdiction had been assumed under the 1976 legislation since 1981. 12

9. There were two major considerations behind the concern felt by developing countries with this recent application and interpretation of the United States legislation in 1976. In the first place, many of these countries have, by and large, a substantial volume of transactions with parties, whether individuals or corporations including multinationals, who have a place of business or some other kind of link with the United States. Such transactions might include purchase of food grains by governments or their agencies, obtaining of supplies and material for defence forces, purchase of aircrafts for civil aviation, transportation and shipping contracts, etc. In addition, the governments often award contracts for the supply of plant and machinery, and the construction of factories and other development projects; they undertake purchases of cement and other materials for the building of infrastructure; and they acquire instruments and cables for communication systems and even fertilizer for agricultural use for food production. Most of these transactions, even though they appear at first sight to be of a commercial nature, are in fact undertaken for the fulfilment of the government functions of the state concerned. The performance of these contracts in many cases are basically outside the United Kingdom, except for perhaps some formal act or the shipment of supplies or the repatriation of profits. In several cases, particularly those related to development projects, Governments may have no option but to award contracts to United States corporations when projects are taken up under the Aid Assistance Programme of the United States on the pattern of tied credits.

10. Under international law and the prevailing practice of most states, transactions of the type mentioned above could well be regarded as public acts of a sovereign state in respect of which the state would be immune from the jurisdiction of the courts in a foreign state, even under the restrictive doctrine. But under the US legislation all such activities would be treated as 'commercial' and in respect of which the US Courts could assume jurisdiction on the basis of some kind of nexus, even though the contract was to be performed outside the United States. This is also likely to result in a conflict of jurisdiction with the courts of the country where the contract is to be performed.

11. The second matter causing concern was that even in respect of transactions which might fall squarely within the public functions of a sovereign state under the US legislation, parties may well be encouraged to file actions in the courts of that country for alleged grievances simply to bring pressure upon a sovereign state to meet the party's demands. This has indeed happened in certain cases against the Republic of Mexico, where a claim to immunity was upheld only after extensive and expensive litigation. Prior to the enactment of the US Foreign Sovereign Immunity Act 1976, what would have happened in such a situation is that the foreign government concerned would have approached the State Department. If that Department was satisfied that the transaction related to the activities of the state of a governmental or public law nature, the Department would have issued a 'suggestion' to the court that the government against whom an action had been brought was entitled to immunity in respect of that transaction. But since enactment of the 1976 legislation, a foreign government is now obliged to establish its claim to immunity before a court in the United States. Apart from the fact that such a procedure is in derogation of the dignity and sovereignty of a state, the process of litigation in the United States may often prove to be protracted through the various stages of appeals and it is certainly expensive beyond the capacity of smaller countries. In one instance, the government of a developing country had to spend as much as US\$200,000 in legal costs for establishing its immunity before the Court of first instance alone. If costs at the appellate stages are calculated, the amount would have exceeded US\$600,000.

12. The issues were initially considered at a meeting of the Legal Advisers of the members States of the AALCC held in November 1983. The Legal Advisers, whilst recommending certain follow-up action in monitoring further developments in the field, expressed the view that in the light of a divergence of state practice and the growing trend towards the enactment of national legislation in some countries restricting immunity, it was desirable that the law on the subject be settled authoritatively through the work of the International Law Commission so as to achieve a uniform approach towards the application of sovereign immunity. The matter was thereafter placed before the AALCC's annual session in Kathmandu in February 1985. It was then felt that, having regard to the divergent views expressed in the Sixth Committee on the draft articles prepared by the Commission and its Special Rapporteur, it was desirable that the AALCC itself should proceed to consider the subject with a view to making appropriate recommendations to its member governments, since governments by and large will have to decide for themselves their own approach and attitude in the matter of sovereign immunity. The topic was also discussed thereafter at the Committee's Arusha Session, held in February 1986.

13. In view of the fact that 17 governments¹³ members of the AALCC or associated with it are also members of the Commonwealth, and that close co-operation exists between the Commonwealth Secretariat and the AALCC which was taken note of by the Commonwealth Law Ministers at their Colombo meeting, this paper has been prepared as the topic may be regarded as an appropriate area in which further co-operation between the AALCC and the Commonwealth Secretariat might be fruitful.¹³

14. It will be seen from the debates in the Sixth Committee, as also at the Arusha Session of the AALCC, that the countries which continue to advocate the application of sovereign immunity in its absolute form are those which basically follow a system where international trade and commerce as well as major activities in the field of production, distribution and transport services are all considered to be the essential functions of a government whether carried out through government departments or independent governmental agencies. The viewpoint of these nations, although sought to be supported on a doctrinal basis, nevertheless has an element of practical advantage to be gained for the state which undertakes commercial activities abroad on a large scale. The disadvantages of an indiscriminate application of the doctrine of sovereign immunity, or its extension into the private law sphere, as well as its impact on the average citizens, on the other hand, have been expressed in forceful terms not only in the debates by the representatives of

Western nations but also in the recent judicial pronouncements in the United Kingdom, the United States of America and certain other countries. In the modern context, it may not be wholly realistic to contemplate the jurisdictional immunity of states in its traditional form, and it is felt that there should be no serious obstacle to the acceptance in principle of the restrictive doctrine in so far as most Commonwealth countries are concerned. The question, however, is where to draw the line in order to strike a balance between the principle of state sovereignty and the interests of the citizen. Here, it is felt that even the restrictive doctrine must have some limitations, so that the sovereignty of a state in regard to what may in the present context be regarded as governmental functions, is not unduly encroached upon and governments are not subjected to the jurisdiction of foreign courts in respect of such activities. It will be seen from the discussions in the AALCC that the main concern of its member governments relates to two major areas namely:

- (i) the extent to which the courts of a country should be permitted to exercise jurisdiction against foreign governments or governmental agencies in respect of transactions where the main elements of performance are to take place outside the country, even on a restrictive application of the doctrine of sovereign immunity; and
- (ii) whether the term 'commercial transaction' (where the same is sought to be excluded from the application of sovereign immunity should include matters where the purpose of the transactions in question are primarily related to the exercise of governmental functions.

In addition, matters pertaining to the assumption of jurisdiction with regard to contracts of employment or to actions in tort - and the extent to which levy of execution or attachment on governmental property may be permitted - also arise for consideration in any examination of the scope and extent of the restrictive doctrine.

BACKGROUND

Position in common law

15. The traditional doctrine of sovereign immunity in its absolute form, developed over four centuries, based on nation state theory, was long recognised as a part of common law. It thus ensured foreign sovereigns complete immunity from jurisdiction of the English courts in regard to any suit, whatever may be the nature of the action. The first occasion when the doctrine was seriously tested before an English court was in 1820 in the Prins Frederik¹⁴ case which arose from an admiralty action in regard to a ship used for commercial purposes. In that case as also in a number of subsequent cases¹⁵ the courts declined jurisdiction although in The Charkieh¹⁶ a contrary decision was taken. In Christina¹⁷ arguments were advanced for disallowance of immunity on the basis of the emerging practice in the continental Europe towards making a distinction between sovereign acts of states on the one hand, and non-sovereign or commercial acts on the other. Here again the claim to immunity was upheld by the House of Lords, although some doubts were expressed in the opinions delivered by three of the Law Lords. It is significant that the cases in the English courts before the Second World War arose mainly out of admiralty actions, because the commercial activities of states by then had not reached substantial proportions. The common law doctrine was uniformly applied throughout the British Empire, except in the case of the Indian sub-continent where the Code of Civil Procedure, enacted in 1908, sought to leave some discretion in the hands of the executive branch of the

government. Section 86 of the Code provided that no foreign sovereign could be sued in the courts of British India without the permission of the Governor-General. This was no doubt in the context of the existence of a large number of princely states in the sub-continent under the suzerainty of the Crown, against whom suits in the British Indian Courts were not infrequent. The common law doctrine of absolute immunity was also applied in the United States of America until the beginning of the Second World War as evident from the judgment of Marshall C.J in The Schooner Exchange v M.C. Faddon.¹⁸ The English practice was followed in Carlo Poma¹⁹ and the doctrine of absolute immunity was reiterated in the Pesaro²⁰ and followed in The Navamar (1937). 14,15,16,17,18,19,20

Continental practice

16. In the continental Europe the doctrine of sovereign immunity in its absolute form was well rooted,²¹ but beginning with decisions of the Belgian and Italian courts towards the later part of the nineteenth century and soon followed by the mixed courts in Egypt, a distinction began to be drawn between various classes of state activities for the purpose of according of immunity.²² Whilst immunity was invariably allowed in regard to acts of a sovereign nature, various judicial criteria were evolved for denying immunity in regard to other types of state activities namely (i) dual personality of the state; (ii) dual capacity of the state; (iii) acta jure imperii and acta jure gestionis; (iv) public and private nature of state acts or activities; and (v) commercial and non-commercial activities. In later years, cases of restriction on immunity had been mainly based on the doctrine that trading or commercial activity constituted an exception to the rule of state immunity, but there had been wide divergence of views as to just what in fact constituted trading or commercial activity. After the First World War the trend in continental Europe began to tilt towards the restricted doctrine of sovereign immunity to a greater extent, as is evident from the decisions handed down by courts in France and Germany in addition to those of the Netherlands, Belgium and Italy, although the decisions were never uniform. It can be seen through the evolution of case law in various countries that the same court at different periods, and various courts of different systems, had all reached different conclusions regarding state immunity in the context of trade and commercial activities. This is due to the fact that the courts very often looked at the motivation of a particular transaction or contract, although the act on its surface may have been clearly commercial or of private law nature (such as in cases of contracts for purchase of supplies for the armed forces, or of food supplies for its population). The continuing trend towards the application of the restrictive doctrine led to the conclusion of a Convention for the unification of certain rules relating to the immunity of state-owned vessels in 1926, wherein the contracting states agreed to submit to the jurisdiction of the local courts in certain circumstances. 21,22

Developments since the Second World War

17. Since the Second World War the restrictive trends in continental Europe continued to develop and to be applied, culminating in the adoption of the European Convention on State Immunity of 1972. This provides that a Contracting State cannot claim immunity from the jurisdiction of a court in another contracting state if it has, in the territory of that state, an office, agency or other establishment through which it engages in the same manner as a private person in industrial, commercial or financial activity. The Convention, to which most of the states members of the Council of Europe are party, came into force in 1976. The restrictive doctrine is now well-accepted in the practice of Belgium, Italy, Switzerland, France, Austria, Greece, Romania, West Germany, Netherlands and Denmark. The Scandinavian countries apply the restrictive doctrine in regard to state-owned vessels.

18. In the common law countries which had traditionally stuck to the principle of absolute immunity policy, changes were soon noticeable in the face of ever-growing activities of states in the fields of trade, commerce, transportation services and banking, either directly or through state organisations with separate juristic entities. In the United States a trend towards drawing a distinction between governmental acts and those agencies with separate juristic states (and denying immunity to the latter) was already noticeable in the inter war years.²³ The Governmental policy, too, was also began to show a distinct leaning towards the restrictive doctrine in response of public opinion by the 'forties, which culminated in the issue of the Tate Letter in 1952 enunciating a restrictive doctrine based on a differentiation between acta imperii and acta gestionis. In 1945 another important development took place following the decision of the Supreme Court in the case of Republic of Mexico v Hoffman²⁴ wherein Chief Justice Stone laid down that the courts would be guided by the decision of the executive branch of the government in the matter of allowance of jurisdictional immunity. The Mexico case, although subject to much criticism from the legal profession laid down the American policy that was to be followed for a period of 30 years: the courts treated as conclusive the suggestions filed by the State Department on the question as to whether a particular action was or was not to be non-suited by reason of a claim to immunity.^{23,24}

19. In the United Kingdom the trend towards the application of the restrictive doctrine found forceful expression in the dictum of Lord Denning in the Nizam of Hyderabad²⁵ wherein serious doubts were expressed about the applicability of absolute immunity in all cases. The decision of the Privy Council in 1975 in The Philippine Admiral²⁶ and the decision in the Court of appeal in the case of Central Bank of Nigeria²⁷ in 1977 practically completed the process of a reversal of policy, and the House of Lords decision in 1981 in I Congresso del Partido²⁸ (in reversing the decision in Christina) had practically laid the doctrine of absolute immunity to rest. ^{25,26,27,28}

20. The trends evidenced since the mid 'seventies in common law countries appear to be swinging away almost to the other extreme - from a doctrine of absolute immunity to one of strict restrictive practice - and this is achieved through legislation. The first step in this direction was initiated in the United States in 1976, followed by the United Kingdom, Canada, Australia and Singapore.

PRESENT NATIONAL POSITION IN SOME COUNTRIES

21. The development of the law relating to jurisdictional immunity of states in most countries of Europe and in the United States has by and large, been through a process of judicial interpretation, but more recently the trend in favour of enactment of legislation has been gaining ground in order to achieve a greater degree of uniformity in national positions than would have been possible had the matter been left in the hands of the courts. There are as yet only a few countries where legislation has been introduced; there are some where judicial pronouncements give a fair indication of the national positions; but in the large majority of countries the position is not clear since the instances of governmental policy announcements or court decisions are either very limited or even non-existent. Some of the national positions are set out below:

United States of America

22. The position is now governed by the Foreign Sovereign Immunity Act 1976 which came into force on 21 January 1977.

23. Although the decision of the Supreme Court in the Mexico case had been criticised by international lawyers, it was only in 1961 that the American Bar Association took up cudgels against the practice of the State Department's intervention in the Cuban expropriation cases. Agitation by the Bar culminated in the introduction of a Bill in 1973 (re-introduced in 1975) whose purpose was to define the scope and extent of sovereign immunity and also to place the matter squarely in the hands of the courts. In a letter submitted on behalf of the Department of State and the Department of Justice to the Speaker of the House of Representatives, it was stated that the broad purposes of the legislation was 'to facilitate and depoliticise legislation against foreign States and to minimise irritations in foreign relations arising out of such litigation' and to that end to entrust resolution of the question of sovereign immunity to the judicial branch of the government. The purpose of the legislation, it was stated, was to codify and refine the restrictive theory of sovereign immunity and to replace the absolute immunity accorded to foreign States from execution of judgment in a way conforming more closely with the restrictive theory of immunity from jurisdiction.

24. The 1976 Act set out a number of situations where a foreign State would not be entitled to claim immunity. These, apart from the traditional exceptions based on waiver and claims in relation to property, include three categories of cases which are set out below:

- (a) an action based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States;
- (b) an action in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment;
- (c) a case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State.

25. A Bill to amend the 1976 Act, introduced in July 1985, seeks to provide for another exception where immunity cannot be claimed, that is, in regard to any action to enforce an agreement to submit to arbitration contained in any agreement or contract between the parties.

26. It is of interest to note that the commercial activity of a State in regard to which immunity is denied is likely to include even governmental actions in acquiring its defence requirements or in feeding its population, since the definition of the term 'commercial activity' for the purposes of the Act clearly states that 'the commercial character of an activity shall be determined by a reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose'. The Bill introduced in the House of Representatives on 31 July 1985 to amend the 1976 Act seeks to extend the definition of commercial activity by including any promise to pay made

by a foreign State, any debt or security issued by a foreign State, and any guarantee by a foreign State of a promise to pay made by another party.

27. The Act also makes wide inroads into the immunity of States from attachment or execution by providing that the property in the United States of a foreign State used for a commercial activity shall not be immune from attachment or from execution. The same position applies to property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity. The Act, however, enumerates certain types of property which are immune from execution.

28. The scope of the legislation, that is the matters on which a foreign State will not be allowed to claim immunity, is best illustrated from what was stated by the Department of State and the Department of Justice on a section-by-section analysis of the provisions of the Bill. The relevant extracts are quoted below:

'Section 1605 (a) (2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the 'commercial activity (is) carried on in the United States by the foreign State'. This phrase is defined in Section 1603 (e) of the Bill. The second situation, an 'act performed in the United States in connection with a commercial activity of the foreign state elsewhere', looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates US securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

The third situation - 'an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States' - would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)'.

29. Dealing with the question of what is to be regarded as 'commercial activity', the analysis of the Department of State and the Department of Justice proceeds:

'Commercial Activity: Paragraph (c) of Section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavour, from a individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'Particular transaction or act'.

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract

by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

A transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID programme. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service or military personnel, but not the employment of American citizens or third country nationals by the foreign State in the United States.

The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this Bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a produce, its leasing of property, its borrowing of money, its employment or engagement of labourers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

As paragraph (d) of Section 1603 indicates, a commercial activity carried on in the United States by a foreign State would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. Sec. 1605 (a) (5)), and an indebtedness incurred by a foreign State which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States (e.g. loans, guarantees or insurance provided by the export-import Bank of the United States). It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contract beyond the occasioned simply by US citizenship or US residence of the Plaintiff.

United Kingdom

30. The position in the United Kingdom is governed by the State Immunity Act 1978. The Act, which is based on the restrictive doctrine, incorporates a number of exceptions where claim to immunity could not be invoked by a sovereign State. Such exceptions include the following:

- (i) Proceedings in respect of which the State has submitted to the jurisdiction of the Courts of the United Kingdom expressly or by implication;
- (ii) A commercial transaction entered into by the foreign State or an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom subject to the proviso that immunity may be claimed if the parties to the dispute are States or have otherwise agreed in writing or if the contract (not being a commercial transaction) was made in the territory of

the State concerned and the obligation in question is governed by its administrative law;

- (iii) Proceedings relating to a contract of employment between the foreign State and an individual when the contract was made in the United Kingdom or the work is to be wholly or partly performed there; and
- (iv) Proceedings in respect of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom.

31. The other instances where the State is not immune from the jurisdiction of the Courts in the United Kingdom relate to matters concerning immovable property; patents, trade marks, design or plant breeders rights; membership of a body corporate or partnership; proceedings arising out of submission to arbitration; admiralty proceedings and actions in rem against a ship; and proceedings relating to liability for value added tax, duties or customs or excise, and rates in respect of premises occupied for commercial purposes.

32. The expression 'commercial transaction' in respect of which no claim to immunity would be admissible is widely defined to mean:

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

33. Although the areas where immunity will not be admissible under the United Kingdom legislation are, by and large, the same as those in the United States Sovereign Immunities Act 1976, the 'long arm jurisdiction' of the courts would appear to be less wide, since the courts would not assume jurisdiction in respect of a transaction merely on the basis of some kind of nexus, since the Act requires that a contract fall to be performed at least partly in the United Kingdom. Furthermore, an organ of a state having a separate juristic entity is entitled to claim immunity in relation to anything done by it in the exercise of sovereign authority. There is another important provision (section 15) which provides for reciprocity and enables Her Majesty by Order in Council to provide for restricting or extending the immunities and privileges under the legislation.

Other Commonwealth Countries

34. In Commonwealth countries such as Australia, New Zealand and Canada the common law doctrine of absolute immunity as applied by the courts in England was generally recognised and followed in judicial decisions. Nevertheless, the restrictive doctrine gradually gathered momentum in Canada following the trend in the United States, but there was no clear evidence of the restrictive practice either in Australia or New Zealand, or for that matter in any other Commonwealth country. Nevertheless Canada, Australia and Singapore have now promulgated legislation on the United Kingdom model. The AALCC is not aware of any Commonwealth Africa legislation on the topic.

35. In India, the Code of Civil Procedure, in section 86, provides that no ruler of a foreign State may be sued in any court except with the consent of the Central Government, that is to say, that the matter of immunity falls primarily to be determined by the political branch of the Government. If the Central Government gives its consent to a foreign State being sued, the courts may still be entitled to adjudicate on a claim to immunity if such a plea is raised in the proceedings. It is difficult to predict what the attitude of the courts would be in such a situation, i.e. whether it would adhere to absolute immunity or be in favour of the restrictive doctrine. If, however, the Central Government does not give its consent on the basis of its own determination, no court in the country would have jurisdiction to entertain the action. The Central Government has given no authoritative guidance as to the principles it would follow in its determination of the matter under section 86 of the Civil Procedure Code.

Pakistan

36. In Pakistan, the position until recently was the same as in India but it has now enacted legislation (State Immunity Ordinance 1981 followed by an Act) which restricts immunity for sovereign States on basically similar lines as in the United Kingdom Act of 1968. It was brought into force in 1979 but was expressly made applicable only to proceedings in respect of transactions which took place after the promulgation of the aforesaid legislation.

Soviet Union and Eastern Europe

37. In the Soviet Union, the principle of State immunity is regarded as absolute. Soviet legislation does not draw any distinction between 'public acts' and 'non public acts' of foreign States. The ships owned by a foreign State and employed in commercial service also enjoy immunity. The basic rule in this regard is contained in Article 61 of the Fundamentals of Civil Procedure which provides that an action against a foreign State may be permitted only with the consent of the competent authorities of that State. Section 3 of Article 61, however, provides:

'Where the same jurisdictional immunity as that which, under the present article, is accorded to foreign States, their property or their representatives in the USSR is not accorded in a foreign State to the Soviet State, its property or its representatives, the Council of Ministers of the USSR or another competent authority may prescribe the application of retaliatory measures in respect of that State, its property or its representative'.

38. The civil procedure codes of the Union Republics contain a similar rule.

39. In Czechoslovakia, the doctrine of absolute immunity is generally applied and foreign states are not subjected to the jurisdiction of the courts. However, this is subject to the exception that in cases where the proceedings relate to immovable property located in Czechoslovakia, and in cases where foreign States voluntarily submit to the jurisdiction, the courts may entertain actions. Government ships operated for commercial purposes also enjoy immunity.

40. The position in Hungary and German Democratic Republic are basically similar to that in Czechoslovakia, whilst in Yugoslavia a trend is noticeable towards an approach of a distinction being drawn between different classes of state activity but without leaning completely in favour of the restrictive doctrine.

Middle East

41. In Egypt the question of sovereign immunity has been largely influenced by the decisions of the mixed courts, which had drawn up a distinction between sovereign and non-sovereign acts of States. The Egyptian courts have continued to follow that trend and the executive authority adhered to the doctrine that immunity was not absolute but limited to acts of sovereign authority. There is no specific legislation on the subject but the case law is in favour of a restrictive doctrine.

42. In the Syrian Arab Republic the principle of jurisdictional immunity of foreign States and their property is regarded as absolute. This is, however, subject to two exceptions, namely:

- (i) where the foreign State gives its consent or where the consent is implied; and
- (ii) where the national legislation of a foreign State does not accord immunity, the Syrian judiciary is not obliged to allow immunity to such a State.

43. In Lebanon the general trend has been similar to that in Egypt, in favour of a restrictive doctrine but with recent practice far from clear.

WORK OF THE INTERNATIONAL LAW COMMISSION

44. The International Law Commission took up the topic 'Jurisdictional Immunities of States and their Property' pursuant to General Assembly Resolution 31/151 of 19 December 1977, and decided to include the topic in its work programme at its thirtieth session in 1978. The Special Rapporteur appointed by the Commission for this topic, HE Dr Sompong Sucharitkul, has so far submitted seven reports containing formulations of proposed articles 1 to 28. The Commission has so far been able to conclude consideration of Articles 1 to 20, which have been provisionally adopted with the exception of Articles 4, 5 and 6. Those three articles (dealing with 'Jurisdictional Immunities not within the scope of the present articles' (Article 4), 'Non-retroactivity of the present articles' (Article 5); and 'the principle of State Immunity' (Article 6)) are to be considered again by the Commission after the conclusion of discussion on the entire topic.

45. The Commission's work is at present related to the question of immunities from the jurisdiction of the courts (i.e. the organs of a state which are entitled to exercise judicial functions). The articles formulated by the Commission are intended to be divided into four parts: Part I, entitled 'Introduction', will comprise five draft articles; Part II, entitled 'General Principles', will also comprise five draft articles. Part III, entitled 'Exceptions to State Immunity', which will comprise 10 articles, is by far the most important. Part IV will deal with the question of immunity with respect to state

property from measures of attachment and execution. This will comprise some eight articles (Articles 21-28) – the subject matter of the seventh report of the Special Rapporteur still to be considered by the Commission. The text of the articles provisionally adopted by the Commission (Articles 1-20) as also the text of eight articles proposed in the seventh report of the Special Rapporteur are annexed hereto as Appendix A.

46. The draft articles in Parts I and II have encountered fewer complications than those contained in Part III, which go into the root of the matter in identifying the types of cases where a state could not claim immunity from jurisdiction of the courts in another state. These relate to 'Trading or commercial activity' (Article 12); 'Contracts of employment' (Article 13); 'Personal injuries and damage to property' (Article 14); 'Ownership, possession and use of property' (Article 15); 'Patents, trade marks and intellectual or industrial property' (Article 16); 'Fiscal matters' (Article 17); 'Participation in companies or other collective bodies' (Article 18); 'Ships employed in commercial service' (Article 19); and 'Submission to Arbitration' (Article 20).

47. The draft articles prepared by the Commission represent by and large a compromise formulation which are perhaps more balanced than the position obtaining under some of the recent legislation. For example, in article 12 (which deals with the question of 'commercial contracts') the motivation behind the transaction entered into by a state is taken as a relevant consideration in appropriate cases. Moreover, the exercise of the 'long arm jurisdiction' of national courts would appear not to be contemplated. The Commission's draft can therefore be regarded as providing a good starting point for those drafting national legislation.

SOME CONCLUSIONS

48. In the light of the divergence of state practice and the increasing trend towards application of a restrictive doctrine in the countries where developing nations are obliged to undertake most of their activities in the private law sphere, a close examination of the doctrine of sovereign immunity and its application ought to be undertaken on an urgent footing. Whilst a certain degree of reciprocity could be contemplated in the matter of according jurisdictional immunity to foreign states, a uniform national approach would facilitate its implementation. As suggested above, given the present level of governmental activity in extended fields, a restrictive doctrine might not be altogether out of place. But the question is the scope and the extent to which restrictions would be reasonable. It might be thought desirable that governments decide upon a firm policy, either through promulgation of legislation or through other appropriate means according to the constitutional practice of each state, rather than allow the matter to remain at large and to be decided by the judiciary on a case by case basis.

49. The following criteria are suggested in this connection:

- (i) A plea of immunity may not be available in respect of actions or proceedings where a foreign State has waived its claim to immunity, expressly or by implication, such as by filing its defence or counterclaim or taking such other steps in the proceedings inconsistent with its claim to immunity. Immunity will also not be admissible in regard to a counterclaim or a claim by a party in regard to a transaction where the foreign State has itself invoked the jurisdiction of the court.

- (ii) Immunity will not be admissible when the proceedings relate to ownership or possession including succession to property situated within the territories of the State of forum, provided that no action would be maintainable for eviction from premises used for the purposes of a diplomatic mission, consular post or any other governmental function as a supply mission.
- (iii) A State may not claim immunity in regard to its activities which are of a commercial nature and undertaken for commercial purposes where the performance of the contract takes place or the preponderance of activities in relation to such performance are present within the territories of the forum State. A claim to immunity shall not be denied if the transaction in question is directly related to the sovereign functions of a State such as procurement of its defence requirements or maintenance of essential supplies for its population. No Court or Tribunal shall assume jurisdiction against a sovereign State solely on the basis of the transaction having a nexus with the territory unless the contract falls to be substantially performed within that State.
- (iv) A State may not claim immunity in regard to a contract of employment to be performed in the forum State except when the employment relates to the functions of a Diplomatic mission, consular posts or a mission entrusted with the sovereign functions of a State.
- (v) A State may not claim immunity in regard to a claim for compensation for death or personal injury where the accident has taken place within the territories of the forum State.
- (vi) A State may not claim immunity in regard to transactions related to loans, debentures; participation in companies and corporations; trade marks and patents provided that the proceedings in relation to those transaction are based on the performance of rights and obligations within the forum State in accordance with the contractual provisions.
- (vii) A State may not claim immunity in regard to any claim or proceedings related to ships operated for commercial purposes or its air transport services.
- (viii) An organ of a State having a separate juristic entity under the laws of that State shall not be entitled to immunity save and except to the extent that it may be entrusted with the performance of sovereign functions. The onus of proof in this regard shall rest with the entity of the foreign State.

FOOTNOTES

- 1 324 U.S. 30
- 2 See the opinion of Lord Maugham in the Christina Case (1938) AC485; Lord Evershed M R in Dollfus v Bank of England (1950) 1 ch 333 and Lord Denning in Rahimtoola v Nizam of Hyderabad (1958) A.C. 379
- 3 I Congresso del Partido (1981) 3 WLR 328
- 4 The State Immunity Act 1978
- 5 State Immunity Act 1981
- 6 State Immunity Act 1979
- 7 Foreign State Immunity Act 1984
- 8 State Immunity Act 1982
- 9 Report of the Third Session 1960
- 10 674 2nd 300 (2nd Cir 1981)
- 11 691 F. 2nd 1344 (11th Cir 1982)
- 12 461 US 480
- 13 The Commonwealth countries, members of the AALCC are Bangladesh, Cyprus, Gambia, Ghana, India, Kenya, Malaysia, Nigeria, Sierra Leone, Singapore, Sri Lanka, Tanzania, Uganda, Botswana, Mauritius; Australia and New Zealand have Permanent Observer status.
- 14 2 Dods 451
- 15 De Haber 'The Queen of Portugal (1851) QB 171
The Parlement Belge (1880) 5 PD 197 CA
The Porto Alexandre (1920) P 30 CA
- 16 (1873) LR 4 A & E 59
- 17 [1938] AC 485
- 18 (1812) 7 Cranch 116
- 19 (1919) 259 F 369
- 20 (1925) 271 U.S 562
- 21 See the decision of the French Court of Cassation in Le Gouvernement espagnol v Cassaux J.P 1849 - I - 166; The Campos (1919) Clunet Vol 47 p 747; The West Chatala RIDM (1922)
- 22 See for example the Havre Case (1879) PB 1879-II-175, the Peruvian Loan Case PB 1881-II-313 before the Belgian Courts; Gutierrez v Elmilik (1886) Storelli v Governo della Repubblica Francese (1924) A.D 1923-24 before the Italian Courts.
23. For example see United States v Deutsche (1930) 31 F. 2d. 199 Ullan v National Economy Bank AD 1938-0 Case No 74 Bradford v Director-General of Railroads Mexico A.D. 1925-26 Case No. 132

- 24 324 US 30
- 25 [1958] A.C. 379
- 26 [1977] A.C 373
- 27 [1977] 2 WLR 356
- 28 [1981] 3 WLR 328

DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND
THEIR PROPERTY, AS PROVISIONALLY ADOPTED BY THE
INTERNATIONAL LAW COMMISSION

PART I

INTRODUCTION

Article 1

Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions

... (*see infra*)

(g) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Article 3

Interpretative provisions

... (*see infra*)

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account

if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract.

(Articles 4 and 5 - see infra)

PART II

GENERAL PRINCIPLES

Article 6

State immunity 6/ *(see infra)*

Article 7

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8

Express consent to exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

Article 9

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10

Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

EXCEPTIONS TO STATE IMMUNITY 7/ (*Article II - see infra*)

Article 12

Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.
2. Paragraph 1 does not apply:
 - (a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;
 - (b) if the parties to the commercial contract have otherwise expressly agreed.

Article 13

Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.
2. Paragraph 1 does not apply if:
 - (a) the employee has been recruited to perform services associated with the exercise of governmental authority;
 - (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;
 - (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
 - (d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 14

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 15

Ownership, possession and use of property

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding-up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by prima facie evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

Article 16

Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 17

Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 18

Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating

to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 19

State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, inter alia, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity or interpretation of the arbitration agreement,
- (b) the arbitration procedure,
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Notes

1/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10).

2/ Ibid.

3/ Yearbook of the International Law Commission, 1977, vol. II (Part Two), p. 133, document A/32/10, para. 130.

4/ Provisional numbering.

5/ Provisional numbering.

6/ Article 6 as adopted provisionally at the thirty-second session read as follows:

"Article 6

State immunity

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

Notes (continued)

2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

For the commentary to the article, see Yearbook ... 1980, vol. II (Part Two), pp. 141-142, document A/35/10, chap. VI.B.

Article 6 was further discussed by the Commission at the thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its future sessions. The Drafting Committee considered article 6 briefly during the thirty-seventh session, but, for lack of time, was unable to conclude its consideration of this article.

7/ The title of this part will be re-examined after the Commission has considered all possible exceptions.

PART III. EXCEPTIONS TO STATE IMMUNITY

Article 11

Application of exceptions in the present part (revised version)

1. The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.
2. Nothing in the present part shall prejudice the question of extraterritorial effects of measures of nationalization taken by a State in the exercise of governmental authority with regard to property, movable or immovable, industrial or intellectual, which is situated within the territory.

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES

Article 21

Scope of the present part

The present part applies to the immunity of one State in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution in connection with a proceeding before a court of another State.

Article 22

State immunity from enforcement measures

A State is immune without its consent in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgement or any other debts.

Article 23

Effect of express consent to enforcement measures

1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint on the use of its property or property in its possession or control, or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint on the property which it has specifically identified for this purpose,

- (a) by international agreement, or
- (b) in a written contract, or
- (c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present draft articles, for which a separate waiver is required.

Article 24

Types of property generally immune from enforcement measures

1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of another State shall be permitted on the use of the following property:

- (a) property used or intended for use for diplomatic or consular purposes or for purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability;

(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of a State; or

(c) property of a central bank held by it for central banking purposes, and not allocated to any specific payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes, and not specifically earmarked for payments of judgement or any other debts; or

(e) public property forming part of national archives of a State or of its distinct national cultural heritage.

2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes.

PART V. MISCELLANEOUS PROVISIONS

Article 25

Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(a) In a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds on behalf of the State for governmental purposes; or

(b) In a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(c) In a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26

Service of process and judgement in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.
2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.
3. No judgement in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.
4. A copy of any judgement rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgement set aside shall begin to run after the date on which the copy of the judgement is received by the State concerned.

Article 27

Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.
2. No fine or penalty shall be imposed on a State by the court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.
3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28

Restriction and extension of immunities and privileges

A State may restrict or extend in respect to another State the immunities and privileges provided in the present draft articles to the extent as appears to it to be appropriate for reason of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

PART I. INTRODUCTION

Article 2

Use of terms

1. For the purpose of the present articles:

- (a) "court" ... (adopted)
- (a) "immunity" ... (withdrawn)
- (b) "jurisdictional immunities" ... (withdrawn)
- (c) "territorial State" ... (withdrawn)
- (d) "foreign State" ... (withdrawn)
- (e) "State property" means property,
rights and interests which are owned,
operated or otherwise used by a State
according to its internal law ... (revised)
- (f) "trading or commercial activity" ... (withdrawn)
- (g) "commercial contracts" ... (adopted)
- (g) "jurisdiction" ... (withdrawn)

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3

Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

- (a) the expression "State" includes:
 - (i) the sovereign or head of State,
 - (ii) the central government and its various organs or departments,
 - (iii) political subdivision of a State in the exercise of its governmental authority, and
 - (iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government; (revised)

(b) the expression "judicial functions" includes:

- (i) adjudication of litigation or dispute settlement,
- (ii) determination of questions of law and of fact,
- (iii) administration of justice in all its aspects,
- (iv) order of interim and enforcement measures at all stages of legal proceedings, and
- (v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to, a legal proceeding by the judicial, administrative or police authorities of a State. (revised)

2. ... (approved)

Article 4

Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

- (i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- (ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- (iii) special missions under the Convention on Special Missions of 1969,
- (iv) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
- (v) permanent missions or delegations of States to international organizations in general,
- (vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, (added)

shall not affect

(a) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or internationally protected persons (under the above-mentioned conventions);

(b) the application to such missions or representation of States or international organizations, or internationally protected persons of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles; (revised)

(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.
(revised)

RECENT DEVELOPMENTS IN RELATION TO UNITED STATES EXTRATERRITORIAL CLAIMS

A paper prepared by the Government of the United Kingdom

Over the years there have been a number of instances where U.S laws have been applied to persons, things or conduct outside the United States apparently without regard for the legitimate interests of other countries. This paper outlines recent developments in two principal areas of concern.

Anti-Trust

The potential application of U.S anti-trust laws to conduct outside the United States is well-known. Even where the US Government may be sympathetic to the interests of other countries involved, a number of factors operate against the foreign company or companies. Private parties can bring treble damage actions. A defendant company may not recover its costs even where it successfully resists the action. Class actions are possible. Plaintiffs' lawyers often accept cases on a contingency fee basis. There is no formal mechanism for stopping private anti-trust suits even where the legitimate interests of other countries are affected.

The US administration has recently undertaken a review of a number of anti-trust issues. A task force has reported and the Administration has proposed five Bills to cover US anti-trust law. These are the Merger Modernization Act, The Anti-trust Remedies Improvements Act, the Interlocking Directorate Act, the Foreign Trade Antitrust Improvements Act and the Promoting Competition in Distressed Industries Act. Among other things the Bills deal with jurisdiction in foreign commerce cases, treble damages and costs. On jurisdiction, it is proposed that the Courts should be instructed to dismiss private anti-trust cases where the exercise of jurisdiction would be unreasonable in the light of six exclusive factors:

- '(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;
- (2) the nationality of the parties and the principal place of business of corporations;
- (3) the presence or absence of a purpose to affect United States consumers or competitors;

- (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;
- (5) the existence of reasonable expectations that would be furthered or defeated by the action; and
- (6) the degree of conflict with foreign law.'

On treble damages, it is limiting claims for treble damages to overcharges and underpayments. So treble damages would only be awarded to persons who have paid higher prices to the defendants (or, as sellers, receive lower prices from the defendant) because of anti-trust violations. The recovery of other plaintiffs would be limited to full compensation - actual damages plus prejudgment interest, costs, and lawyers' fees.

On defendants' legal fees, the task force proposes that successful defendants should be able to recover legal fees where private plaintiffs' claims are 'frivolous, unreasonable, without foundation, or in bad faith'.

Whilst welcome in themselves these proposed changes do not appear to go far enough to eliminate the potential for major disputes. More preferable would be an executive power to compel dismissal of private suits for foreign policy considerations and an end to treble damage in all foreign commerce cases - as had been proposed in the Bill promoted (but now dead) by Senator De Concini.

Export Controls

The principal US export control is the Export Administration Act which claims re-export jurisdiction over certain US origin goods, technology and goods incorporating US components. That Act also enables regulations to be made which claim control over companies incorporated outside the US but 'controlled in fact' by a US company (EAA 1979 s.16(2)). The extraterritorial reach of these regulations can cause serious difficulties in practice to foreign companies re-exporting goods.

A recent development affects 'the distribution licence', a system of bulk licensing under the Export Administration Act allowing approved companies to export certain goods to certain destinations without individual transaction approval from the US Department of Commerce. There has been concern about the abuse of this system and the diversion of goods - consequently the regulations have been tightened. In particular stringent requirements are now imposed on foreign consignees to maintain an internal compliance programme to ensure adherence to US export controls and to submit to routine audit by US officials.

The implementation of an internal compliance programme imposes a severe administrative burden on the companies involved. The question of audit visits raises a separate issue, namely a danger of the US taking enforcement action against a foreign (for example UK) company that has been audited (or indeed another UK company) for an extraterritorial offence using information obtained during the audit.

In recent years the United States has, in pursuance of its foreign policy, purported to impose economic sanctions, including the freezing of foreign assets outside the United States. So in the past sanctions have been imposed in relation to Iran and Nicaragua, and most recently, Libya. The recent US regulations on Libya include a total ban on direct export and import trade service contracts and all other non-humanitarian transactions by US persons, including travel to Libya other than for journalism or evacuation. The Libyan regulations define 'US person' apparently to exclude foreign subsidiaries of US corporations and all non-US persons or entities acting outside the United States. By not including foreign subsidiaries in this definition the regulations relating to Libya recognise the concerns of countries, including the United Kingdom, relating to the extent of application of previous sanctions regulations.

SOVEREIGN IMMUNITY: AUSTRALIAN LEGISLATION — THE FOREIGN STATES IMMUNITIES ACT 1985

A memorandum by the Government of Australia

Australia has enacted the Foreign States Immunities Act 1985, which came into force on 1 April 1986 (apart from s.18(2) which concerns sister-ship arrest, an action not currently available under Australian law).

2. The Act implements the recommendations of the Australian Law Reform, Commission made after comprehensive study of the approaches of other countries to foreign state immunity and in particular the legislation enacted during the last decade by the United States, Canada and the United Kingdom. (The latter Act is closely followed by the legislation of Singapore, Pakistan and South Africa). The Australian Act follows the general approach of these Acts. However, the thorough study of their operation by the Law Reform Commission has enabled Australia to make improvements in some areas.

3. The Act follows the general international trend by adopting the restrictive doctrine of sovereign immunity. Foreign states are immune from jurisdiction except in proceedings concerning:

- (i) commercial transactions;
- (ii) tort resulting in death, physical injury or damage to tangible property;
- (iii) employment contracts with locally recruited staff;
- (iv) real property disputes;
- (v) industrial and intellectual property;
- (vi) the supervisory jurisdiction of a court where the parties have agreed to submit a dispute to arbitration; and
- (vii) membership of a body corporate, an un-incorporated body or a partnership where at least one member is not a state.

A foreign state may also waive its immunity.

4. "Commercial transaction" is defined as a commercial, trading, business, professional or industrial or like transaction into which the foreign state has entered or a like activity in which the state has engaged and as including:

- "(a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of finance; and
- (c) a guarantee or indemnity in respect of a financial delegation".

This specific description of the transactions covered avoids the uncertainties of concepts such as "commercial" and "non-governmental"

5. Consistently with the approach taken to immunity from jurisdiction, the property of foreign states is immune from execution, subject to specified exceptions. Commercial property is not immune from execution regardless of whether it was used in the activity from which the claim arose. "Commercial property" is defined as property other than diplomatic or military property, that is in use by the foreign state concerned substantially for commercial purposes. The Australian Act thus utilizes separate definitions of "commercial transactions" and "commercial property" for the purpose of jurisdiction and execution respectively, the latter taking "purpose" into account. Immovable property and property acquired by succession or gift s not immune from execution if a successful suit is brought against the particular property. There is no requirement that this be commercial property. A foreign state may also, of course, waive its immunity from execution with respect to any property.

6. The Act also provides expressly for service of process. Process for service on foreign states is to be through the diplomatic channel or in accordance with any agreement between the party or Australia and the foreign state.

7. In developing this legislation, Australia was of course mindful of the work of the ILC and the AALCC on this subject. The Australian Act is generally in accordance with the ILC work to date on a draft international convention. The enactment of legislation on foreign state immunity in other common law countries such as the United Kingdom, Singapore, and Pakistan means that Australian courts can no longer look to decisions of the courts of those countries for elaboration of the common law. Since there is very little litigation on this subject within Australia, it was necessary for us to legislate, to clarify the provision, in advance of the completion by the ILC of its work. As stated by the Attorney-General when presenting the Bill to the Australian Parliament, Australia will of course reconsider the Act in the light of any Convention resulting from the ILC work.

8. A more detailed discussion of the key provisions of the Act is attached.

FOREIGN STATES IMMUNITIES ACT 1985 (AUSTRALIA) DISCUSSION OF KEY PROVISIONS

Immunity of Foreign States from Jurisdiction

Subject to specified exceptions, foreign states are immune from the jurisdiction of Australia courts in a proceeding.

Exceptions to Immunity from Jurisdiction

These specific exceptions are as follows:

- (a) Submission to jurisdiction: A foreign state may waive its immunity expressly either in the face of the court at the time of court proceedings or by prior written agreement, including by a treaty, or by unilateral declaration. An agreement to waive immunity cannot be withdrawn except in accordance with the terms of the agreement. While pre-dispute waivers were not recognized by civil law courts and by the recent U.S., Canadian, and UK legislation. A foreign state also waives its immunity by implication if it initiates court proceedings, or subject to certain safeguards, if it intervenes in court proceedings.

Submission to the jurisdiction also renders the state open to a claim made in the

proceeding, such as a set-off or counter-claim, arising out of and relating to the transactions or events to which the proceedings related. Such a claim is not limited to relief of the same amount or kind as that sought by the foreign state. This is consistent with the UK and Canadian legislation and the draft provisionally approved by the ILC (Article 10). It is in contrast, however, to the approach of the United States legislation which, in addition, allows counterclaims not connected to the subject matter of the initial action, if the relief sought does not exceed in amount nor differ in kind from that sought in the initial action (s.1607).

- (b) Commercial Transactions: A foreign state is not immune insofar as a proceeding concerns a commercial transaction, except where all parties are states or have otherwise agreed in writing, or the proceeding concerns a payment such as a grant, scholarship, or pension. The principle that, when a foreign state acts in a commercial manner which would otherwise be within the ordinary jurisdiction of local courts, it should be subject to that jurisdiction is of course the central argument behind the shift from absolute to restrictive immunity. The distinction between commercial and other transactions or between governmental and non-governmental transactions has however proved difficult to apply to particular facts. The widely accepted doctrine is that one should look to the nature, not the purpose of the transaction. On this basis, a contract for the purchase of boots for a state's army can be characterized as by nature a contract and thus a commercial and non-governmental transaction, notwithstanding the purpose of maintaining the army. This test, however, has not provided a coherent dichotomy in practice.

The Australian Act avoids uncertainty by defining a commercial transaction as a "commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged" and as including:

- " (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation".

(The latter does not include a contract of employment or a bill of exchange as these are the subject of separate provisions).

This approach follows the UK Act and contrasts with the U.S. Act and the ILC Draft which utilize the nature/purpose distinction.

The Australian Act in contrast to the U.S. and Canadian Acts, but like the U.K. Act, deals separately with some aspects of commercial activity, namely, contracts of employment, industrial and intellectual property, membership of bodies corporate, arbitration, local taxes, and bills of exchange. (The last is not dealt with separately under the U.K. Act). This enables the Act to make clear provision as to the various considerations governing whether immunity is to be withheld.

- (c) Contracts of Employment: A foreign state as employer is not immune in so far as a proceeding concerns the employment of a person where the contract of employment was made in Australia or was to be performed wholly or partly in Australia. This includes proceedings both concerning entitlements under the contract and rights or obligations under an Australian law. Australia considers that it has an interest

in seeing that employees in Australia are able to use local courts to resolve disputes. However it recognises the special interests of foreign states in certain employment contracts. For this reason, the provision does not apply where, at the time the contract was made, the employee was a national of the employer state and not a permanent resident of Australia, or was an habitual resident of the foreign state; not does it apply to the employment of diplomatic and consular officers or to administrative and technical staff of a mission and consular employees unless they were Australian nationals or permanent residents when the contract was made. By so specifying the contracts for which a foreign state remains immune the Act avoids the difficulties of applying a general exclusion of contracts for employment of a governmental character. (Contrast ILC Draft Article 13). Like the provision removing immunity with respect to commercial transactions, it is possible to contract out of the operation of this provision. However, this does not permit contracts purporting to negative rights and duties, from which it is not otherwise permissible to "contract out" under Australian law.

- (d) Industrial and Intellectual Property: This provision follows the U.K. Act by providing that a foreign state is not immune in proceedings concerning the ownership registration or protection in Australia of an invention, trade mark, or design, but also adds proceedings concerning the ownership of a copyright. Like the U.K. Act, the Australian Act also denies immunity in proceedings concerning an alleged infringement of any of these and concerning the right to use a trade or business name.
- (e) Arbitrations: Where a foreign state is a party to an agreement to submit a dispute to arbitration, the foreign state is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court. This does not apply to arbitrations between states or between states and international organisations. The Australian Act also provides for the enforcement of arbitration awards. This issue is not expressly dealt with in the U.S. Act. Awards, whether Australian or foreign, are subject to court enforcement if there was an agreement to submit the dispute to arbitration and the foreign state would not have been immune under the Australian Act in a proceeding concerning the transaction or event which is the subject of the arbitral award. This enforcement provision is subject to any inconsistent provision in the agreement.
- (f) Membership of bodies corporate, partnerships etc: A foreign state is not immune in proceedings between members of a body corporate, an incorporated body or a partnership of which at least one member is not a state and which was established under Australian law or is controlled from or has its principal place of business in Australia, in so far as the proceedings concern its membership or a right or obligation relating to its membership. This provision closely follows the U.K. Act (s.8).
- (g) Bills of Exchange: Where a foreign state gives a bills of exchange in connection with a non-immune transaction or event it is not immune if it is sued on the bill of exchange rather than on the underlying transaction or event. This prevents any possible argument that a bill is a "commercial transaction" and thus that proceedings concerning a bill are not immune even if the underlying transaction is immune. There is no equivalent provision in any treaty or the legislation of any other country.
- (h) Taxes: If Australian law imposes a taxation obligation upon a foreign state, which will of course be a matter of interpretation of the relevant tax law, it is considered proper that the foreign state not be immune in proceedings to recover the tax. The Act denies immunity accordingly. However, as under Australia's

federal system taxes are imposed not only by the federal government but also by States and local authorities, the Act only operates to deny immunity in respect of Acts prescribed by the Governor-General. This enables the federal government to ensure a consistent approach is achieved.

- (i) Personal Injury and Damage to Property: Like the U.S., Canadian and U.K. Acts, the Australian Act provides that a foreign state is not immune in a proceeding in so far as it concerns the death or personal injury of a person or the loss or damage of tangible property. Like those Acts, also, the Australian Act makes no distinction between acts which might be described as governmental and other acts. The Act follows the U.K. Act providing for non-immunity by reference to the place of the act or omission causing the damage, as opposed to the place where the damage occurred, which is the approach of the U.S. and Canadian Acts.
- (j) Ownership, Possession and Use of Property: Consistently with the view generally accepted internationally, a foreign state is not immune in a proceeding concerning its ownership, interest in, or possession of immovable property in Australia. This is of course subject to the inviolability of diplomatic and consular premises under the Vienna Conventions. Likewise a foreign state is not immune in a proceeding in so far as it concerns property acquired by way of gift or succession. Also, based on the view that where a local court is administering, or supervising the administration of property it is appropriate that it should be able to adjudicate on all conflicting claims to such property, foreign states are not immune in a proceeding insofar as it concerns bankruptcy, insolvency or the winding up of a body corporate, or the administration of a trust, the estate of a deceased person or a person of unsound mind.

Execution

10. Consistently with the approach taken to immunity from jurisdiction, the property of foreign states is made immune from execution to satisfy judgments made against the foreign state, subject to specified exceptions. Like the U.K., Canadian and U.S. legislation the Australian Act allows execution against property used for commercial purposes, leaving governmental property immune. Again the problem arises of the imprecision of this dichotomy.

11. The Australian Act defines commercial property as property other than diplomatic or military property, that is in use by the foreign state concerned 'substantially for commercial purposes. There is also a statutory presumption that property that is apparently not in use in being used for commercial purposes unless the court is satisfied that it has been set aside for other than commercial purposes. The Australian Act thus utilizes separate definitions of "commercial transaction" and "commercial property" for the purposes of jurisdiction and execution respectively.

12. This approach differs from all other recent legislation. Australia considers such a division appropriate because while, as discussed, it is generally said that the purpose of a transaction is irrelevant to the question of jurisdiction, the purpose of holding property is relevant to the question of execution.

13. The express exclusion of diplomatic and military property from the definition of commercial property is not found in any other legislation and which probably unnecessary, avoids all possible doubts. Another feature not found in any other recent legislation on sovereign immunity is the express provision for property used for mixed purposes where such property cannot be severed according to the type of use. The Australian Act allows execution against property used "substantially for commercial purposes".

14. Unlike the U.S. Act, but like the U.K. and Canadian Acts, execution is not restricted to property used in the activity from which the claim arose. Such a restriction would prevent execution for non-commercial torts and also give rise to difficult problems in deciding whether on any given facts a sufficient nexus exists between the property and the claim. Furthermore, as a matter of policy there appears to be no reason why all commercial property belonging to the foreign state in the jurisdiction should not form a common fund against which judgment creditors may execute. Consistently with the lack of immunity of immovable property and property acquired by succession or gift, such property is not immune from execution if a successful suit is brought against it. There is no requirement that the property be commercial property. In this the Australian Act follows the Canadian in contrast to the U.S., approach. While there is probably very little immovable property that is neither commercial nor protected under the Vienna Conventions (which the Act, of course, does not override) Australia wishes to avoid as far as possible leaving a person who has won a judgment in respect of such property without a remedy. With respect to property acquired by succession or gift, Australia considers that where a judgment is obtained that a gift or legacy should not have gone to a foreign state, there is no reason to allow the foreign state to retain such a windfall, even if it has been put to non-commercial purposes.

15. A foreign state may of course waive its immunity from execution with respect to any property.

16. The Australian Act also allows remedies other than the seizure of property, such as injunctions. However a penalty by way of fine or committal cannot be imposed for failure to comply with a court order and specific performance is not available for breach of a contract of employment.

Service of process

17. The Act also provides expressly for service of process. Like all other recent legislation on sovereign immunity, provision is made for service on foreign states through the diplomatic channel, or in accordance with any agreement between the party or Australia and the foreign state. No other means of service within Australia is effective. However, where a foreign state enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, it may not subsequently question the validity of the service.

JURISDICTIONAL IMMUNITY — THE TANZANIAN EXPERIENCE

Memorandum by the Government of the United Republic of Tanzania

Introduction

In the perspective of world history Tanzania's experience as a modern sovereign State is quite new. We will celebrate our Jubilee anniversary on 9 December, 1986! Within this short period in a life of a nation, Tanzania has had the advantage of experiencing two major types of jurisdictional immunities, firstly that of being a sovereign State with its property immune from suits and legal process in judicial organs of other foreign States. In this regard we are all aware of other 'states' some quite near us at the present venue which the community of nations has categorically refused to recognize and accord them sovereign status. Secondly, Tanzania officials in our missions abroad have experienced diplomatic and consular immunities and privileges accorded to them by foreign States within which they operate.

2. Concurrently with our own States' and officials' experience in foreign States, Tanzania has accorded the same corresponding status and immunity to foreign States, and their property diplomatic and consular immunities and privileges to their personnel accredited to our country.

Diplomatic and Consular Immunities and Privileges

3. It is imperative at the outset to briefly elaborate on Tanzania's experience in relation to diplomatic and consular immunities and privileges. This is a relatively easier and clearer topic to deal with than that of jurisdictional immunity of state and its properties.

4. As a member of the United Nations Tanzania has found no difficulty in complying with the standards set by the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 when dealing with matters of diplomatic and consular immunities and privileges. The Tanzanian legislation which dealt with diplomatic immunities and privileges [The Immunities and Privileges (Extension and Miscellaneous Provision) ordinance Cap.450] did not adopt the Vienna Convention on Diplomatic Relations of 1961 as a municipal law but was highly influenced by it. In March 1986 this legislation was repealed and re-enacted with certain modifications by the Diplomatic and Consular Immunities and Privileges Act of 1986 which now expressly incorporates the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 as law in force in Tanzania.

5. We have incorporated these two Vienna Conventions into our municipal law because we believe that the principles enunciated in them correctly state the present position of international law governing matters pertaining to immunities and privileges of diplomats and consul officials of member states.

6. We have not as yet incorporated into our municipal law the Optional Protocol of 1961 concerning the compulsory settlement of disputes arising out of the interpretation or application of the Vienna Convention on Diplomatic Relations of 1961 because we foresee a possibility of having a dispute cropping up at a time when we may not be able for various reasons to utilize fully the services and compulsory jurisdiction of the International Court of Justice as envisaged in the Protocol. Also, we have utmost faith that where a dispute on

the interpretation or application of the Vienna Convention on Diplomatic Relations of 1961 arises we can always amicably work out a settlement agreeable to us and the foreign State concerned. It may be noted here that the Optional Protocol Concerning Compulsory Settlement of Disputes of 1961 took into account only the Vienna Convention on Diplomatic Relations of 1961 and that the Optional Protocol applies only to those party to it (See article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes Done at Vienna on 18 April, 1961).

The Diplomatic and Consular Immunities and Privileges Act, 1986

7. The jurisdictional immunity and privileges of High Commissioners, Ambassadors and other Heads of Diplomatic Missions accredited to Tanzania, together with that of their official and domestic staff and families, are provided for in Part II of the aforementioned Diplomatic and Consular Immunities and Privileges Act of 1986.

8. The immunities and privileges of foreign consular officers accredited to Tanzania are covered in Part III of the Act. Part IV of the Act provides for immunities and privileges to the United Nations and all its organs and to other international, regional and bilateral organisations. It may be mentioned here that the only institution of the Commonwealth Secretariat based in Tanzania (The Commonwealth Regional Health Secretariat for East, Central and Southern Africa and Southern Africa Extension Unit - Commonwealth Secretariat) is scheduled under the Act as an inter-regional organisation enjoying diplomatic immunities and privileges. Part V of the Act deals with waiver of immunity and privileges which can only be done by the sending State, organisation etc. or the Head or Representative of the mission or office etc. and such waiver shall be expressed and communicated in writing to the Government of Tanzania.

9. The Act empowers the Minister responsible for foreign affairs to confer by order published in the Government Gazette immunities and the collateral privilege of exemption from taxation, rates or fees to persons in the service of a government or agency of foreign power or in the service of a class of officers to be specified in the Gazette who would otherwise have not enjoyed such immunities or privileges if it would appear to the Minister that they perform duties substantially corresponding to those which, in the case of a foreign sovereign power, would be performed by a diplomatic agent. Such provisions give room for the internationally or regionally recognized freedom movements and governments in exile to be accorded diplomatic recognition and the ensuing immunity and privileges in appropriate circumstances.

Problems encountered in respect of diplomatic and consular immunity and privileges

10. Where there is a grant of a right or privilege there is always a possibility of abuse or misuse of the same. We have had a few occasions when Tanzanians enjoying diplomatic or consular immunity and privileges in foreign States have abused or misused such immunity by involving themselves in one way or the other with suspicious criminal activities such as the carriage of contraband materials which are unacceptable or illegal under the laws of States of the forum. In such situations, corrective measures expected of us under international law and under our municipal law or disciplinary proceedings were promptly taken against the culprits.

11. Likewise, we have had the experience of occasional abuse and misuse of diplomatic and consular immunities and privileges being committed by officials of foreign States accredited to Tanzania. The privilege of being exempted from prohibition in importing or paying taxes, duties or fees on certain movable properties for example, has been abused on several occasions by having the same properties passed over by way of contracts of sale, gifts etc. to persons resident in Tanzania who are otherwise not entitled to such privileges. Sections 25 and 26 of our Diplomatic and Consular Immunities and Privileges Act of 1986 have

tried to contain some of these abuses by prescribing for such properties to be sold only to the Government or any person enjoying the same customs franchise privileges, or to be re-exported. In cases of motor vehicles imported free of custom duty in pursuance of diplomatic immunities or privileges, if they exceed four years from the date of registration such vehicles are required to be sold to any person without customs franchise privilege on obtaining a written permission from the Customs Authority.

12. We have experienced foreign States invoking or influencing invocation of diplomatic immunity upon their officials or associates who are under contract of service or employment with the country of the forum and who by virtue of such contract of service or employment become crucial or potential witnesses simply in order to assist their nationals or other suspected criminals without diplomatic immunity escape trial and conviction by our courts. As such in Tanzania the idea of exempting individuals who are attached or under contract of service or employment performed in whole or in part in the state of the forum from enjoying immunity is supported in respect of the following circumstances:

(i) If the suit in court relates to his contract of employment or services or attachment;

(ii) If he is required to give evidence in court in relation to his expatriate knowledge and experience gained or investigation and observations made while on the job in the state of forum;

(iii) If as a result of his contract of service or employment he obtains data, information or makes reports which are relevant and admissible as evidence in the courts of the country of the forum.

13. It is also a matter of concern that some foreign States based in Tanzania have not been forthcoming when it comes to waiver of immunity against their officials who have committed criminal acts or to paying compensation to victims of intentional, reckless or negligent actions or omissions of their officials enjoying diplomatic or consular immunity through the normal diplomatic channels.

14. To overcome part of this problem the 1986 Act aforementioned has provided for compulsory comprehensive insurance cover in respect of any motor vehicle belonging to a person enjoying diplomatic and consular immunities and privileges as a start. It is perhaps desirable, in the long run, to have no immunity from the jurisdiction of courts for personal injuries and damage to property caused by a person who otherwise enjoys diplomatic and consular immunity and privileges.

15. Should that be the case, one problem in this regard is likely to crop up. For instance, a foreign State whose official has been involved in such acts could transfer the official concerned from the state of the forum in order to assist him avoid prosecution. Under the Tanzania court procedures an accused or defendant cannot be tried in absentia or without notice. There is also the fact that the amount of compensation for a similar kind of injury or damage caused greatly vary from country to country. Compensation awarded for a traffic death in Tanzania is not necessarily the same as that which may be awarded for a similar death in a rich western country.

16. To a limited extent, the Tanzania Act provides retaliatory measures against a foreign State which disregards diplomatic or consular immunity and privileges. It allows for withdrawal and restriction of immunities and privileges in situations where a foreign State or her officials fail to accord corresponding immunities and privileges as conferred under the Act to such a foreign State or her officials to Tanzania.

Jurisdictional Immunities of States and Their Property

17. There is no special legislation in Tanzania dealing with the question of jurisdictional immunities of States and their property. This, it will be appreciated, is not peculiar to Tanzania alone because it obtains also in some other jurisdictions. The U.N System too has not yet come up with any convention or treaty in this regard, though proposals for codification of principles applied in customary international law concerning jurisdictional immunities of States and their property is currently being worked out by the International Law Commission. With keen interest we look forward to having the accomplishment of the work done by the International Law Commission in drafting articles on this important subject in the near future.

18. The participatory role played by different States of varying political and economic stands in the work of the International Law Commission and the United Nations is in itself a reassuring fact that the Commission will take into account the immunity interests of all the States on the general basis that a sovereign State cannot exercise jurisdiction over another sovereign State except where there is reciprocity, waiver, or agreement to the contrary. Otherwise, state immunity invariably is susceptible to various conflicting interests between equal sovereign States if not guided by agreeable principles of operation. There are some areas in which there is general consensus on the immunity of a State and its property. For example, it is accepted all over the world that any municipal courts by their process shall not implead a foreign State or foreign sovereign. To the contrary all national courts have always denied state or sovereign immunity in suits for title over real property.

Restriction and Immunity

19. The traditional absolute theory of immunity which exempted a state in every way from the jurisdiction of other countries of late has been greatly curtailed. It is common knowledge that under this concept the government of a particular state could neither be sued abroad under any circumstances nor its property be attached and its public vessels were as it were "floating islands" wherever located.

20. The curtailment of this absolute theory of immunity is partly due to the fact that in the course of the 20th century there has emerged socialist and developing States which conduct state monopoly in foreign trade and shipping.

21. Furthermore, apart from the socialist and developing States it is an acknowledged fact that all governments as a whole, whether capitalist or socialist in their policies, are in today's world directly or indirectly involved in commercial activities both within their countries and internationally with foreign States.

However, in spite of this reality, it is curious to note that the draft of the International Law Commission under the provision of article 19 does not prescribe the granting immunity to state owned or state operated ships undertaking commercial activities. Socialist and developing countries may see this approach as the Commission's inclination to lean towards a limited scope of immunity. This, no doubt, is disadvantageous to them for most of their commercial and shipping activities are undertaken by their governments. On the other hand industrialized capitalist countries might interpret this concept of state immunity as a threat likely to work to the detriment of their countries' privately owned companies which are party to private contracts.

22. In such circumstances, Tanzania would rather wait for further developments in Tanzania and in customary international law on the field before enacting any municipal law covering jurisdictional immunity of States and their property. Meanwhile, the principle of reciprocity or comity would still adequately form the basis for according immunity to States and their property.

Conclusion

23. Tanzania has benefited a lot from the principles and ideas of jurisdictional immunity and privileges of diplomatic consuls, States and their properties as well as of international or regional organisations long established by other nations.

24. In today's world where there is tremendous increase in commercial activities and global ventures by States as well as private individuals the question of restrictive jurisdictional immunity assumes even greater magnitude. In order to justify this doctrine within the context of modern times, sufficient time and experience is pre-requisite before any meaningful conclusion can be drawn.

25. Consequently, it is no gainsay that a forum of this kind, where distinguished Law Ministers and other luminaries of the legal profession from the Commonwealth are meeting, provides an invaluable opportunity for exchanging ideas and experiences with a view to enhancing further development on this important subject. Tanzania supports any move in this direction.

Damages in Administrative Law

DAMAGES IN ADMINISTRATIVE LAW

A paper by Professor James S. Read, Professor of
Comparative Public Law in the University of London and
Joint General Editor, Law Reports of the Commonwealth.

Summary

Should the law provide a general right to damages for loss caused by unlawful or invalid administrative action? This important question appears to have been neglected by law reform agencies and other official bodies.

2. Administrative law evolved slowly and spasmodically in England until the rapid growth in the scope and vigour of judicial review of administrative action over the past twenty years. Since 1978 major procedural reforms have removed the weaknesses of the old procedures which restricted the effectiveness of judicial review; but the effects of the old procedures, with their emphasis upon controlling or invalidating administrative decisions by means of the prerogative orders, linger and particularly in the absence of any general remedy in damages for administrative misconduct.

3. Without such a general right to damages, claimants must bring their actions within the terms of existing heads of tortious liability, discussed in turn.

(i) Negligence. This may prove difficult to establish in many cases. Where discretionary administrative powers are involved, the courts have identified two levels of analysis: the policy/planning level, susceptible to judicial review and political sanctions only, and the operational level, at which liability for negligence may arise. (*Anns v Merton London Borough Council* [1978] AC 728, HL.)

(ii) Breach of statutory duty. The availability of this claim depends upon the interpretation by the court of the presumed intention of Parliament in the statute in question. Precedents are inconsistent and the basic principle has been judicially described as "a game of chance" and "a will o' the wisp".

(iii) Misfeasance by a public officer. It is settled that this requires proof of malice but it is unclear whether mere knowledge is equated with malice for this purpose.

(iv) "Action on the case". An attempt by the High Court of Australia to identify a general basis for the award of damages for loss resulting from the intentional acts of others (in *Beauresert Shire Council v Smith* (1966) has been rejected by the House of Lords and not followed elsewhere.

(v) "Pure economic loss". Recent cases from Canada and Hong Kong show divergent approaches to the extent to which pure economic loss may be recoverable against the state.

(vi) The constitutional dimension. Exceptionally, some constitutions establish a basis for claims in damages against the state for wrongful administrative action: the Constitution of Cyprus is an example.

4. Conclusion. The basic question demands attention. The first report on it by a law reform agency, from New Zealand (1980), recommends a piecemeal approach, by a majority,

including provision in future statutes for compensation to be payable where it is considered appropriate. Difficult questions of policy and principle are raised by any search for a solution. However, the minority view in the New Zealand report, favouring a simple and general reform of the law to provide a remedy in damages for loss resulting from unlawful or invalid administrative acts, is surely preferable.

DAMAGES IN ADMINISTRATIVE LAW

In most Commonwealth countries a basic legal question of fundamental significance remains unresolved, as one of the less attractive legacies of the shared inheritance of the common law: should the law provide a general right to damages for loss or injury suffered by an individual as a consequence of invalid administrative action? Administrative law was, exceptionally, an area of late flowering in English law, its most formative period of growth falling, indeed, within the past two decades. In particular, the development of general principles for the judicial review of administrative action lagged behind the massive growth in governmental powers. When the courts slowly and spasmodically developed such principles in the twentieth century, the provision of compensation for loss was, for various reasons, neglected. The absence of a general common-law right to damages for unlawful administrative action is off-set in some cases by the possibility of claiming damages under an established head of tort liability, such as negligence or breach of statutory duty; but each of these has its own limitations and they do not together amount to a systematic approach, so that many cases are left without any prospect of satisfactory redress.

2. This is one of the most striking areas of common deficiency in the legal systems of the modern Commonwealth, and one which has received surprising little attention in public discussion. The first report by any official law reform agency on the subject was apparently published as late as 1980, in New Zealand, and is discussed later in this paper. In a few countries constitutional provision may offer some assistance to particular claimants, as in Cyprus. But in general this appears to be a question of outstanding importance, suitable for wider discussion with a view of identifying common problems and possible solutions.

The Evolution of Administrative Law

3. It is notorious that, for all its many virtues, the common law for most of its history failed to evolve a satisfactory approach to public law, in the form of an effective scheme of administrative law or an integrated pattern of judicial remedies for the control of administrative action. In English legal history many factors inhibited the systematic growth of public-law remedies to parallel those which were developed by the courts for private-law suits: the recognition of extensive royal prerogative powers, the exercise of which was long considered to be beyond judicial review; the common-law immunities of the Crown, including the general immunity from actions in contract and tort until the Crown Proceedings Act 1947; "Crown privilege" in the law of evidence, until its transformation into the modern law of "public interest immunity"; the establishment of the doctrine of "parliamentary supremacy". Of course, in the formative centuries in the evolution of the common law, there was little need for public-law remedies, for government agencies and their administrative powers were very limited; the pressure for judicial intervention grew from the late nineteenth century, with the flood of legislation creating new administrative bodies and powers.

4. Dicey, the centenary of whose famous work Law of the Constitution was justly celebrated in 1985, lauded the English constitutional system, in which he saw individual rights as being more effectively protected by the regular processes of the common law in the ordinary courts than by written constitutions elsewhere. In a careful comparison Dicey saw many similarities between the growth of English law and the emergence of the distinctive French system of droit administratif: the predominance of case-law as a vital source in both systems, influenced by the opinions of text-writers and with the capacity

for rapid evolution; the historical origin of jurisdiction in each country in the gradual separation of judicial from executive functions; the parallel between the emergence and survival of equity in England and droit administratif in France, as additional legal systems beneficially modifying the ordinary laws. Nevertheless Dicey thought droit administratif "rests upon ideas absolutely foreign to English law" - in essence, the ideas that special principles, within the jurisdiction of special courts, govern the relations between individuals and the state. Yet Dicey duly admired the French system for its own merits, for example, the skill in evolving new remedies; he noted, however, of the remedy in damages against the state:

" the success with which administrative courts have extended the right of private persons to obtain damages from the State itself for illegal or injurious acts done by its servants, seems, as an English critic must think, to supply a new form of protection for the agents of the government when acting in obedience to orders. There can surely be little inducement to take proceedings against a subordinate if the person damaged can obtain compensation from the government".¹

This seems a perverse argument with which to defend the English system which in most cases denies the person injured any such choice of defendant.

5. In England the maintenance of administrative standards was entrusted not to the courts but to other organs and procedures. The nineteenth-century reforms transformed a corrupt and inefficient bureaucracy into an efficient and uncorrupt public service commanding general confidence and backed by the doctrine of ministerial responsibility to Parliament. With the enormous growth in the activities and powers of government from the late nineteenth century, further protection for individual citizens in routine decision-making has been provided by several distinctive instruments established by legislation. The device of "public inquiries" before final decisions, extensively applied particularly in land use matters, accommodates a measure of popular participation and public fact-finding; the extensive apparatus of (administrative) tribunals of many kinds, whose jurisdiction penetrates most areas of life, provides for the disposal of far more disputes than the courts themselves deal with; as additional watch-dogs the "ombudsmen" - the Parliamentary Commissioner for Administration (first established in 1967), the Health Service Commissioners and the Commissioners for Local Administration - investigate individual complaints of injustice arising from maladministration.

6. However, no new machinery was introduced for the general legal control of administrative action. In some areas of administration statutes have provided for direct appeals to the courts from decisions by administrative authorities (including most tribunals). Otherwise it is the responsibility of the courts to investigate the existence and scope of lawful authority for administrative action, whenever it is challenged. To perform this task English lawyers and judges invoked the supervisory jurisdiction of the courts in the form of the prerogative orders (formerly writs), especially certiorari, prohibition and mandamus. The early growth of judicial review was consequently hampered by the procedural limitations attending these remedies, including the significant restriction that an application for a prerogative order could not be combined with an application for any other remedy, such as damages. Later, in the twentieth century, the primarily private-law remedies of declaration and injunction were also found to be available and advantageous in some cases where the validity of administrative action was questioned, and these remedies were free of the those procedural restrictions and could be combined with claims for damages.²

7. Growth in the application of these remedies in the English courts in respect of administration action was notoriously unsystematic, marked by hesitation and inconsistency in judicial decisions over many decades. The precise grounds upon which the courts might

intervene remained for long uncertain and unsystematised. The ultra vires doctrine was stretched to accommodate various elements held to be required for proper decision-making; the application of the rules of "natural justice" was extended to "quasi-judicial" decisions; and all kinds of decisions were subjected to the Wednesbury test of "reasonableness".³ In the landmark case of the Brighton Chief Constable, Ridge v Baldwin⁴, the House of Lords held that the old distinction between "administrative" and "quasi-judicial" decisions was otiose. The two decades which have followed have seen a steady expansion of the scope and vigour of judicial review of administrative action, with a welcome elucidation of the principles applied.

8. However, until 1978 the machinery of judicial review in England continued in an unsatisfactory state, which was authoritatively compared with the old "forms of action" in the unreformed law of civil procedure of more than a century earlier. This criticism was quoted by the Law Commission⁵, which recommended far-reaching reforms which have now been substantially implemented in England, although it appears that the old, unreformed machinery is still applied in many Commonwealth states.

9. As from 1978 the whole character of judicial review of administrative action in England and Wales was transformed by major procedural reforms. A new Order 53 of the Rules of the Supreme Court, reinforced by the Supreme Court Act 1981, largely implements the recommendation made by the Law Commission, with some differences. The basic reform introduced a new, unified procedure of "application for judicial review", a two-stage procedure in the Queen's Bench Division of the High Court, requiring the grant of leave to apply at the first stage. By such application all of the relevant remedies can be sought, in any combination - prerogative orders, declaration, injunction and damages. Interlocutory orders such as discovery are available in respect of all remedies and the requirement of locus standi, formerly defined differently for the different remedies, is now stated in a common phrase requiring an applicant to have "sufficient interest". The courts have seized the opportunity presented by this fresh start to rationalise further the process of judicial review. Such remedies as declaration and injunction continue to be available as private-law remedies by ordinary action in the Chancery Division, but the House of Lords has decided that that route is no longer open to enforce rights claimed under public law against a public authority : the Order 53 procedure is the exclusive remedy in such cases (save for a few exceptional cases which are yet to be fully defined)⁶. In the celebrated "G.C.H.Q." case the late Lord Diplock gave a magisterial classification of the grounds upon which the courts may intervene to control administrative action : "illegality", "unreasonableness" or "procedural impropriety".⁷ In the same case the House of Lords held that even the exercise of royal prerogative powers is now within the reach of judicial review except in certain areas of government such as those affecting national security.

10. Some Commonwealth countries have adopted reforms of the relevant law, in some cases ante-dating the English changes : for example, the Judicial Review Procedure Act 1971 of Ontario and the Judicature Amendment Act 1972 of New Zealand. In Australia the Administrative Decisions (Judicial Review) Act 1977 restated the grounds for judicial review. Many countries, however, retain the older unreformed procedure in local form.

Damages

11. The judicial remedies available are applied essentially to control administrative action that is improper or excessive : they are instrumental in character, not compensatory. These remedies serve to quash a decision, to compel or forbid the exercise of an administrative power, or to declare the legal position. Under Order 53 in England an application for any such order can now be combined with a claim for damages; however, this reformed procedure does not - could not - alter the rules of substantive law. It has

long been clear that the common law failed to develop any general principle to support the award of damages as compensation to any individual who may have suffered loss or injury through administrative action which may be shown to be unlawful.

12. This gap in the law has been considered on various occasions. When the English Law Commission first reported on Administrative Law in 1969, it posed, as one of the key questions for further study (by a proposed Royal Commission, which was never established), the question how far remedies for judicial review of administrative action should include a right to damages.⁸ When the Law Commission returned to the subject, in its Report on Remedies in Administrative Law (1976), it expressly refrained from comment on the substantive law which determines liability for damages, as falling outside the scope of that Report on procedure, although the Commission noted that its Working Paper No. 40, which preceded the Report, attracted "a substantial body of opinion among the commentators" that "a separate inquiry was desirable into the question of damages as a remedy for illegal administrative action".⁹ The Commission also cited the view expressed by Lord Wilberforce in his dissenting speech in Hoffmann-La Roche and Co. v Secretary of State for Trade and Industry :

"...When the court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself. In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of the administration. Consequently, where the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act: it can take effect (in our language an injunction can be given) and at the end of the day the subject can, if necessary, be compensated. On the other hand, if the prospective loss is not pecuniary (in our language, 'irreparable') the act may be suspended pending decision - in our language, interim enforcement may be refused. There is clearly an important principle here which has not been elucidated by English law, or even brought into the open."¹⁰

In that case the House of Lords upheld an interim injunction granted to the Secretary of State, restraining pharmaceutical companies from charging prices exceeding those specified in a statutory order the validity of which had been challenged by the companies in pending litigation, without requiring the Secretary of State to give any undertaking to make good any consequent loss of profits if the order was subsequently invalidated. Lord Wilberforce would have refused the injunction without a scheme, as approved by the judge at first instance, to protect the respective pecuniary interests of the companies and the Secretary of State.

13. In the absence of a general common-law right to claim damages for ultra vires administrative action, a claim for damages can be made only where it can be based upon some other, recognised head of liability. Claims in tort are most likely to arise and to be framed in negligence, breach of statutory duty or abuse of public office.

Negligence

14. More than a century ago the House of Lords decided that damages could be awarded against a public authority for loss caused by negligence in the performance of statutory functions where the action taken is shown to have been *ultra vires*. In Mersey Docks and Harbour Board v Gibbs a cargo owner sued for loss caused when a ship grounded in the port, which had not been properly dredged of mud. The House of Lords affirmed that a common-law duty of care was properly imposed on the Dock authorities in the exercise of their statutory powers.¹¹ The courts have refrained from imposing a general duty of care upon administrative authorities to act lawfully - had they done so the scope of negligence would have been virtually coterminous with that of *ultra vires*. However, in fact special difficulties may arise in establishing that administrative agencies owe the necessary duty of care towards a particular individual - and perhaps even more difficulties in proving a breach of such a duty.

15. The Australian case of Dunlop v Woollahra Municipal Council is instructive.¹² Dunlop contracted conditionally to sell property to a development company which, however, rescinded the contract when the Council refused planning permission for a proposed building. The Council then passed two resolutions as building restrictions to control building on the site but in previous proceedings Dunlop had obtained judicial declarations that these resolutions were invalid and void : one was inconsistent with the applicable planning law; the other was invalid because Dunlop had been given no notice or opportunity to make representations. Dunlop sustained losses as a result of the invalid resolutions, partly because of changes in the property market, including interest paid on an overdraft and rates and taxes on the property. In this action Dunlop alleged, *inter alia*, that the Council had acted in breach of its duty to take care because in passing the resolutions it had failed to seek proper legal advice. At first instance Yeldham, J. doubted whether such a duty of care was established by the precedents but in any event he was satisfied that no breach of it had been proved : the resolutions had in fact been passed at the instance of the Council's solicitors. The Judicial Committee of the Privy Council, on appeal, noted that the question in issue in the previous proceedings had been finely balanced and agreed with the important finding by Yeldham, J., that the failure to give Dunlop an adequate hearing could not in itself amount to a breach of a duty of care. The Privy Council also upheld the rejection of Dunlop's claim under two other heads of alleged liability, to be discussed below, so that the Council was held to have committed no actionable wrong and Dunlop was left without any recompense for his losses.

16. In applying the rules of negligence to administrative action, the courts have held that the exercise of discretionary powers involves a level of decision-making which does not necessarily give rise to duties of care owed directly to individuals who may be affected. In making such decision a public authority may rather owe a general duty to the community as a whole, enforceable primarily by political sanctions and especially by Parliament. Such matters have been characterised as decisions of general policy; they are, of course, susceptible to judicial review on the application of a party who can demonstrate a "sufficient interest" in the matter. The implementation of such policy decisions in specific cases will involve a particular exercise of administrative powers at a second, "operational" level, at which a duty of care may well arise in respect of the individuals who will be directly affected. Losses caused by a failure to take proper care at the operational level may result in the award of damages.

17. In 1878 the House of Lords held that statutory authority could not provide a defence to a claim in negligence where the exercise of statutory power to construct a reservoir and direct river water caused flooding of the plaintiff's land:

"... no action will lie for doing that which the legislature has authorised if it be done without negligence, although it does occasion damage to anyone; but an

action does lie for doing that which the legislature has authorised, if it be done negligently. ... if by a reasonable exercise of the powers... the damage could be prevented it is... 'negligence' not to make with reasonable exercise of their powers."¹³

In East Suffolk Rivers Catchment Board v Kent the Board had exercised statutory powers to repair a river wall in such a way that the plaintiff's land had remained flooded for longer than it would have been if the Board had exercised reasonable care. The House of Lords held that the Board had a power, but no duty, to mend the walls; it could have lawfully refrained from acting and the only duty it owed in repairing the wall was to avoid causing "fresh" damage; it was not liable for failing to cure existing damage, caused by natural flooding, expeditiously.¹⁴

18. In Home Office v Dorset Yacht Club youths undergoing Borstal training escaped from custody and damaged a yacht. A claim was brought in negligence, alleging careless supervision by the officers. The House of Lords accepted that public policy required the emphasis in subordinate legislation upon training through cooperation in open institutions; for such decisions the Minister is responsible, primarily to Parliament, and the courts can intervene only in terms of ultra vires, not for negligence. The reservoir case (above) was distinguished : that concerned a private Act which authorised works merely affecting the property of others. The Borstal system is very different, with wider implications for trainees and the whole nation. The courts have no criteria by which to assess the balance of conflicting interests; the law of negligence cannot be applied to such decisions, but it will apply to the conduct of the particular officers in charge of the inmates (in effect, at the "operational" level).¹⁵

19. The locus classicus for this doctrine is now the celebrated decision of the House of Lords in Anns v Merton London Borough Council, where it was held that the local authority would be liable for negligence at the operational level in respect of the foundations of a new building.¹⁶ The decision was applied in Dennis v Charnwood Borough Council to negligence by a local authority in approving plans for a building without considering the adequacy of the proposed foundations.¹⁷ Anns was further considered in Fellowes v Rother District Council, where Goff, J., as he then was, summarised the principles as follows:

"Where a plaintiff claims damages for negligence at common law against a public body or official purporting to act in pursuance of a power conferred by statute or other legislation, he can only succeed if he can show (1) that the act complained of was not within the limits of a discretion bona fide exercised under the relevant power, (2) that having regard to all the circumstances, including the legislation creating the relevant power, there was sufficient proximity to create a duty of care on the defendant to avoid damage to the plaintiff of the type complained of, and no ground for negating (or reducing or limiting) such duty of care, (3) that it was reasonably foreseeable by the defendant, or by those for whom he was vicariously responsible, that the act complained of was likely to cause damage of the type in fact suffered by the plaintiff by reason of such act."¹⁸

The Anns distinction between policy and operational levels of functions in relation to liability in negligence has been applied by the Supreme Court of Canada which had indeed itself drawn a similar distinction between "administrative" and "business" powers.¹⁹

20. Yet the precise distinction between the two levels of "policy" or "planning" or "operation" remains an elusive one in many situations, so that a commentator has suggested that the allocation of a particular decision mainly reflects the court's perception of the justiciability of the question raised:

"When a court feels that the allegation of negligence is unsuited to judicial resolution it will apply the label planning decision to express that conclusion."²⁰

Breach of statutory duty

21. Another way of seeking damages against a public authority is by a claim for breach of statutory duty, but the precise scope of this tort is still somewhat uncertain. Its application depends on the interpretation by the court of the intention of Parliament in the statute in question. For example, the courts have varied in their reactions to the effect of an alternative remedy provided by the statute. In 1898 the House of Lord held that where the Act provides a remedy - there in the form of a right of appeal to the Minister - the right to sue for damages was by implication excluded (for failure to provide a public sewer).²¹ Yet in a later case damages were awarded against a local authority for breach of duty to supply clean water even though the statute in question provided for a penalty which was, however, held not to be an exclusive remedy.²² The principles, as set out by the House of Lords in 1949²³ were summarised in 1969 as follows:

- (i) The question is one of the interpretation of the statute in the light of the previous law.
- (ii) Does it exist for the benefit of the public at large or of a category of persons to which the plaintiff belongs?
- (iii) If the former, and a specific remedy is provided for its enforcement (e.g. criminal proceedings), no action for breach of statutory duty lies.
- (iv) If the latter, then - (a) if no specific remedy is provided there is a right of action for breach of statutory duty, (b) even if there is a specific remedy, there may be a concurrent right of action, especially if the specific remedy is not effective to ensure that the duty is performed."²⁴

This summary received judicial approval in an unusual case where it was the Crown which sought to recover damages for loss alleged to have resulted from an inaccurate although "conclusive" certificate issued by a registrar of land charges. Fisher, J., held that the registrar could be liable for breach of statutory duty and that the local council could be vicariously liable for the negligence of its employee, the clerk who searched the register; however, the action failed because the Crown had suffered no damage in terms of the legal effect of the Act.²⁴

22. Yet the attempt to define principles in this area of the law conceals the fact that there is no consistency between the cases where the action has been allowed and those where it has been refused. In 1978 Lord Denning, M.R., termed these the "pro-cases" and the "contra-cases" respectively, and commented:

"... it has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it. I decline to indulge in such a game of chance."²⁵

23. Several modern cases in England have arisen under the Housing (Homeless Persons) Act 1977, which imposes a "housing duty" at various levels upon local ("housing") authorities towards persons whom the authority is satisfied are "homeless" according to prescribed criteria. The statute is silent as to remedies. The Court of Appeal held in several cases that a civil action for damages was available. Lord Denning, M.R., held:

"...this is a statute which is passed for the protection of private persons, in their capacity as private persons. It is not passed for the benefit of the public at large. In such a case it is well settled that, if a public authority fails to perform its statutory duty, the person or persons concerned can bring a civil action for damages or an injunction"²⁶

In such cases the relationship between proceedings for judicial review and the action for damages was often canvassed. With the recognition by the House of Lords in O'Reilly v Mackman that the new Order 53 establishes an exclusive remedy²⁷, a decision by the House of Lords delivered on the same day analysed the position under the Housing (Homeless Persons) Act and applied to the action for breach of statutory duty principles rather similar to those already established in Anns to actions in negligence: Lord Bridge, with whom other members of the House agreed, identified a dichotomy between the "decision-making" functions of a public authority, in public law, which are subject to control by way of judicial review only, and the "executive functions" which implement the decision and the exercise of which gives rise to rights and obligations in private law enforceable by actions for injunctions and damages.²⁸

24. The English approach to this form of liability has by no means been favoured throughout the Commonwealth. In the leading Canadian decision, Saskatchewan Wheat Pool v Government of Canada²⁹, the Supreme Court of Canada rejected the view that there is a nominate tort of breach of statutory duty, holding that liability for such breach must be brought under the law of negligence. Evidence of such breach, causing damage, may be evidence of negligence. Dickson, J. (as he then was), vigorously rejected the English doctrine that the court should give effect to the (usually unstated) intention of Parliament in this regard:

"The pretence of seeking what has been called a 'will o' the wisp', a non-existent intention of Parliament to create a civil cause of action, has been harshly criticised. It is capricious and arbitrary, 'judicial legislation' at its very worst."

Misfeasance by a public officer

25. The tort of abuse of office has been established since the House of Lords decision in the celebrated case of the returning officer, Ashby v White, in 1703³⁰. This was one of the grounds presented by the claimant in Dunlop v Woollahra but the Privy Council upheld the dismissal of the claim, tersely approving the conclusion of Yeldham, J., at first instance that the relevant authorities establish that

"in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."

The precedents, however, are again contradictory as to whether knowledge in itself imports sufficient "malice" for this purpose. In a leading case from Quebec, Roncarelli v Duplessis³¹, the defendant, Premier of Quebec, directed the independent Liquor Commission to cancel the licence which the plaintiff had held for over thirty years. (The plaintiff had regularly assisted fellow Jehovah's Witnesses before the courts on minor charges.) The defendant was held liable for "gross abuse of legal power" under the Quebec Civil Code, Article 1053:

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another..."

Applying Quebec civil law, Rand, J., compared English law, citing Ashby v White to show that the defendant had also acted "maliciously", broadly defined as "acting for a reason and purpose knowingly foreign to the administration....".

26. In the Supreme Court of Western Samoa Mahon, J. recently reached a similar decision - and awarded exemplary damages for misfeasance - where the (former) Prime Minister influenced the Independent Public Service Commission to stop the appointment of the plaintiff, a naturalised citizen, to a senior post. The Minister was motivated not by ill-will but by his wish to advance indigenous citizens, but this ulterior motive was held to be "malice" for the purpose of this action.^{31A}

"Action on the case" : An Australian initiative spurned

27. A bold attempt by the High Court of Australia in 1966 to identify a new basis for the award of damages against administrative authorities would have rendered otiose many of the rules which clutter and restrict the scope of existing common-law remedies, but unfortunately it has not proved fruitful. In Beaureser Shire Council v Smith³² the Council damaged the plaintiff's well by the unlicensed, and therefore unlawful, extraction of gravel from a river bed. On the basis of eight English precedents, the High Court held the Council liable, recognising a novel innominate tort of broad scope in these words:

"... the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."

In Kitano v The Commonwealth, however, the High Court endorsed the view of Mason, J. that "unlawful" here is to be given a restricted meaning : an act done in breach of a statutory duty, where the statute gives no express or implied remedy in damages, is not necessarily "unlawful" within this principle. A plaintiff "must show something over and above what would ground liability for breach of statutory duty if the action were available"³³.

In Dunlop v Woollahra, insofar as the plaintiff framed his action in trespass on the case, invoking Beauresert, his claim failed : the Privy Council upheld the decision at first instance that the precedents establish a clear distinction between invalidity and unlawfulness - the fact that the Council's resolutions had been held invalid was insufficient to bring them within the Beauresert doctrine. A few months later the House of Lords, noting that that doctrine was of uncertain scope and that Beauresert had not been applied in Australia or any other jurisdiction, declared that it forms no part of English law.³⁴ This reaction has been lamented by a commentator who compared the Beauresert principle to the American "prima facie tort" doctrine.³⁵

"Pure economic loss"

28. Recent attempts to extend the scope of available remedies against government agencies to include damages for "pure economic loss" have met mixed reactions in the courts. Two comparable cases related to the exercise of statutory powers to regulate financial institutions. In Canada investors in trust companies sued the Crown for breach of statutory duty and negligence in the exercise of regulatory powers under the Trust Companies Act.³⁶ In Hong Kong depositors in a deposit-taking company sued the Commissioner for Deposit-Taking Companies for negligence (only) in the Commissioner's failure to exercise the duty of care which, it was alleged, he owed the plaintiffs at common law by reason of his statutory powers.³⁷ In each case the respective Statement of

Claim was struck out as disclosing no reasonable cause of action and an appeal was brought to the appropriate Court of Appeal. In Canada the Federal Court of Appeal set aside the striking-out order, allowing the action to proceed; the Court of Appeal of Hong Kong, however, upheld the striking-out order there. Each Court of Appeal found guidance in the celebrated passage in Anns where Lord Wilberforce explained the two stages in establishing a duty of care : first, a sufficient relation of proximity must be shown; then, it must be considered whether "there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...".³⁸

29. On such issues, including the particular question whether the Crown could be liable for "purely economic loss", the Court of Appeal in Canada considered that it was not plain and obvious that the plaintiffs did not have a cause of action, so that their action should proceed. In Hong Kong, however, the Court of Appeal in 1986 declined to follow that decision. One member of the court held that the claim failed the initial proximity test because the depositor had not relied upon any knowledge or skill in relation to tangible or physical property. Two members of the court considered that the proximity test was satisfied but held that this was nevertheless not the sort of damage for which compensation should be ordered against the Crown, for the legislation did not guarantee depositors against losses caused as much by their own misjudgments as by administrative default. In the words of Fuad, J.A.,:

"... a statutory authority cannot be held liable in negligence for economic loss suffered by another as a result of the failure of a third party to meet his contractual obligations in a financial or commercial transaction, even if it can be shown that the authority has failed to perform statutory functions whose objects are to prevent or mitigate that type of loss. This, it seems to me, would be to impose a limitation or 'control mechanism' upon common law principles governing liability for negligence in the public law context which can be readily understood and applied, and which would not lead to a capricious result."

The constitutional dimension

30. In most Commonwealth countries the common law applies subject to the provisions of the Constitution as the supreme law. Constitutional provisions may be relevant to the question of the award of damages for invalid administrative acts. For example, the Constitution of Cyprus, provides, in Article 172 :

"The Republic shall be liable for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic..."

Article 146 gives the Supreme Court exclusive jurisdiction to adjudicate finally on any complaint that any administrative act or decision is unlawful or in excess or abuse of power; in such a case the Supreme Court may declare the decision or act null and void. The Article then provides, in paragraph 6 :

"Any person aggrieved by any decision or act declared to be void under... this Article... shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a court for the recovery of damages or for being granted other remedy and to recover just and equitable damages to be assessed by the court..."

The Supreme Court has held that these provisions give a constitutional right to compensation from the state, although it is enforceable only after a judgment of the

Supreme Court under Article 146 annulling the administrative act in question. A public officer incurred unnecessary expenses in pursuing higher studies to acquire qualifications which, by a wrongful amendment of the scheme of service, were required for promotion; by legal action he successfully challenged the amendment, which was annulled, and his promotion was then reconsidered. In a further action the Supreme Court held that he was entitled to press his claim for damages in respect of the expenses incurred, despite the subsequent correction of the administration action.³⁹

Conclusion

31. Should the law provide a general remedy in damages for loss or injury caused by invalid administrative action? The foregoing summary of the existing law shows how limited and unsystematic that law is, and these weaknesses remain even with the adoption of reformed procedures for judicial reviews in various Commonwealth jurisdictions. The absence of a general right to damages, except in those few states like Cyprus where constitutional provisions may apply, leaves a serious gap in the law to the prejudice of individuals who suffer loss caused by unlawful or excessive administrative action. Dunlop v Woollahra⁴⁰ is an example of a case where compensation should have been recoverable, but was not available on the basis of the present law.

The English Law Commission posed the problem in 1967: "How far should remedies controlling administrative acts or omissions include the right to damages?"⁴¹

It has not yet had an opportunity to offer an answer to the question. The first official report on the matter in the Commonwealth came from the Public and Administrative Law Reform Committee of New Zealand in 1980, in its final Report on Damages in Administrative Law⁴². That Committee concluded that there are many situations where damages should be available for improper administrative action and considers three broad possibilities:

- (i) leaving the courts to develop the law;
- (ii) new legislation establishing a right to damages generally for loss caused by unlawful administrative action; or
- (iii) specific provision for damages or compensation to be included in specific statutes in respect of particular administrative powers.

A minority of the Committee favoured the second, simple solution; the majority recommended that the matter should be left to the judges, under the first option, with some statutory developments under the third heading. The provision of compensation should be considered in the drafting of new statutes; principles of liability could be adjusted to the character of the power involved and recovery of damages need not necessarily be by way of an action in tort. Guidelines for the consideration of new powers were put forward, for example, the degree of risk that innocent persons might suffer loss through bona fide administrative decisions, the likely weight of such losses and the potential for amelioration by means of judicial review; statutory provisions would not usually be required where a common-law remedy is available.

32. The New Zealand Committee emphasised the importance of general policy consideration in this area, taking town planning as an example for detailed scrutiny: here individuals may suffer possibly serious economic loss as a result of the pursuit of the public interest by a public authority. The Committee recommended that the existing provisions for compensation in the legislation should be expanded - compensation to be provided from either central or local government funds according to whether the relevant decision benefitted national or local interests.

33. On the basic question there is an inevitable clash of interests. Yet it is surely preferable that the community as a whole, rather than individuals who happen to be affected, should bear the losses sustained directly as a result of invalid administration acts. The existing law has created a tangle of routes by which compensation may be sought, but each of these has unpredictable elements and together they do not provide a comprehensive or integrated pattern of remedies. The solution preferred by the New Zealand Committee would continue this patchwork and add to it a further variety of legislative provisions - and would, moreover, require, for consistency, a review of all existing statutory powers. Yet there is an understandable and authoritative reluctance to accept that public funds should be burdened with compensating for all losses which result from administrative acts - as demonstrated by the "economic loss" case from Hong Kong, cited above. A commentator has suggested that reform of English law could be based upon two general principles, perhaps in combination: "compensation for invalidity" - appropriate for losses arising from modern regulatory legislation - and "a risk theory" to provide a mechanism for operating a value judgement to determine which "interests in society should be protected against either lawful or unlawful interference by government".⁴³ He cites the Land Compensation Act 1973 in England as containing this idea: it provides compensation for the depreciation of land values through physical factors, such as pollution caused by the use of public works such as highways.

34. The complexity of the issues likely to be raised by a piecemeal approach to reform in this area should not be allowed to discourage the reformer - although it might perhaps give encouragement to those, like the minority on the New Zealand Committee, who recommend a simpler and more general solution, for which the precedent to the Cyprus constitutional provisions discussed above might be invoked. Certainly the basic question posed at the outset of this paper should not be ignored. The words of a leading American authority may be quoted in support:

"A system of administrative law which fails to provide the citizen with an action in damages to make him whole ... is actually but a skeletonised system. If individuals are to be protected adequately, an action for damages is the necessary complement of the action for review, which results only in the setting aside of improper administrative action."⁴⁴

This was quoted in an earlier comparative review of the subject in New Zealand:

"Without a remedy of this nature being also available a formal pronouncement by a court that an administrative act is illegal or otherwise invalid frequently represents no more than a mere Pyrrhic victory for an aggrieved citizen."⁴⁵

35. It is suggested that it would be consistent with fundamental principles of democratic government, and an appropriate fulfilment of the procedural reforms so far accomplished in some Commonwealth jurisdictions - and perhaps anticipated in others - to give an affirmative answer to the basic question: the law should be amended to provide a general remedy in damages for losses which result from unlawful or invalid administrative acts.

FOOTNOTES

1. Dicey, op. cit., 9th ed., 1948, p. 404
2. As in Vine v National Dock Labour Board [1957] AC 488.
3. Associated Provincial Picture Houses Ltd v Wednesbury Corportaiön [1948] 1 KB 223
4. [1964] AC 40.
5. S.A. de Smith, quoted in Law Commission, Report on Remedies in Administrative Law, 1976, Comnd. 6407, para. 32.
6. O'Reilly v Mackman [1983] 2 AC 237.
7. Council of Civil Service Unions v Minister for the Civil Service [1985] LRC (Const) 948, [1984] AC 374.
8. Law Com. No. 20, Cmnd 4059.
9. Para 9.
10. [1975] AC 295 at pp. 358-59.
11. (1866) LR 1 HL 93.
12. [1982] AC 158.
13. Geddis v Bann Reservoir Proprietors (1878) 3 App Cas 430
14. [1941] AC 74.
15. [1970] AC 1004.
16. [1978] AC 728.
17. [1983] QB 409.
18. [1983] 1 All ER 513 at p. 522.
19. Barratt v District of North Vancouver [1980] 2 SCR 418; Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg [1971] SCR 957.
20. P.P. Craig, Administrative Law (1983), p. 535.
21. Pasmore v Oswaldtwistle Urban District Council [1898] AC 387.
22. Read v Croydon Corporation [1938] 4 All Er 631.
23. Cutler v Wandsworth Stadium [1949] AC 398.
24. Ministry of Housing and Local Government v Sharp [1970] 2 QB 223.
25. Ex Parte Island Records Ltd [1978] 3 All ER 824 at p. 829.

26. De Falco v Crawley Borough Council [1980] 1 All ER 913 at p. 920
See also Thornton v Kirklees Metropolitan Borough Council [1979] QB 626, CA
27. See footnote 6 above.
28. Cocks v Thanet District Council [1983] AC 286.
29. (1983) 143 DLR (3d) 9 at p. 17
30. 2 Ld. Raym. 938, 3 Ld. Raym. 320.
31. (1959) 16 DLR (2d) 689
- 31A. Vermeulen v Attorney-General [1986] LRC (Const) 786
32. (1966) 120 CLR 145.
33. (1973) 129 CLR 151 at p. 175.
34. Lonrho Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456 at p. 463.
35. Harlow, Compensation and government torts (1982), pp. 66-67.
36. Baird v Queen in right of Canada (1983) 148 DLR (3d) 1.
37. Yuen Kun Yeu and Others v Attorney-General [1986] LRC (Comm) 300.
38. [1978] AC 728 at pp 751-2.
39. Frangoulides v The Republic (1982) 1 CLR 462. See also Hapeshis and others v The Republic (1979) 3 CLR 550.
40. See footnote 12 above.
41. Working Paper No. 13, repeated in Law Com. No. 20 (1969).
42. 14th Report.
43. P.P. Craig, Administrative law (1983), pp. 550-54. See also the same author's "Compensation in Public Law" (1980) 96 LQR 413, 435.
44. B. Schwartz, Introduction to American Administrative Law (1958), p. 207.
45. E.J. Haughey, The Liability of Administrative Authorities (1975).

Options in Law Revision

LAW REVISION IN THE CARIBBEAN

A paper prepared by Sir Clifford Hammett
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There are 18 Commonwealth Territories in or near the Caribbean of which twelve have been independent for varying periods since 1962, and six are United Kingdom Dependencies. A note of the existing text of the legislation of each Territory is set out in the Appendix at the end of this paper.

2. In six of these Territories comparatively recent Revised Editions of Laws have been published in loose leaf form which can be updated by the incorporation of loose leaf supplements. The present position in each case is as follows -

	Year of Publication	Year to which Law was revised	Year to which Law has been updated
Barbados(a)	1975	1971	1978
Belize(b)	1985	1980	1980
Bermuda	1972	1971	annually(c)
Guyana	1973	1970	1976
Jamaica	1975	1973	annually(c)
Trinidad & Tobago	1981	1977	1980

(a) Statutes only. See Appendix for Revised Edition of Subsidiary Legislation

(b) Statutes only

(c) Where the updating is carried out annually it takes about 18 months for the supplementary loose leaf sheets to be prepared and printed before they can be incorporated in the Revised Edition.

3. In the Cayman Islands a continuous system of Law Revision, unique in the region, has been adopted since 1975. About 70 of the existing laws have been revised, consolidated and republished in loose leaf form in this period. All new laws are published in this form and together with the revised laws are held in loose leaf binders specially produced for this purpose. Bound annual volumes of laws are not published.

4. In the Turks & Caicos Islands the last Revised Edition of Laws was published in bound volume form in 1970.

5. In the remaining ten Territories, periods varying from 24 years in the case of Montserrat and up to 60 years in the case of St. Vincent have elapsed since the date of their last Revised Edition of Laws.

6. No Revised Edition of the Subsidiary Legislation of St. Vincent and the Grenadines has ever been published. The different methods of publishing Revised Editions of the Subsidiary Legislation in other Territories have taken the following forms -

- (1) Separate Revised Editions in bound volume form - in The Bahamas and Belize.
- (2) Separate Revised Editions in loose leaf form - in Barbados and Jamaica.
- (3) By incorporating Subsidiary Legislation, in loose leaf form, immediately after the Statute under which it was made, in the loose leaf Revised Edition of Laws - in Bermuda, Guyana, Trinidad and Tobago and the Cayman Islands.
- (4) Separate bound volumes of Subsidiary Legislation published as a part of the set of the last Revised Edition of Laws in bound volume form - in each of the remaining nine Territories.

7. In all Territories, except the seven in which a comparatively recent Revised Edition of Laws in loose leaf form has been published, it is becoming increasingly difficult to ascertain the law with certainty and despatch. In each of these 11 Territories the need for the publication of a new Revised Edition of Laws is becoming increasingly urgent.

8. In the report on the Legal Resource Needs in Small States (in respect of Bermuda and the Caribbean) by Professor Keith Patchett, to the Commonwealth Secretariat, in 1980, he stressed the need then for new Revised Editions of Laws in these territories. Professor Patchett had served, some 12 years ago, as the first Dean of the Law Faculty of the University of the West Indies in Barbados. He was very well aware of the situation in these Territories as a study of his detailed and lucid report shows. It is regrettable that so little progress has been made in this field since 1980.

9. This situation has been alleviated to a limited extent by the publication of updated consolidated and cumulative indexes of the Statutes and Subsidiary Legislation of each of these 18 Territories at regular intervals, under the West Indian Legislation Indexing Project. This is a project undertaken by the Law Library at the Faculty of Law, of the University of the West Indies in Barbados, with the assistance of the British Development Division in the Caribbean.

10. In the past, until about 1960, it was the practice in all such overseas territories for a revised edition of laws to be published at reasonably frequent intervals. In those days there were not as many laws and the cost of printing was within the financial capacity of each Territory. Today, there are a considerably greater number of laws and the cost of printing has increased enormously. From the latest estimates I have seen the cost in England of producing 250 sets of a revised edition of laws consisting of 9 volumes will amount to about £180,000. By the sacrifice of some degree of quality and stringent economies this figure could perhaps be reduced by up to 25% but even this is beyond the available resources of many small territories. From time to time, however, funds for printing may become available and it may be helpful to see what may be learned from the more recent law revision exercises that have been carried out in the region.

11. In most of the Territories now in urgent need of a new Revised Edition of Laws there are a number of laws which are archaic in both form and content. There is a need in each Territory for an overall exercise in Law Reform to ensure that when a new Revised Edition of Laws is produced it will contain more laws that are in keeping with present day requirements

than is the case at present. Technical assistance for this purpose is available from the Aid Agencies at present and the cost of the comparatively limited amount of printing concerned is not beyond the resources of most territories. If a new Revised Edition of Laws is produced in loose leaf form this exercise can be carried out over a longer period, both before and after the new edition is produced. If however the new Revised Edition is to be produced in bound volume form, as many as possible of the measures of law reform should be enacted beforehand. If enacted afterwards the new edition will quickly become out of date and much of the expense of production will have been wasted. This is one of the considerations to be taken into account when deciding whether the new editions should be in 'loose leaf' or 'bound volume' form.

12. The Revised Editions of Laws at present in force in the eleven territories now in need of a new Law Revision exercise are in bound volume form, on traditional lines. Statutes in the Revised Edition are printed according to their subject matter, in one of about 30 different sections called "Titles", bearing their subject matter heading, in a numerical series, from "Title No. 30". Statutes allocated according to their subject matter, to their appropriate "Title", are called "Chapters". Each Chapter is given a Chapter number in one continuous numerical series, running throughout the revised edition, from "Chapter No.1" to the last Chapter in the edition. The pagination in these revised editions was either on a "volume basis", in each volume of the edition, or in some cases, on an "edition basis" i.e. continuous throughout each volume to the last one in the set.

13. In revised editions in loose leaf form the pagination is neither on a "per volume basis" nor an "edition basis", but on a "per statute" basis, i.e. the first page of each statute is paginated "page 1".

14. The classification of statutes and the order in which they have been printed in the six editions published in the region in loose leaf form is not uniform and differs between territories as follows

- (a) In Barbados and Belize the traditional method has been followed. Statutes are allocated to one of about 30 different "Titles" according to their subject matter, and are enumerated as Chapters in one continuous numerical series from "Chapter No. 1" through to the last Chapter in the edition. In each territory "Chapter Numbers" under some Titles have been reserved for allocation at a later date to statutes on the same subject matter that have not yet been enacted.
- (b) In Bermuda statutes are allocated to one of about 30 different "Titles" according to their subject matter. Under each Title, statutes are not however called "Chapters" but "Items". Each statute is allocated an "Item number" in a separate numerical series under each Title, each beginning with "Item No. 1". Subsidiary Legislation under each Title is identified by bearing the Title number, and the Item number and also an alphabetical series affix e.g. "Title 1. Item 1(a)".
- (c) In Guyana and Trinidad & Tobago the use of the name "Title" has been discontinued. Statutes are placed under general subject matter headings which are not numbered. In Guyana there are 33 and in Trinidad there are 35 different, unnumbered, subject matter headings. The statutes under each subject matter heading are listed under one Chapter or the several Chapters into which each subject matter is divided. These Chapters are numbered but are not named. The numeration of Chapters is on an edition basis - in Guyana from "No. 1 - to - No. 99", and in Trinidad from "No. 1 - to - No. 90". Each statute is assigned a number within its Chapter in a numerical series starting

from "No :01" in each Chapter e.g.: "Chapter 1:15". Several "Chapter numbers" under different subject matter headings and several "Statute numbers" under different "Chapter Numbers" have been reserved for allocation later to statutes not yet enacted.

- (d) In Jamaica the use of the terms "Titles" and "Chapters" has been discontinued. All statutes in the Revised Edition are placed in alphabetical order, according to their short titles, irrespective of their subject matter. They are printed without identifying numbers and do not bear their year of enactment in their short title.

15. From this it can be seen that several different methods of classification, numeration and the layout of Statutes and Subsidiary Legislation have been used in the printing of revised editions of laws in loose leaf form in the region. An examination of each of these methods by the next territory that produces a Revised Edition in loose leaf form should enable it to decide which is most suited to its own requirements.

16. When funds are found for the production of a new revised edition of laws in territories where it is now so urgently required, a decision will have to be made whether it is to take the form of a 'bound volume' or 'loose leaf' edition. Some of the considerations to be taken into account when this choice is made are as follows:

- (a) Costs: When estimates of the original costs of each form of production are obtained, it is doubtful, in view of the total costs involved, if the differentials will be an overriding consideration. In one territory one consideration taken in favour of a "loose leaf" edition was that the production of annual volumes of statutes and subsidiary legislation could be dispensed with in future, thereby effecting a considerable saving in costs. This was a fallacy and was later admitted to be a mistake by one of the officers concerned. Annual volumes of laws are still required whichever form of production is decided upon.

Whilst the original costs of a loose leaf edition may be marginally higher than those of a bound volume edition, they do save the enormous cost of a total replacement of a bound volume edition, when some years, later, a new revised edition is required. Against this however, the lower but repeated costs, either annually or periodically, over the years of updating a loose leaf edition by supplementary pages, must also be taken into account.

- (b) Size of Volumes: Any volume of more than 500 pages tends to become inconveniently large to handle as a reference book. Larger volumes are liable to become damaged more frequently in the course of usage. There is a tendency for loose leaf volumes to be much more bulky, and so more difficult to handle, than bound volumes of the same number of pages.
- (c) Supplements: It invariably takes about 18 months or more for the preparation, printing and publication of sets of supplementary pages to update a loose leaf revised edition. The expense concerned and the unexpected delays in production that occur and the staff required for the work are all invariably underestimated.
- (d) Ease of Reference etc. A loose leaf edition of laws will always be at least 18 months out of date, owing to the minimum time

taken to prepare, print and insert the supplementary updating pages. It is not always easy to be sure of the date to which a particular statute in a loose leaf edition has in fact been updated. When, as not infrequently is the case, it is desired to ascertain the law in respect of facts that occurred some time prior to the date to which the relevant laws in a loose leaf edition have been updated, it is not possible to do so without reference to a number of other texts.

- (e) Law Reform: Where, over a period of time, measures of law reform are enacted it is much easier to incorporate these into the body of Statute Law in a Revised Edition in loose leaf form, than it is in a bound volume edition. It is not so necessary therefore for measures of law reform to be enacted before undertaking a law revision in loose leaf form, than one in bound volume form.

17. These are some of the considerations to be taken into account when a choice is made between a "loose leaf" and a "bound volume" revised edition of laws. Whilst my own preference leans in favour of bound volumes there are very cogent reasons why, in the particular circumstances of the Territories concerned, the loose leaf form may perhaps be better suited to their present needs.

18. It is in the smaller, less developed territories in the region that new Revised Editions of Laws are most urgently needed. Many of their laws have been amended so many times over the years that even with access to a complete set of these laws it is becoming difficult to ascertain exactly what the law is on certain subjects. This position is aggravated by so many of the older annual volumes of laws being out of print and copies of them no longer being obtainable or easy to locate. In some territories complete sets of the laws are not held by the Courts of Justice. In two of them, they are not even held in the Chambers of their Attorney General or by the Legislature. I personally became aware of this when I needed to gain access to complete sets of laws for the purpose of compiling consolidated indexes of their Statutes and Subsidiary Legislation.

19. In larger territories a substantial part of the costs of printing a new Revised Edition of Laws can be recovered by sales to local legal practitioners, banks, and commercial houses, and to public institutions such as Law Libraries, both within the region and overseas. This is not the case in smaller territories where practically the entire cost of production must be found by the local Government. The Governments of most small territories do not have the resources either of personnel or finance to match these needs unaided.

20. If the present position in these territories is allowed to deteriorate it will eventually imperil the maintenance of the rule of law, and there will be the danger of a breakdown in the proper administration of justice. Sooner or later, it will be necessary for outside Aid Agencies to assist those territories to produce new Revised Editions of their laws so that once again it will be possible to ascertain the law with a greater degree of certainty and despatch than is presently the case.

**The Legislation of Commonwealth Territories
in and near the Caribbean**

ANGUILLA
(Dependent)

- (1) Laws up to 4th August 1971
 - (a) 1961 Revised Edition of Laws of St. Christopher, Nevis & Anguilla (8 Vols.)(Bound)
 - (b) Annual Volumes of Laws of St. Kitts etc. 1962-1971
- (2) Laws after 4th August 1971
 - (a) Annual Volumes of Laws of Anguilla 1971-1981
 - (b) Cyclostyled Gazette Supplements 1982 onwards.

ANTIGUA & BARBUDA
(Independent 1981)

- (1) 1971 Revised Edition of Laws of Antigua (8 Vols)(Bound)
- (2) Annual Volumes of Laws 1962 onwards

BAHAMAS
(Independent 1973)

- (1) 1965 Revised Edition of Statutes (7 Vols)(Bound)
- (2) Annual Volumes of Laws 1966 onwards
- (3) 1965 Revised Edition of Subsidiary Legislation (3 Vols)(Bound)
- (4) Unbound copies of Statutory Instruments issued as Supplements with the Gazette

BARBADOS
(Independent 1966)

- (1) 1971 Revised Edition of Statutes (7 Vols)(Loose leaf)(updated to 31.12.1978)
- (2) Annual Volumes of Statutes 1979 onwards
- (3) 1983 Revised Edition of a substantial part of existing Subsidiary Legislation (to 31.12.1978) (3 Vols)(Loose leaf)
- (4) Annual Volumes of Subsidiary Legislation 1979 onwards

BELIZE
(Independent 1981)

- (1) 1980 Edition of Statutes (6 Vols)(Loose leaf)
- (2) Annual Volumes of Statutes 1981 onwards

- (3) 1962 Revised Edition of Subsidiary Legislation (4 Vols)(Bound)
- (4) Annual Volumes of Subsidiary Legislation 1963 onwards

BERMUDA
(Dependency)

- (1) 1971 Revised Edition of Public Acts and Subsidiary Legislation (7 Vols)(Loose leaf)(updated annually by loose leaf supplements)
- (2) Annual Volumes of Public Acts
- (3) Annual series of Gazettes (unbound) containing Subsidiary Legislation

BRITISH VIRGIN ISLANDS
(Dependency)

- (1) 1961 Revised Edition of Laws (7 Vols)(Bound)
- (2) Annual Volumes of Laws 1962 onwards

CAYMAN ISLANDS
(Dependency)

- (1) 1963 Revised Edition of Statutes (3 Vols.) (Bound)
- (2) From 1975 onwards all laws are being revised and replaced by individual loose leaf copies of new laws and revised laws under the Law Revision Law 1975. This process is now virtually complete
- (3) All Statutes and Subsidiary Legislation are now published in the Gazette in loose leaf form. Annual bound volumes of these laws are not published.

COMMONWEALTH OF DOMINICA
(Independent 1978)

- (1) 1961 Revised Edition of Laws (6 Vols)(Bound)
- (2) 1962-3 Supplementary Volume
- (3) Annual Volumes of Laws 1962 to date

GRENADA
(Independent 1974)

- (1) 1958 Revised Edition of Laws (6 Vols)(Bound)
- (2) Annual Volumes of Laws 1959-1979
- (3) "Peoples Laws" (1979-1983) some of which were not issued in bound volumes
- (4) Laws since 1983 issued as Gazette Supplements

GUYANA
(Independent 1966)

- (1) 1973 Revised Edition of Laws (14 Vols)(Loose leaf) updated by loose leaf supplements to 1976
- (2) Unbound copies of Statutes and Subsidiary Legislation, issued as supplements with the Gazette from 1973 onwards. No bound Volumes of Laws have been published since 1973

JAMAICA
(Independent 1962)

- (1) 1973 Revised Edition of Statutes (20 Vols) (Loose leaf) updated annually by loose leaf supplements
- (2) Annual Volumes of Statutes 1973 onwards
- (3) 1974 Revised Edition of Subsidiary Legislation (9 Vols)(Loose leaf) updated annually by loose leaf supplements
- (4) Annual Volumes of Subsidiary Legislation 1974-1978
- (5) From 1979 onwards Subsidiary Legislation published as supplements with the Gazette

MONTSERRAT
(Dependency)

- (1) 1962 Revised Edition of Laws (8 Vols)(Bound)
- (2) Annual Volumes of Laws 1962 onwards (These are incomplete and efforts are being made to print the missing volumes)

ST CHRISTOPHER &
NEVIS
(Independent 1983)

- (1) 1961 Revised Edition of Laws of St. Christopher, Nevis & Anguilla (8 Vols) (Bound)
- (2) Annual Volumes of Laws 1962-1973 (Later volumes are in process of printing)
- (3) Statutes and Subsidiary Legislation issued as supplements with the Gazette from 1974 onwards

ST LUCIA
(Independent 1979)

- (1) 1957 Revised Edition of Laws (7 Vols)(Bound)
- (2) Annual Volumes of Laws 1957 onwards

ST VINCENT &
THE GRENADINES

- (1) 1926 Revised Edition of Statutes (2 Vols)
(Bound)
- (2) Annual Volumes of Statutes 1927 onwards
- (3) Subsidiary Legislation in annual volumes 1900 etc onwards (No consolidated Edition of Subsidiary Legislation has been published)

TRINIDAD & TOBAGO
(Independent 1962)

- (1) 1980 Revised Edition of Laws (16 Vols)
(Loose leaf) updated by Supplements to
31 Dec. 1980 (still in process
of completion)
- (2) Annual Volumes of Laws 1977 onwards

TURKS & CAICOS
ISLANDS

- (1) 1969 Revised Edition of Laws (3 Vols)(Bound)
- (2) Annual Supplementary Volumes to 1979
- (3) Cyclostyled copies of Statutes and Subsidiary Legislation
published in or with the Gazette 1980 onwards

NOTES

1. General: These particulars are given in general outline and not in detailed form. Where Annual Volumes are printed it must be remembered that these are not always published at the end of each year, but, at times, several years (in some cases up to 20 years) later. In the meantime the unbound loose leaf copies of Statutes and Subsidiary Legislation issued as Gazette supplements must be retained and used for reference.
2. "Laws": This term includes both Statutes and Subsidiary Legislation unless otherwise stated.
3. "Gazettes": These, with their supplements, are published in printed form, except in the cases of British Virgin Islands, Anguilla and Turks & Caicos, where, in the absence of Official Government Printers they are published in Cyclostyled sheets.
4. The year by which a Revised Edition is known in a territory is usually the year to which the laws it contained have been updated. In some cases however it is the year of publication of the Revised Edition.

OPTIONS IN LAW REVISION — EMERGING PROBLEMS AND EMERGING TRENDS: THE HONG KONG EXPERIENCE

A paper by the Government of HONG KONG

INTRODUCTION

In an article in the Hong Kong Law Journal some years ago, Professor Bartholomew of the University of Singapore wrote that the object of law revision was -

"to make available to the public and to the legal profession an up-to-date, comprehensive, concise and readily available statement of the written law of the country".

2. Professor Bartholomew referred to this object, so defined, as an ideal. It is unattainable because the legislative process will not stop for revision and because, as the legislative activities of modern countries increase, so does the burden of editing, publishing, consolidating and revising the growing volume of statutes.

3. Many and varied paths are followed throughout the Commonwealth in pursuit of the ideal. With the advent of computerized typesetting and data storage, rapid updating and reprinting of texts are possible, and many jurisdictions are moving to a loose leaf system, or a variation of such a system, for some or all of their legislation.

4. Once a decision is made to depart from the traditional decennial, bound Revised Editions, or from the issue of periodic reprinted consolidations, it becomes a question of degree, and of striking a balance between conflicting interests, namely printing expense, up-to-dateness, updating effort, and the need for certainty and confidence in the text.

5. Some jurisdictions maintain a loose leaf service which is not authoritative i.e. it is in addition to the authoritative bound Revised Edition and annual supplements. Others produce a loose leaf edition of principal legislation only, or of subsidiary legislation only. It would seem to be a very brave (or foolhardy) step to embark on a loose leaf edition for all legislation, particularly an authoritative edition.

6. This paper discusses options in the Hong Kong context.

BACKGROUND

7. Between the years 1887 and 1965 Hong Kong produced 6 bound Revised Editions of the statutes. In 1962 a decision was made to publish a permanent Revised Edition which would thereafter be revised annually. After much research and argument, a system of loose booklets, that is, bound self-contained booklets of each piece of legislation, both primary and secondary, was preferred to a system of loose leaf pages. Annual volumes of all legislation appearing in the Gazette were to continue, but the booklets, once published, would become the authoritative version of the law contained therein.

8. A similar system was already operating in Kenya and one or two other African jurisdictions, and booklets are, of course, the basis of the United Kingdom "Statutes in Force" service, so there is no claim to originality on that score.

The Present Process of Consolidation and Revision

9. The permanent Revised Edition came into force in 1965 and since then the statutes have been selectively revised and consolidated on an annual basis. New booklets containing new laws are inserted, and repealed laws removed. Where laws are substantially amended, the booklet is replaced with a new one, containing the law both consolidated and revised. Minor amendments to the laws, not justifying the reprint of a booklet, are gathered together in a volume of minor amendments, also annually revised. Booklets which have been replaced and extracted are bound in separate annual volumes of Extracts, which are able to form a basis for historical research of the Revised Edition.

10. There is also a separate noter-up service. At 2 or 3 week intervals through the year, the gazetted amendments to laws are issued in a form for cutting and pasting into the booklets. A subscriber who follows the instructions faithfully, can maintain an authoritative statute book which is no more than 2 to 3 months out of date. This surely approaches the ideal - but at ever increasing effort and expenses.

Advantages and Disadvantages of Booklets

11. The main advantages of the booklet system over a loose leaf system are, first, that booklets can be removed as a whole for use in court, and sold individually to the public; secondly that there is no conceptual difficulty in accepting a bound booklet as an authoritative version of a law, while there is great difficulty in accepting a collection of loose leaves as authoritative; thirdly there are not the difficult current-page indexing, pagination and layout problems; fourthly historical research of the Revised Edition is possible through the extracted booklets, whereas it is virtually impossible with extracted pages. Of course it is possible to research a measure through the successive annual volumes of the Gazettes, but this is outside the Revised Edition.

12. More difficult to ascertain are relative costs. On the one hand loose leaf generates more printing where there are successive amendments to the same provisions, and for the page-by-page incorporation of each minor or consequential amendment. In the booklet system these are collected together on minor amendments sheets in one volume. On the other hand, a new booklet often involves reprinting many unamended pages.

13. On balance it is thought that loose leaf would be more expensive in terms of printing costs. As against that there would be savings in updating time by comparison with the noter-up service. This is mentioned again below.

Size of the Revised Edition

14. Perhaps, all other things being equal, there is not much between the systems where the volume of legislation is relatively small and compact (say 10 to 15 thousand pages). But what if it is much more?

15. Hong Kong's Revised Edition began in 1965 with 14 volumes. In 1986 there are 26 volumes, comprising some 18,000 pages. By 1992 or thereabouts some 60 volumes are expected. The main cause of this rapid expansion is that Hong Kong is embarking on a project to

translate all existing statutes into Chinese and to draft all future laws bilingually in English and Chinese. The result will be a Revised Edition of twice its present size. Some 40,000 pages.

16. How can either booklet service or a loose leaf service be maintained with regular updating for an Edition of that size, bearing in mind that every amendment must be made to the text in each language?

17. The noter up service for the booklet system is issued bi-weekly, about 2 to 3 months behind the publication of the amendments in the Gazette. Let us assume that loose leaf replacement pages are similarly delivered on a bi-monthly basis.

18. On the one hand, the cut-and-paste noter up service is already, and will increasingly be, extremely expensive in terms of time and labour. There are at present some 240 sets which are noted up in the Attorney-General's Chambers alone. One clerk working full time can maintain 8 sets, so that the full time services of 30 clerks are required solely for this purpose. A 60 volume edition would require a small army. Not only that, but the task is tedious in the extreme. Even the legendary diligence of the Hong Kong office workers flags at the prospect of yet another day with the scissors and paste. Their complaints are echoed strongly by the staff of Hong Kong's Judiciary, and in the large law firms. There are more than 1,200 other subscriptions to the noted up service in Hong Kong.

19. On the other hand, it is suggested that a bi-monthly replacement pages service, each issue having 1,000 to 2,000 sheets, would be impossibly unwieldy. There are large potential problems of page indexing and confusion if an issue is delayed and is subsequently overtaken by another issue with the replacement pages themselves replaced. This could lead to a disastrous loss of confidence in what is, after all, the 'authoritative' Edition. Many jurisdictions with even a limited loose leaf service do not take this risk and provide the service as a supplement, without authoritative status, to the bound Edition with annual supplements.

A Possible Solution for Hong Kong

20. Is there a way around this seeming impasse? The noter up service is essential to practising lawyers because the Revised Edition is revised and consolidated annually. Due to the printing delay caused by printing of the annual revision at one time (some 4,000 pages in 1985), the revised booklets are not now available until the middle of the year following. Thus a law enacted in January 1986 would not appear in booklet form until mid-1987.

21. The situation could be considerably eased by a more frequent consolidation, or even a continuous consolidation and revision of the booklets and minor amendments volume (which is already loose leaf). As and when laws are substantially amended new booklets could be released, perhaps on a quarterly basis. Where amendments were few, replacement loose leaf pages would be issued for the minor amendments volumes.

22. Of course, it is less convenient to consult both the main volume and the minor amendments volume for the current (or near current) law. A possible edition or alternative is a colour-coded card or page insert for each booklet drawing attention to the latest amendments and current status of the law contained in it.

23. This possible refinement of the booklet system is now being examined.

Employment of Computer Technology in Revision and Consolidation

24. It is considered that Hong Kong's loose booklet system with annual revisions is particularly well suited to a jurisdiction where -

- (a) the volume of legislation in the Edition and enacted annually is fairly modest; and
- (b) the legislation is enacted in one or two principal legislative sessions during the year.

25. When these conditions exist, the efficient replacement of booklets can be achieved without the aid of sophisticated computerized typesetting and data storage. Until recently Hong Kong has not had these facilities. Furthermore, the noter up service is not so vital, and may be reduced in frequency or dispensed with altogether.

26. Hong Kong's position now and in the future is quite different, with bilingual statutes swelling the statute book and weekly sittings of the legislature for 10 months of the year.

27. It is not feasible to move to a continuous consolidation and revision system, whether by page or booklet, without the aid of modern computer technology. Draft legislation must be entered on word processors/computer terminals in the draftsman's office and transmitted whether by disk or direct line, to computer typesetting equipment at the printer's plant. The advantages are in the speed and accuracy of updating. Re-keying is avoided and proof-reading is thereby reduced. Rapid reprinting of text is possible. The Government Printer in Hong Kong has now computerized typesetting for both English and Chinese. Full text storage of the bilingual laws will, however, require a further large computer memory. It is hoped to have the necessary equipment within the next 2 to 3 years.

28. It is relatively short step from text storage to the availability of on-line terminals in offices and libraries displaying the up-to-date text of any law. A back-up database is in any event required for printing purposes. It is thought that this text, maintained by the Law Draftsman's office, could be available for the purpose. What can be monitored on screens can also be printed out in hard copy, but the uses of a partial, unauthorized text would necessarily be limited.

29. The existence of a full text database raises the further exciting possibility of installing a programme for the search and retrieval of selected information from the statutes. Such programmes are available and in use, on a large scale, in the United States, Canada and Europe, but the Hong Kong Government has not so far been convinced that the benefits for a relatively small number of potential users exceeds the considerable cost of setting up and maintaining the programme. The situation will however, be kept under review.

CONCLUSIONS

30. Instant accessibility to the current statutes, at least in electronic form, is now more than an ideal for Hong Kong. In common with other smaller jurisdictions, however, it may well have remained out of reach for many years. Only the decision to enact legislation bilingually has, in a sense, provided for it.

31. In any event the lawyer's world is still a world of books and it is to the printed volumes in their sturdy binders that the lawyer will instinctively turn to find what is hoped, if not confidently, to be the current law. We are obliged to continue the search for improved techniques of revising and consolidating the printed texts. On this note we await with interest the sessions of this year's Commonwealth Law Minister's Meeting which is expected to devote some time to a discussion of this topic.

OPTIONS IN LAW REVISION: EMERGING PROBLEMS AND EMERGING TRENDS — A ZIMBABWE PERSPECTIVE

A paper prepared by the Government of Zimbabwe

Historical Perspectives

In Britain and many other Commonwealth countries statute law revision is a relatively recent phenomenon. Thus, although in Britain, the earliest English statute on record is dated 1235, we are told by the authors of Craies on Statute Law that it was not until 1856 that the process of statute law revision began in that country. That process appears to be still in progress because as recently as 1965, the Law Commission established in that year, had as part of its principal objects, the task of "systematic development and reform, including in particular the codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law..."

2. For most of the other Commonwealth countries, however, statute law revision could have started only as soon as practicable after 1856 as each acquired a local legislature and a collection of local statutes. As in other aspects of colonial administration, through the use, on the one hand, of colonial office personnel, such as the colonial legal officers, namely, the Attorneys-General and the judges of the superior courts, and the use of the colonial Instructions on the Preparation and Printing of Revised Editions and the Annual Volumes of the Statutes, on the other, the form and development of statute law revision generally followed identical patterns for a long time in Britain and the other Commonwealth countries. Indeed, after the emergence, during the period under reference, of legislation as the principal source of law, statute law revision, often referred to as the reform of the statute book, became the most widespread and the single most important form of law reform in these countries. Of the supersession of the common law by statute law, a noted American writer, Albert J. Harno, has observed that "... legislation came largely to replace the judicial process as a means for rapid and radical change of law. The legislature has machinery, such as the standing committees, the appointed investigation commission, and the special investigating organisations within the executive branch for securing requisite information...". It can engage in social planning of long-term, wide-ranging policy in fields such as taxation, housing, penology and prison reform, child welfare, co-ordinating of production and purchasing power, improvement in the administration of justice. The paramount issues of our time lie within its domain rather than that of the common law.

3. We are however warned by Professor Allen in his landmark work, Law in the Making, that law revision started in Britain almost by accident and of necessity had to grow slowly. At page 259 of the Second Edition of that work, he gives the following account of the circumstances in which statute law revision started in England:

"Uncertainty as to its authority cannot exist in regard to a modern Act of Parliament; but when we speak glibly of the "statute book" we do not always realize what a curiously formless document it is. Until the Statutes of the Realm were published [1011-1713], our enacted law was disorderly to an almost incredible degree...[In] the intricate maze of statutes repealed, partially repealed, and re-enacted in whole or in part, it was sometimes almost impossible to ascertain what the true statute law was on any uncertain point. The most absurd results were sometimes produced. A statute, 21 and 22 Vict., C.26 [The Property Qualifications for Members of Parliament Act, 1875],

was solemnly passed to repeal 6 Anne, C.5 [The Taxation Act, 1706], and 33 Geo II, C.20, [The Admission of Vassals Act, 1751], both of which had been repealed by 1 and 2 Vict., C.48 [The House of Commons Qualification Act, 1838]. In 1842, in the case of *Reg. v G.W. Railway Co.*, 3Q.B. 333, the Court of Queens Bench carefully considered the statute 2 and 3 Ed. VI., C.24 which had been repealed fourteen years previously. Counsel not infrequently went into Court relying on Acts which neither they nor the Judge knew, nor could reasonably be expected to know, had been abrogated. At last a move was made for extensive revision. A number of commissions sat from 1834 onwards, and though many of their recommendations never got beyond the stage of pious wishes, one result was a series of Statute Law Revision Acts which began in 1861 and got rid of an enormous quantity of obsolete matter. One Act of 1867 alone repealed 1,300 statutes. This salutary process of expurgation has gone on more or less continuously up to the present time. The Revised Statutes were [first] published 1870-85 and the second edition 1888-97. We now have reasonably manageable collections of legislation. But we are still far off perfection, and much might yet be done to reduce the statutes to a more systematic form..."

The Revised Edition of the Laws System

4. The Statute Law Revision Acts referred to by Professor Allen were the work of the Statute Law Revision Committee set up in 1868. Unfortunately the repeals with which the Statute Law Revision Acts were concerned were not express or specific repeals but only the implied ones. They were concerned with cleaning the Statute Book of, to use the words of the Bill to the 1927 Act, "enactments which are expired, spent, repealed, [impliedly] superseded or obsolete," and the Committee was therefore often held to ransom by interest groups opposed to the repeal of various statutes they found reason to hang on to. Furthermore, the cleaning of the Statute Book by the Statute Law Revision Acts, was only a prelude to the more important task of compiling and publishing the Revised Edition of the Statutes. Lord Thring has noted in Practical Legislation, published in 1902 that

"In 1868 Lord Cairns appointed a statute law committee of which I am the only original member still surviving. The duties of the committee are to make arrangements for, and to superintend the publication of a revised edition of the statutes. The first step was to free the Statute Book from obsolete and repealed statutes. This has been done under the superintendence of the committee down to the present time. Two revised editions have been published, the second is a cheaper edition than the first, and is contained in sixteen volumes brought down to the year 1886, the last volume of which was published in 1894..."

According to Halsbury's Laws of England, 4th Edition Vol. 44

"The third edition was published in 1950 under the title "The Statutes Revised". Publication of a fourth edition retitled "Statutes in Force", and for the first time grouping the statutes according to their subject matter rather than chronologically, was completed in 1981."

By a plan drawn up by Sir Nicholas Bacon, in 1557, the revised edition is always case-bound. Under this plan, reproduced in Allen, Law in the Making

"First, where many laws be made for one thing, the same are to be reduced and established into one law, and the former to be abrogated ... Where there is but one law for one thing, that these laws are to remain in case (emphasis added) as statutes ... Where part of one acte standeth in force and another part abrogated, there should be no more printed but that that standeth in force".

Defects of the Revised Edition System

5. The system of revised edition of the statute described above had several defects which were apparently noted in Britain long before it was handed down to the Commonwealth countries in their colonial days. Part of the problem was the case-bound form in which the editions were compiled. In that form only noting-up of the changes occurring in the law could be effected, leaving the editions surrounded by a veritable sea of the annual statutes and other legislation virtually threatening to drown it. Consequently the temptation was either to leave the laws in that perplexing state of scatter and fragmentation until the next periodic revision, which was by no means predictable, or to alleviate the situation temporarily and at great expense through the expedient of reprinting with amendments under an Amendments Incorporation Act such as we have currently in force in Zimbabwe. The experience with reprints is that, like the original laws, they cannot be up-dated without another reprinting.

6. The chaos created by the revised edition system of the laws is indeed well documented. As far back as 1921, in a short work entitled Delegated Legislation, Dr. Cecil T. Carr, one-time Editor of the Revised Statutes, had lamented that

"In its least inconvenient form [the Statute Book] consists of

- (a) twenty substantial volumes... containing all Acts passed down to the end of Queen Victoria's reign;
- (b) annual volumes from 1900 onwards; and
- (c) single unbound copies of any Acts passed since the last annual volume was issued."

"There are few branches of law in which it will not be necessary for the practitioner to consult several of these volumes at once. As a collection our Statute Book might be summed up as beyond the average citizen's pocket to purchase, beyond his bookshelves to accommodate, beyond his leisure to study and beyond his intellect to comprehend..."

Is it any wonder that the enormity of the task in terms of labour and expense has often either delayed or postponed the periodic revisions indefinitely? It is indeed noteworthy that in Britain, since the process of law revision began in 1856, there has been only four revised editions, an average of one edition every thirty-two and half years.

But perhaps the most serious defect of the revised edition system introduced in Britain is the intrinsic tendency to obsolescence of the revised statutes produced thereby. The reasons for this were, firstly the length of time required to complete each work of revision and secondly, the fact that by its very nature a waiting period of at least one year, or "five or six years" (to go by Sir Alison Russell's prescription) or "ten years" (to go by Sir Mackenzie Dalzell Chalmers prescription), is always required before any revision of the laws can take place. Invariably, the body of unrevised legislation created during the intervening period is so great that neither time nor the necessary resources are found to bring the whole body of statute law into any reasonable state of currency. As a result, a noted authority on the statute law in Britain, Sir Mackenzie Dalzell Chalmers, drew attention to the fact that the revised edition system and updating of the statutes were actually incompatible. In an article in the *Edinburgh Review* of April 1924, cited in Carr, Revised Statutes, 45 *Law Quarterly Review* (April, 1929) at page 177, he is reported to have observed regrettably that

"It seems scandalous that a citizen, bound at his peril to obey the law, cannot go

into a public library and find an edition of the statutes for the time being in force which is approximately up to date. No revised edition could be kept actually up to date (emphasis added).... but a reasonable course would be to re-edit the public general Act every ten years..."

Of course, as demonstrated above, no amount of re-editing or reprinting can solve the problem of obsolescence in the revised edition system. A recourse to that expediency only postpones the day of disillusionment. But, in Britain, change came so slowly that it was only in 1965 that a new beginning was made, with the establishment of the Law Commission, towards the "systematic development and reform [of the Law], including in particular... the elimination of anomalies... the reduction of the number of separate enactments and generally the simplification and modernisation of the law..."

The Loose-leaf form of Compilation and Revision - Early African initiatives

7. Meanwhile with the British experience, no doubt, as background, a number of Commonwealth African countries had begun to take steps to alleviate the problems of the revised edition system by resort to the loose-leaf form of compilation.

8. By 1962, in Judicial and Legal Systems in Africa, edited by Professor Allott, it was noted at page (xi) in the following "Guide to Statutes" that

- (1) Each territory has a periodical revision and consolidation of its laws (e.g. that for Sierra Leone is dated 1959); in the revision each principal law is given a chapter number (usually abbreviated to "Cap"), by which number the law is often cited. In addition annual volumes of legislation are issued, containing the principal laws made during the previous year; each such law is given a serial number, (e.g. "No. 22 of 1959), by which it is sometimes cited.
- (2) Certain territories (e.g. Ghana, Northern Rhodesia [Zambia] have abandoned the system of periodical revision in favour of a loose-leaf system involving the annual editions of all the laws in force..."

The following entries are then made against the names of the countries which have adopted the loose-leaf system at the time

- "(1) Ghana - Acts of the Republic of Ghana, 1960 - current
(loose-leaf : in continuous revision).
- (2) Tanganyika [Tanzania] - Tanganyika Revised Laws, 1959
Revision (loose-leaf : in
continuous revision).
- (3) Northern Rhodesia [Zambia] - Laws of Northern Rhodesia,
1961 Edition (loose-leaf:
in continuous revision).
- (4) Nyasaland [Malawi] - Laws of Nyasaland, 1958 Revision
(loose-leaf : in continuous
revision)."

The Commissioner for the Revision of the Laws in Zambia has explained in the Preface to the Laws of Zambia, 1972, that the loose-leaf system was adopted with the hope "that the preparation and printing of the supplements... will thereby be simplified, and also that

eventually it will be unnecessary for any person to have to make extensive [noting-up or] amendments to his set of the Laws..." The mechanics of the system set out in sections 10 and 11 of the Laws of Zambia (Revised Edition) Acts, give further indication of the sort of improvement the loose-leaf system was intended to achieve on the case-bound system, namely -

- (1) each law was to be wholly contained in a separate chapter; and
- (2) "The volumes shall be bound in such a manner as will enable any page and any chapter to be easily removed and replaced."

But the date or time for any revision is required by section 9 of the Act to be fixed by the Minister, apparently, depending upon the need and availability of resources. It is therefore a periodic revision.

9. Similarly, the Malawi scheme is also a periodic revision, with yearly intervals. This is again made clear in the Preface to the current edition where it is stated that the edition - "has been published in loose-leaf so that it may be revised periodically (it is hoped, annually.)"

Section 6 of the enabling Act, the Revision of the Laws Act (cap. 1:02) provides that "As soon as practicable after the 1st January, 1969, and after each subsequent revision date the laws of Malawi shall be revised... to the intent that the laws of Malawi shall contain all the written laws which are required or authorized by this Act to be included therein and are in force on the relevant revision date."

10. In reality the Zambia, Malawi and Tanzania schemes are revised editions in loose-leaf. As such, revision under those schemes can be done only in arrears, generally. However, through the facility of the replacement page mechanism there is no reason why a fairly current updating in the form of incorporation of amendments cannot be done. This should be possible in Malawi where the basis for that possibility should exist if the revisions had faithfully followed the one year intervals prescribed by the enabling statute. Be that as it may, from this short appraisal of the loose-leaf systems in Zambia, Malawi and Tanzania it should be clear that contrary to their appraisal in the Allott Survey none of them can be described as a continuous revision system. The loose-leaf form of compilation certainly makes it possible to undertake current as distinct from bulk or comprehensive revision on the revision dates. In other words none of these countries is compelled to revise and reprint all the laws at the same time as would have been the case if they had retained the case-bound form of compilation. In those circumstances the advantage of the loose-leaf was more in terms of savings of production costs and labour. None of the three African systems concerned was a continuous one.

11. But in Ghana more was gained from the loose-leaf. Since the system there was more concerned with updating of the laws, it is the one system which could be described as continuous revision. There, the loose-leaf system, according to the Preface to the first Volume of the Acts, was based on a system of continuous numbering of the laws which dispensed with the traditional practice of starting a fresh numbering at the beginning of a calendar year or a new Parliament etc. Under this system, it is possible to file all laws passed by Parliament, including amending Acts, in their numerical sequence. The text of each amending Act is then incorporated into the relevant principal Act, as soon as may be after the passing of the amending Act, through the replacement page mechanism, which also offers the facility for the correction of printing and other errors of a verbal nature. As a result, each set of the Ghana statutes was expected continuously to contain all the living law up to the latest published Act, and each Act, to be consolidated with all amendments, if any, and therefore contained in one document, brought up to date accordingly. This was the true continuous revision system, if by revision is meant the process of consolidating amendments with the principal Acts. But obviously, statute law revision could mean more than this. There are

many, like Alison Russell, who believe that, at a minimum, statute law revision must also take account of similarity of the subject matter of the laws so that similar laws may be grouped as closely as possible to each other for the ease or convenience of reference by the reader and where necessary, to make it possible for Acts dealing with the same matter to be consolidated into "one complete revised ordinance" to borrow the words of Sir Alison Russell. This is done through the classification of the statutes by subject-matter groups. This, the Ghana scheme completely ignored, but apparently, not without reason, for classification in law revision is not without its own special problems. As Robert K. Cullen, Law Revisor for the American State of Kentucky, and a leading authority on the subject, has written in the Oregon Law Review of December, 1944

"If the system of classification is not logical, or if good logic has not been used in fitting legislation into the classification system, the necessary reclassification may require a complete renumbering of the statutes. This will destroy the working knowledge of the user of the statutes who has committed certain section numbers to memory..."

Yet in the view of the same author, and admittedly most Western authorities on the subject

"Without question, the most important object of a revision of statutory law is the bringing together of those laws and parts of laws which, from similarity of subject matter, properly belong together. Only by so doing can the implied repeals, inconsistencies, conflicts, duplications, and repetitions be readily identified [for elimination or expurgation]. So long as the statutes dealing with the same subject remain scattered through the statute book, it is wasted effort to undertake to improve the language and style of the individual laws. Each section in the body of the statute law must be considered as a unit of the whole; its construction and application may depend upon or be controlled by a dozen other sections; it cannot be lifted out and its language revised without reference to the other sections upon the same subject..."

Although there is a lot of logic in the Cullen prescription, there is no doubt that its application will make the notion of continuous revision and the updating of the laws only a figment of the imagination.

12. The problems of obsolescence associated with the inherited British revised edition system will be worse confounded and from the point of view of costs alone, no revision will at all be possible in the developing countries of the Commonwealth. Indeed from the recent survey of the subject undertaken for Hong Kong by Messrs Pierce and Martin it would appear that the scale of revision called for by the Cullen formula is only possible because of the computer technology, in the form of data base of statutes, which only the rich developing Commonwealth country can afford at the moment. For reasons of cost alone, this comprehensive view of revision may therefore appear to be a thing of the far distant future for the poorer countries of the Commonwealth. But perhaps a greater reason for the irrelevance of the comprehensive view is the urgency which more countries appear to be attaching to the incorporation of amendments and the reduction in the number of separate enactments as the main focus of revision especially where by so doing the law is left relatively unchanged and therefore does not require re-enactment, as is the case in the comprehensive revision systems.

Restatement of the Problems of Statute Law Revision

13. One feature which should have emerged from the account of the revised edition system so far given is the silence with which that system treats the need to bring the laws up to date. Since, however, all are agreed that bringing the laws up to date is a legitimate and perhaps an equally important object of statute law revision, the revised edition system could

therefore be said to be outdated to the extent to which it is unable to address the issue of updating. This might explain the way in which the problem of statute law revision is being stated currently. In a recent statement of the problem in the Newsletter of the Commonwealth Association of Legislative Counsel nothing was, for instance, said about the need for the logical re-arrangement and classification of the laws which as we have seen are the hall-marks of the revised edition system. The emphasis, if any, was on the need for updating. For in the view of the learned author

"No jurisdiction in the Commonwealth seems to have found an entirely satisfactory method of making available to the legal profession and other interested persons the whole of the statute law of the jurisdiction currently in force in an up-to-date form consisting of the text of each law as originally enacted and incorporating all amendments of that law up to the present. This note considers briefly the problem confronting all jurisdictions (emphasis added) of keeping the published statute law up-to-date in an easily accessible form".

More and more it would appear that the concerns of those like Chalmers who viewed updating with greater urgency are being vindicated.

The Zimbabwe Position

14. It may be fitting and proper, in concluding this contribution on the problem of statute law revision, to state that Zimbabwe has recently addressed the issue in an attempt to devise the most effective plan for a new loose-leaf system. It is perhaps sufficient to say that we found enough virtue in the concept of subject-matter classification of the laws to retain it as part of the plan finally adopted. But we also found the need to keep our laws constantly up to date sufficiently compelling to devote a large part of the plan to accommodate that need. It is our view that if any conversion from the bound revised edition volumes to the loose-leaf system is to justify the effort, it is in the extent to which the latter corrects the inadequacies of the former for updating purposes that the justification can be felt most effectively. In other words, a loose-leaf system is the more useful if, in addition to anything else, it provides the instrumentality for a system of continuous revision.

15. Therefore, one important feature of our new plan is to reduce to the barest minimum the time between the passage of an amending Act and the actual incorporation of its provisions into the relevant principal Act. To this end, where traditionally the classification of the laws for revision purposes is done after enactment, resulting in a mandatory waiting period of at least one year before revision takes place, we intend to do so at the Bill Stage so that there is no waiting time at all. Thus, simultaneously with the passing of an amending Act by Parliament, there will be produced under the new system loose-leaf pages consolidating the provisions of the amending Act with the appropriate sections of the relevant principal Act. Thereafter, it will be a simple matter to insert the loose-leaf replacement pages in the principal statute and to remove the pages which need replacement. The facility of the replacement page mechanism will also be used for correcting any errors of a verbal nature so that eventually the law is not only brought up to date in terms of consolidation but also as regards the removal of inaccuracies and inconsistencies, of course, without changing the substance.

16. We see in this plan a historic opportunity to combine some of the best features of the revised edition system with the advantages of the continuous revision concepts so as to achieve the unique result of putting the laws in some kind of orderly arrangement while getting it updated constantly, a result which to our knowledge has not yet been attained elsewhere.

OPTIONS IN LAW REVISION — THE UGANDA EXPERIENCE

A memorandum by the Government of Uganda

Introduction

It is without doubt that social and economic stability are basic constituents of a sound legal order which is, in turn, a pre-requisite for national development. This has never been so true in the history of Uganda as it is today. The role of the Ministry of Justice in the restoration of the rule of law and maintenance of law and order and the preservation of human rights in Uganda is fundamental and cannot be over-emphasized. The Ministry is only too well aware of its role of being in the vanguard for making available to the public and the law enforcement agencies the legal tools which are indispensable in the achievement of the above objectives. The Ministry is also cognisant of the indisputable fact that the body of legal enactments of any given society must be periodically epitomised, after being brought up to date, and put in a form properly arranged for ease of reference and use by all concerned. The importance and necessity of periodic revision of laws need no elaboration for this is a well-known practice in all countries.

The exercise of revising the laws has always been carried out in Uganda at intervals of approximately ten years. The purpose of the project being to revise all the statutory laws of Uganda, both principal (which are variously called Acts, Decrees, Ordinances, or Statutes depending on the government by which they were made), and subsidiary laws (which as is the modern practice) are called "Statutory Instruments" so as to bring them up-to-date. The laws of Uganda have been previously revised five times, four of them during the colonial era, and once after independence. The last revision, which was in 1964, produced the laws of Uganda which are in use today. Twelve years later Government recognised the dire need for a revised edition of the laws of Uganda, and appointed, in 1976, a Commissioner for that purpose. But due to political instability, technical and economic difficulties, the revision exercise has not been completed yet and it is still an on-going project to which government now attaches great importance.

History of Law Revision in Uganda

The first revised edition of the laws of Uganda came out in 1910, about fifteen years after the first written laws concerning Uganda had come out. This put together in one volume, Regulations made under the Africa Order in Council, 1889, and Ordinances made under the Uganda Order in Council, plus the Agreements made between the British Colonial Administrators and the various African native administrations. The revised edition of fifty-five enactments was prepared by two Commissioners, both English Judges of the High Court. They were both appointed by administrative instructions, unlike subsequent revisions, when Commissioners were appointed by law enacted for that purpose.

The second revision was undertaken twelve years later. It was prepared under the authority of the Revised Edition of the Laws Ordinance, 1923, by which the then Chief Justice was appointed Commissioner. He was given wide powers of revising and consolidating the laws as were in force at a date specified in the Ordinance. The 136 enactments came out in three volumes. The first two volumes contained the principal legislation while the third contained all the orders, proclamations and other subsidiary laws. This practice of separating the principal legislation from the subsidiary laws was

followed by virtually all subsequent Commissioners. In addition to the powers of the Commissioner contained in the Ordinance to omit certain laws from the revision, there was enacted a General Revision Ordinance specifying certain laws which were to be omitted. This was the first revised edition to be printed by the Government Printer in Entebbe, Uganda.

Twelve years later in 1935, the work of revising the laws was given to Uganda's Attorney General, assisted by a Crown Counsel. Of the six volumes in which the 179 enactments appeared, three were printed in England, while the other three were printed by the Government Printer.

The first non-government employee Commissioner to revise the laws was appointed in 1951. He produced nine volumes which were printed in England, consisting of five volumes of ordinances, three volumes of subsidiary legislation and an index volume of all laws printed. The enabling statute this time omitted the Commissioner's power of consolidation. A list of enactments to be omitted from the revised edition was put as a schedule to the enabling Ordinance, and not as in the earlier case, as a separate enactment.

The 1964 revised edition is the most current, consisting of sixteen volumes of the laws, half of them containing principal legislation bound in red covers, and the other half containing the subsidiary legislation bound in blue covers. It was prepared by an expatriate (British) Commissioner, appointed by an Act of Parliament in independent Uganda. Coming as it did soon after independence from the British Colonial Administration, this revision effected major changes in the law. The laws which had been enacted during the pre-independence period called Ordinances were re-designated Acts. This was to conform to, and attain consistency with laws which had been, and would continue to be passed as Acts of Parliament of the newly independent country. The revision omitted from the statute books, enactments of the United Kingdom Parliament which had been applied to Uganda by the various Orders in Council, which on attainment of independence, ceased to be of application. Also omitted were the agreements entered into by the British with the various African Chiefs, which had constituted the basis of much of British rule over Uganda. Save for the three volumes of the 1923 revision, this was the first revision exercise to be handled to completion by the Government Printer.

The revision made more readily available the lawyers stock-in-trade, and placed the administration of justice to the forefront in the overall national development of post-independence Uganda.

From the date of this revision the laws have come out as supplements to the official Uganda Gazette. At the end of each year, these are bound together in two annual volumes, one red volume containing the principal laws, and a blue volume containing the subsidiary laws. This is done by the Government Printer. But of course the bulk of the laws are contained in the 1964 revised edition. So that after more than twenty years since the edition first came out, the need has arisen for a new and revised edition of the laws of Uganda.

The On-going Revision Exercise

(a) The need for the Sixth Revised Edition

The realisation that the 1964 revised edition of the laws, which constitutes the bulk of the corpus juris of Uganda, is out of print, inter-alia, makes the need for the sixth revised edition too urgent to brook more delay than has already been experienced. The revision is necessary to effectively facilitate the case law as a tool in the

reconstruction and rehabilitation of the country, and the restoration of law and order. It is a lamentable fact that Uganda has gone through a number of wars in the recent past. These have had their negative effects on the administration of justice in general, and particularly, on the procurement of the necessary materials such as books etc. There is now need to equip the organs of the administration of justice, the courts, legal practitioners, government and public bodies, and law enforcement authorities with up-to-date law books. Even the existing laws now being revised are not readily available to most people who deal with legal matters because the 1964 sets were all bought out many years ago and are out of print; and the annual volumes since then have been too few to meet all the demands.

The need for the revision exercise was immediately felt and an attempt to remedy the situation as far back as 1974 was made when an expatriate Commissioner from Pakistan was appointed to prepare the sixth revised edition. The revised laws were expected to come out in 1975, but because of printing problems this did not materialise. The Commissioner's tour on duty ended in 1978, and the exercise was temporarily assigned to the Commissioner for Law Reform. This seems to be the modern practice in countries where Law Reform Agencies exist. By the middle of 1979, most of the planned twenty volumes had been sent to the Government Printer awaiting galley proofs. Unfortunately, these were all destroyed during the 1979 war, along with much of the machinery of the Government Printer. To date, he is not yet in position to start on the full-scale printing exercise of the revised laws along with the other Government printing. In 1982, it was decided to rejuvenate the revision exercise and for that purpose, an Act of Parliament was passed. The Laws (Revised Edition) Act, 1982, unlike its predecessors, did not appoint a Commissioner. Instead, it empowered the President to appoint one by Statutory Instrument. It is the wish of Government to appoint one soon. However, since 1978, the Law Revision exercise has continued to be handled, not surprisingly at a slower pace, by the staff of the Law Reform Commission. But due to the fact that the Government Printer is not yet fully rehabilitated, he cannot handle the voluminous, complicated and time-consuming exercise of printing the law books. That being the case, the revised laws have yet to be printed. The problems attendant to their preparation and printing are still outstanding.

(b) Format

In the proposed sixth revised edition there has been a departure in the format, that is to say in the arrangement of the laws. It is intended to put the subsidiary legislation together with the principal legislation under which it is made, unlike in the past editions. The laws then will come out in twenty volumes instead of the present sixteen of 1964 edition. The traditional system of separating the principal from the subsidiary legislation was found to be unsuitable for a developing country like Uganda, where experience has shown that there is very little of the latter in the majority of cases. It also tends to isolate the two types of legislation which is supposed to be complimentary. All laws will be grouped under thirty titles. The thirty headings into which all the laws have been grouped which we call titles, will be arranged alphabetically. Under each title, kindred chapters of laws, that is to say enactments, will be arranged chronologically. In this way, the number of chapters under any title is never closed. Every new statute will constitute a chapter under its relevant title, and given the next chronological number, under that title. This will achieve consistency in citation of laws irrespective of when or under what regime they are enacted. Presently, because of the different manner in which different regimes have exercised legislative authority in the recent past, Uganda laws consist of Acts of Parliament, decrees, statutes and ordinances. Following each chapter in the same volume will be the subsidiary legislation made under that chapter. Similarly, each new statutory instrument will be added to the existing ones chronologically. The kindred and relevant laws, both principal and subsidiary, will thus be found in the same volume, making reference easy.

(c) Binding style

The revised laws will not appear in firm binders like the earlier ones. Instead they will be inserted in loose-binders specially made for the purpose. This binding style was selected after a number of considerations had been taken into account. Loose binders are adjustable to changing law production. It is simple and easy to keep the law books up-to-date. Any new law which comes out is simply inserted in the volume of the title under which it falls and repealed law is removed. This facilitates the keeping together of all the kindred laws both principal and subsidiary in one volume, irrespective of the dates such laws were made.

Loose-leaf binding helps to do away with having to print annual volumes which would have to be the case if the firm-binding system is adopted. It has always been a costly exercise of having to import covers annually.

Loose binders are practical and convenient, especially for the practitioners and students of law. Legal researchers will find it time-saving. The amended laws are automatically incorporated while the repealed ones do not remain on the statute books. Future laws are easily accommodated. It is like a continuous revision exercise without the necessity of overhauling the whole body of enactments which a revision exercise necessarily entails.

The low-cost element of loose binders is not only in the initial stage but also in the minimising of future costs in terms of labour and time as well as avoiding purchases of different new covers. The loose binders can, it is estimated, serve for over thirty years with good and careful handling. When replacement is needed, it is not for all the volumes in the set, but only for the few which may have been worn out.

Loose-leaf binding in a developing country like Uganda may, among other things, lead to marauding of law books. The complete set of twenty volumes as envisaged, when it comes out, may not cost within the means of all those who would like to have access to them. Consequently, some of the more popular enactments may be pulled out of their respective volumes especially as loose-leaf binding style makes it easy for a leaf to be removed. However, as the laws come out as supplements to the weekly Uganda Gazette, a subscriber or practitioner will find himself, at the end of the year, with a set of laws from the supplements, and another set specially prepared for insertion in his volumes. Apart from its relatively low cost of production, loose-leaf binding is efficient, convenient and professionally suitable and is preferred by the Government Printer.

(d) Volume of work

It is expected that the revised laws will be produced in twenty volumes constituting one complete set. Each volume will contain between 800 to 1000 single-face printed sheets. It has been conservatively estimated that the demand for new law books will be initially three thousand five hundred sets - both local and international. This means producing a total of seventy thousand individual volumes. With a full-time Commissioner assisted by experienced staff, it is anticipated that it would take about 6-8 months to prepare the revised materials and make them ready for printing. Assuming that all his requirements regarding machinery, equipment and personnel are satisfied, the Government Printer is in a position to produce one volume every month. The whole project would then take about twenty months to complete. To date, about one third of the material is ready for printing.

Problems Experienced in the Revision

(i) Personnel

While the Uganda Government has all the intentions of fulfilling its obligation to make law books available, it has not been easy to achieve the objective due to problems which might be similar to those being experienced by other developing countries. The revision of laws requires a person of cool mind and experience in the legal profession as Commissioner. These are qualities which are not easy to come by. They are mostly to be found in Judges and long experienced legal practitioners. In Uganda, while we may have a number of such people, law revision appears to be an art that most lawyers are not prepared to tackle. The qualified supporting staff, particularly those with drafting experience, have always been scarce. Consequently, Uganda has had in the past to resort to the services of expatriate staff. Our experience in one particular case has shown that the initial unfamiliarity with the local law has tended to prolong the exercise.

(ii) Costs

The overall cost of revising the laws has been found to be more than the limited resources of a developing country like Uganda can meet from its own coffers. The problem is compounded by the fact that the Government press has been a victim of the wars of the recent past so that before the Government Printer can embark on the printing of the revised laws, the facilities need to be fully rehabilitated. Virtually all the machinery has to be imported. The covers, whether loose-leaf or firm ones, have also to be imported. If the loose-leaf binding style is adopted, the papers must be punched before they can be inserted into the covers. This can only be done by a drilling machine which also would have to be imported. Even the papers on which the laws are printed may have to be imported. It is intended that the laws should be printed in Uganda and not abroad.

Conclusion

The exercise of revising the laws is a challenge to our Government in terms of material as well as human resources. But being an essential and necessary exercise, we shall not shun away from the challenge. Our desire and determination to succeed shall, we believe, be supplemented by assistance from our friends abroad, especially from the Member States of the Commonwealth.

We need to train our staff to assist the Commissioner with his work. More importantly, we need the funds to purchase the necessary machinery and stationery for the exercise. Coming more than twenty years since the last revision, this exercise will put together almost four hundred statutes and about two thousand statutory instruments. We believe that after the completion of this exercise, the need for revision will not surface for quite some time. This will enable us to effectively meet the invariably increasing demands for statute books out of print. The on-going revision if completed, will enable Uganda to revive its programme for exchange of legal materials with other Commonwealth member countries many of which, in this respect, have virtually written us off their mailing list. With this commitment, we shall, in the not too distant future, be in a position to offer to whoever may be interested, the sixth revised edition of the laws of Uganda.

OPTIONS IN LAW REVISION: CODIFICATION OF THE LAW — GHANA'S EXPERIENCE

A Memorandum by the Government of Ghana

Before the advent of European Settlers to the then Gold Coast, there was only one system of law in the then Gold Coast. It was the unwritten law known as Customary Law which varied from one ethnic group to another, but which was readily enforced and observed by native kings and their subjects. This Customary Law cannot be classified as a Code. However, historians, lawyers, and social anthropologists, by the end of the 19th century, had ascertained the principles of the Customary Law and had reduced them into writing through text-books, for instance, Rattray on Ashanti Law and Custom and John Mensah Sarbah on Fanti Customary Law.

On 31 March, 1876, when the first Supreme Court Ordinance was enacted, two new systems of law appear to have dwarfed the indigenous Customary Law. The Courts Ordinance introduced not only the English Common Law, but also made applicable to Ghana All British Statutes in force on 24 July, 1874. Neither the English Common Law nor any of the English Statutes was a Code in the strict sense. On 4 April, 1877, the Interpretation Ordinance and the Criminal Procedure Ordinance were brought into force. These local Statutes were not Codes. Later, a Criminal Code (Act 29) and a Criminal Procedure Code (Act 30) were introduced. Under section 8 of the Criminal Code, no person shall be liable to punishment by the Common Law for any act. The Criminal Code itself does not encompass all criminal offences known to the law either under the Code or other separate legislation. Nevertheless, Part I of the Act 29 - General Provisions - applies to all offences whether under the Code or not, except where a contrary intention appears. The Code, therefore, lays down all the essential principles within which every court of law is expected to operate (see section 5 of the Criminal Code 1960 (Act 29). Similarly, section 1 of the Criminal Procedure Code 1960 (Act 30) also provides that all offences under the Criminal Code and all other offences shall be enquired into, tried and otherwise dealt with according to the Code, subject to the provisions of any enactment. The existence of the Criminal Code and the Criminal Procedure Code has enabled the Courts, the lawyers, the investigating agencies and the general public to ascertain the criminal law with certainty, clarity and predictability. These are some of the indisputable advantages of codification. Indeed, Ghana said farewell to English Common crimes and procedures several decades ago.

Another development in Ghana's laudable obsession with codification has been in the field of commerce and trade. On 24th May, 1961, the Ghana Bills of Exchange Act (Act 55) was enacted. This piece of legislature could have been a Code. Rather, it re-enacted, with minor modifications, the Bills of Exchange Ordinance (Cap 195) and was made to apply to the whole of Ghana. The earliest Ordinance was the Bills of Exchange Ordinance No. 10 of 1894 which operated in conjunction with English Bills of Exchange Acts passed in 1697, 1704, 1776, 1799, 1808, 1820, 1826, 1832, 1836, 1854, 1856 and 1871. When the 1961 Bills of Exchange Act was passed, these English Statutes ceased to apply; but then section 96 of the same Act provided that "the rules of Common Law, including the Law Merchant save in so far as they are inconsistent with the express provisions of the Act shall continue to apply to Bills of Exchange, Promissory Notes and Cheques". There is no doubt that in this branch of the law, both the draftsmen and the legislature were of the firm view that the law relating to bills of exchange could not be codified. The task of codification would have posed very difficult problems; first of all, it would not have been easy to ascertain with exactitude what the rules of Common Law and the Law Merchant were and, secondly which of these rules could

conveniently be incorporated in a Code. In any case, the relevant Common Law Rules are cluttered up with conflicting and inconsistent decided cases which would defy any attempt at codification. Here is a typical example of a subject-matter which is not suitable for codification.

On 11th July, 1962, the Ghana Sale of Goods Act (Act 137) was enacted and the preamble makes it quite clear that it is an Act to codify with amendments the law relating to the sale and hire purchase of goods. Before this law came into force, the Common Law and English Statutes of 1603, 1823, 1825, 1842 and 1856 governed the sale of goods in Ghana. It is of interest to observe that when M.D. Chalmers drafted the English Sale of Goods Act which was enacted in 1893, his idea was to codify the law. The Bill was originally drafted in 1888, but it took both Houses of the British Parliament 5 years to enact the law in 1893. On codification, M.D. Chalmers has this to say in the introduction to the first edition (1894) of his book on sale of goods:-

"It is always easier to amend an Act than to alter common law. Legislation, too, is cheaper than litigation. Moreover, in mercantile matters, the certainty of the rule is often of more importance than the substance of the rule (a). If the parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation. Sale is a consensual contract, and the Act does not seek to prevent the parties from making any bargains they please. Its object is to lay down clear rules for the case where the parties have either formed no intention, or failed to express it Our common law is rich in the exposition of principles, and these expositions lose none of their value now that the law is codified."

The Ghana Sale of Goods Act 1962 followed the example of M. D. Chalmers, but departed from the English 1893 Act where the principle involved is conflicting and confusing. For instance, although section 62 (2) of the English Act provides that "a thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly whether it be negligently or not", the Ghana Sale of Goods Act refrained from defining what is "good faith" and it is the duty of the courts to put their own construction on the words "in good faith". The Ghana Sale of Goods Act is therefore a Code which not only clarifies the law but makes the law easily accessible and ascertainable through the Code for the benefit of the whole mercantile community.

The next major development in codification in Ghana was the enactment of the present Ghana Companies Code (Act 179) on 1 July, 1963. Before the commencement of this Code, the relevant law was the Companies Ordinance (Cap 193). When Professor L.C.B. Gower was appointed sole Commissioner to enquire into the Company Law of Ghana on 25 August, 1958, he described in his Report the nature of his task as follows:-

"The existing Companies Ordinance was introduced in 1907. It appears to have been enacted hastily as a result of the influx of a number of companies from South Africa. In effect what was done was to re-enact almost verbatim the Companies Act of 1862, an Act which was already regarded as obsolete in England, where it had been substantially revised by later legislation, and where it was about to be repealed and re-enacted with substantial amendments in the Companies (Consolidation) Act of 1908. This Ordinance, virtually unamended, still remains the only statute law in Ghana relating to companies. It was nearly 50 years behind the times when enacted; it is now a century out-of-date."

As a result of this Report, the present Ghana Companies Code was enacted. Both the Report and the Code appear to have the last word on any matter relating to companies in Ghana.

Professor Gower's own feeling about the Code is summed up in the following words:

"When it is borne in mind that the Act attempts to codify the common law and to cover not only the matters dealt with by the English Companies Act but also many of those covered by the Prevention of Fraud (Investments) Act, 1958, I think it can fairly be claimed that it compares not unfavourably in brevity and simplicity with other Acts based on the English model. On the other hand it is not suggested that it is light reading; it deals with a highly technical subject and is necessarily technical."

The Companies Code has been in force for 23 years. It has operated well, it is the second Bible of any entrepreneur in Ghana and it will continue to help in the promotion of commerce and industry. It has simplified the task of the courts, the lawyers and the businessmen. It has proved that codification of the law should be one of the tools of progress and prosperity in a developing country.

Another interesting development in Ghana has been the codification of the Law of Evidence. Before the Evidence Decree 1975 (N.R.C.D. 323) was enacted on 18 April, 1975, the Law of Evidence in Ghana could be found only in imported English legal text-books, local rules of procedure and English Statutes of 1806, 1851, 1853, 1854 and 1869. It was impossible to ascertain the law of evidence with clarity, with alacrity and with confidence. Notwithstanding that the subject matter of evidence is a highly technical subject-matter in which various authors have propounded their own theories in the past, a daring attempt was made to codify the Law of Evidence in Ghana. It was not an easy task; nevertheless, it was worth trying. As early as 1971, the Ghana Law Reform Commission, with the approval of the Ministry of Justice, embarked upon the whole review of the Law of Evidence in Ghana. With very detailed research work, discussions and comments from authoritative legal authors, judges and lawyers, a first draft of the Evidence Code was circulated in October, 1971. The strategy of the Law Reform Commission was to pick and choose from the Common Law and from other sources all the available salient rules of evidence. The Commission had to rely on the following sources:

- The American Law Institute Model Code of Evidence;
- The California Evidence Code;
- Thayer - Preliminary Treatise on Evidence;
- McCormick on Evidence;
- Cross on Evidence;
- Phipson on Evidence;
- Nigeria Evidence Ordinance;
- Wigmore Evidence;
- Proposed Israel Evidence Act;
- Proposed U.S. Federal Rules of Evidence.

The Evidence Decree is a compact Code and it is now read together with a Commentary prepared and published by the Ghana Law Reform Commission. It is now the only authority on the Law of Evidence in Ghana. It is the text-book for law students; it is the authority cited in court by judges and lawyers. One need not now look elsewhere to ascertain the Law of Evidence in Ghana. It has saved Ghana's foreign exchange by dispensing with the importation of text-books on the Law of Evidence. Here is another remarkable example of one of the benefits accruable to a developing country which adopts codification as a tool of reform.

Resources to Codify

The present situation in Ghana is that codification of any branch of the law must involve the marriage of common principles with supplementary statutory provisions relating to any subject-matter. The ascertainment of any relevant law principles depends on the availability of the requisite research staff with the right aptitude for research in

specialised fields. In Ghana, the problem is acute on account of poor salaries and the tendency to seek employment in more lucrative fields. The second problem is the absence of adequate lawyers trained in legal drafting. The Director of Legislative Drafting in the Attorney-General's office can bear testimony to this problem. When the appropriate law has been adequately researched into and conflicting rules are resolved, the researchers' proposals for codification can only be reduced into proper legal drafting. Without legal drafting facilities, the law cannot be codified. Another problem is the cost of printing which is now very prohibitive and must necessarily slow down any attempt to codify the law. A very serious handicap for legal research in Ghana is the absence of well-equipped law libraries in the courts, law schools, the Attorney-General's office and, especially the Law Reform Commission. The constraints on the economy have prevented the importation of legal books published outside the country. This factor has made legal research into some legal topics impossible prior to codification.

Codification of the law need not be undertaken solely by law reform agencies who have enough work on their hands. It is therefore desirable and necessary that depending on the technical nature of the subject-matter, outside bodies and specialists should be commissioned to undertake codification. For instance, in Ghana Professor Gower undertook the codification of the Companies Code; Professor P. S. Atiyah prepared the Sale of Goods Act when he was attached to the Ghana Ministry of Justice; Mr. Jeff Newman of the California Bar, U.S.A. on secondment to the Law Reform Commission drafted the Evidence Decree. In England, the Law Commission invited a group of distinguished academic lawyers, chaired by Professor J.C. Smith, to draft the Criminal Code published last year.

It should also be mentioned that codification of the law is a very slow process and therefore the introduction of any modern technology that will accelerate the pace of codification should be welcomed.

Benefits of Codification

Codification has obvious benefits as pointed out earlier in Ghana's own experience with the operation of the Criminal Code, the Criminal Procedure Code, the Companies Code and the Evidence Decree as examples. Codification has dispensed with the publication of legal text-books. Judges, lawyers, students and the general public can always ascertain the relevant law from these Codes, which may be procured from the Government Printer.

Impact of Codes on Judicial Creativity

There is no doubt that the absence of a Code in England encouraged, and, indeed, compelled English Judges to use their initiative and mental creativity in developing the common law through decided cases. Lord Asquith stated the English tradition as follows:

"English jurisprudence does not start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with ad hoc decisions. General rules are arrived at inductively, from the collation and comparison of these decisions." (Chapman vs. Chapman 1954 A.C. 429 at p.470).

In similar language, Lord Denning stated:

"We do not seek as continental jurists do, to lay down principles first by abstract reasoning and then apply them to concrete cases. We decide cases according to their merits and then see what principle emerges from them." (The Changing Law p.50).

One cannot quarrel with these learned and wise statements. Nevertheless, the British tradition does not condemn codification. The statements only mean that there are two systems

of jurisprudence and the English have in the past relied on one of them. However, it is gratifying to note that even in present day England, the Law Commission is required by statute "to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including any particular codification of such law. The Report on Codification of the Criminal Law in England, published in March, 1985, is a typical example of this new trend.

Construction and Interpretation of Codes

Since the beginning of the century, all bills laid before the Ghana Legislature have been accompanied by a memorandum explaining the objects of the proposed law with explanatory notes on individual sections. The Interpretation Act 1960 (C.A.4) provides as follows:

"19. (1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.

(2) The aids to construction referred to in this section are in addition to any other accepted aid."

As such the task of interpretation in Ghana has been rendered less onerous. Professor Gower's Report on the Companies Code discussed all the relevant decided English cases on every principle. The Memorandum to the Sale of Goods Act is also very detailed; the Memorandum and Commentary on the Evidence Decree are also illuminating. So long as these memoranda and commentaries continue to be made available, construction and interpretation of Codes could be without difficulty.

To Codify or not to Codify

The decision whether or not to codify depends on past experience with the law. Where the law is easily ascertainable through a series of statutes and amendments, it is always easy to consolidate these Acts and to codify the whole law including common law principles. On the other hand, where the common law is not easily ascertainable owing to conflicting rules and principles which are outmoded and cannot meet the contemporary needs of the society, then every attempt should be made, depending on resources, to improve the law through piecemeal legislation because the nature of the subject-matter defies codification.

When should the law be changed

Developing countries have the legacy of depending mainly on principles of the old Common Law. Although the British Parliament has constantly enacted new legislation to cater for new developments and problems which the old Common Law rules could not have anticipated, these new Acts are not statutes of general application in some developing countries, (i.e. former colonies). The result is that these developing countries continue to apply the old Common Law principles which are out of date. In the fields of Contract and Tort, developing countries have to rely on old Common Law principles some of which have ceased to apply in England through legislation; for instance, the U.K. Defamation Act does not apply in Ghana although it was enacted to cater for modern developments. Ghana still relies on the old Common Law of Libel and Slander. As such a new Defamation Law has been drafted which is

still under consideration by the P.N.D.C. The new Defamation Law is an attempt at codification as it abolishes the distinction between libel and slander and takes into consideration continental jurisprudence relating to retratopm and apology as remedies in actions for defamation. Another field in which changes in the law have been prominent is the Customary Law in Ghana which has been in existence for centuries before the Europeans settled on the West African Coast. In Ghana the injustice emanating from some of these ancient customary rles have been elminated. For instnace, in the field of intestate succession, the former outrageous predicament of widows and children has been removed by giving them inheritance rights and privileges under Ghana's new Law of Intestate Succession and the Law of Accountability of Heads of Families and Customary Successors. Another area is the new Copyright Law which protects the rights and financial income of writers, artists, etc. Formerly, these artists had no adequate protection because their works were exploited for large financial gains by others with impunity. There appears to be one laudable criterion for changing the law. Whenever there is an injustice in any existing law, then the law must be changed to ensure fairness and justice.

Consultation

The Ghana Law Reform Commission, since its establishment, has always embarked upon extensive public consultation through advertisements, seminars, radio discssions and correspondence to ascertain the views of the public and interested parties. A typical example is the current exercise in fixing a new age of marriage in Ghana. There is now a general feeling that child marriages are an abomination and should be discouraged. There is also a general consensus that young men and women should not rush into marriage until they are matured and financially sound to undertake the responsibilities of marriage and parenthood. Ghanaians are now reappraising their moral and social values and are encouraging the transformation of Ghanaian society through law reform. So long as the benefits of these reforms are appreciated and are considered necessary, the cost of reform should be borne by the Government in all sincerity and in earnest. The Ghana Law Reform Commission operates on an annual subvention provided by the P.N.D.C. and the Commission is proud that this subvention has been made available regularly over the years and has been regularly augmented to enable the Commission to promote law reform which is its main statutory function in Ghana.

Miscellaneous

A PILOT COMMUNITY MEDIATION SERVICE

A Paper prepared by Ms Jeanette Aickin, Co-ordinator of the
Christchurch Community Mediation Service, Christchurch, New Zealand

INTRODUCTION

The Christchurch Service was established as a two year pilot project with the aim of testing the validity, within New Zealand, of community mediation as a way to settle disputes between persons with ongoing contact with one another. The kinds of disputes envisaged were, for example, between neighbours, family members or persons who worked together in either a voluntary or paid capacity. It was considered that the formal legal system, with an inevitable win or lose outcome, was not always the appropriate vehicle for this kind of conflict there being no facility to deal with future relationships or a compromise settlement.

2. An Organising Committee was set up in late 1982 and comprised representatives from the community, Police, Law Society, District Council of Social Services and District Court. Base funding was obtained from sources such as The Community Development Fund of the New Zealand Lottery Board, charitable trusts, the Department of Social Welfare and the Christchurch City Council. Legislation, the Community Mediation Service (Pilot Project) Act, 1983 was sponsored by the Department of Justice and provided for confidentiality, privilege, voluntary attendance at mediation, no legal enforcement of mediation agreements and also for an independent research evaluation of the project. (A copy of the Act is appended).

3. Preliminary work was done, during 1983, on the projected need for the service and community agencies contacted. The pilot period, January 1984 to December 1985, included a five month establishment phase (January -June 1984) and case intake was initiated in mid-June 1984. Staff included a full-time co-ordinator, an assistant and a team of voluntary mediators who were recruited and trained during February to May 1984.

SELECTION OF MEDIATORS

4. The mediators were selected on the basis of obtaining as diverse a group of people as possible in terms of age, cultural and social background. Educational qualifications were not seen as important but rather the personal qualities of tolerance, commonsense, non-judgmental attitudes, and, not least, a sense of humour. Mediators were, in general, a group of people who had not previously been involved in voluntary work. The first team of 21 mediators included women and men from age groups ranging from early twenties to late sixties and from a range of occupations which included a student, social worker, business manager, weaver, housewife, freezing worker and a fireman. A Maori and a Samoan were members of this first mediation team and assistance was offered by leading members of minority groups in New Zealand, such as the Vietnamese Community.

OBJECTIVES

5. The objectives of the Christchurch Community Mediation Service were to provide a free, community based, mediation service within the area of Greater Christchurch (population approximately 322,000) and to promote awareness and understanding of conflict management within the community. The aim was also to examine, by independent research, the appropriateness of community mediation for New Zealand as a whole.

6. The service was intended to reach all sections of the community and to be available at flexible hours, including evenings and weekends, at times to suit participants in mediation sessions.

CASE-LOAD

7. The work of the service for the first eighteen months of operation to mid-December 1985, that is for the evaluation period, recorded 249 cases and 222 inquiries. By April 1986, a further 51 cases had been accepted for mediation. Intake work consisted of an initial contact by a person with a dispute she or he wished to have mediated (Party A), an assessment by a Co-ordinator as to suitability for mediation, and, if so, a communication by the Service with the other person(s) (Party B) involved in the dispute, which offered to set up a mediation session.

8. Inquiries were recorded as such where the matter was either not suitable for mediation, that is for example on ongoing relationship or a significant power imbalance, or where a person was not yet prepared to try mediation but wanted general information or assistance.

9. Of the 246 cases with an outcome (to 11 December 1985) just under half (41 per cent) were either mediated, conciliated by the Co-ordinator, or resolved without mediation following contact being made by the Service. It is notable that 81.3 per cent of the mediated cases reached an agreement, this was usually written, but a small percentage were verbal agreements. A third of Party B disputants declined to attend a mediation session, one of the principles of the Service being voluntary attendance at mediation, s7.(2) Community Mediation Service (Pilot Project) Act. The Community Mediation Service in this sense reflects a low initial case load for other community mediation services (Norwood, South Australia, West Coast Mediation Service, Vancouver, and a noted low initial intake by North American Community Mediation Services in general). The majority (75 per cent) of the mediated cases have been matters concerning neighbour conflict. Family disputes made up 20 per cent cases. Many disputes have been both long standing (in one case, 20 years) and complex. Arguments over shared driveways, boundaries or trees often included harassment, verbal and/or physical abuse and the involvement of children and other family members. In several instances 4 to 5 households were involved.

SCHOOLS PROGRAMME

10. It was perceived that community education in conflict management was an important part of the work of the Community Mediation Service. A school's programme was developed in 1985 and extended during the beginning of 1986. This has involved conflict management classes, the demonstration of mediation techniques and the exploration of the nature and causes of conflict. Media interest and coverage has been considerable. The wide range of referrals might also be said to indicate an acceptance of the concept of community mediation by a large section of the community.

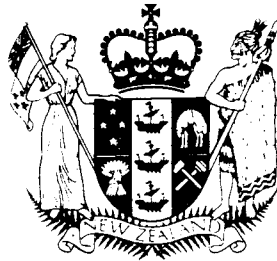
CONCLUSION

11. As a new community scheme for New Zealand, the early model of the Community Justice Centres in New South Wales, Australia, provided some indications for possible directions for the New Zealand Service.

12. However the Australian model was necessarily limited in relevance to a New Zealand scheme, for instance in:

- (a) funding sources, and
- (b) the ethnic and cultural bases of the population.

It is clear from subsequent communications with other community mediation services that New Zealand has experienced a degree of parallel development and similar difficulties to other services. The main problems have been ongoing funding, and the workload of full-time staff where a very wide range of activities has been necessary including administration, publicity, education and client contact. The implications of voluntary attendance at mediation, that is a high rate of refusals to attend, has been mainly in terms of complexity and extent of pre-intake work. This is evident in the maze of agencies contacted to identify either an appropriate kind of approach to a disputant or to make a suitable referral or follow-up. On the other hand a projected actual case load level was not borne out during the pilot period with consequences such as the over-recruitment of mediators. Financial backing for any community organisation is always a difficulty and has also been an undue part of the work of the Community Mediation Service. The progress of this Service has shown, however, in spite of these difficulties that there is a growing acceptance of, and interest in, community mediation as a conflict resolution technique within the Christchurch Community.



ANALYSIS

Title	6. Mediators
1. Short Title	7. Mediation
2. Interpretation	8. Privilege
3. Act to bind the Crown	9. Confidentiality
4. Function of Mediation Service	10. Exemption from liability
5. Functions of Committee	11. Expiration

1983, No. 102

**An Act to facilitate the provision by the Christchurch
Community Mediation Service Incorporated of
mediation services as a pilot project** [16 December 1983]

BE IT ENACTED by the General Assembly of New Zealand
in Parliament assembled, and by the authority of the same, as
follows:

1. Short Title—This Act may be cited as the Community
Mediation Service (Pilot Project) Act 1983.

2. Interpretation—In this Act, unless the context otherwise
requires,—

“Approved premises” means—

- (a) The office premises of the Mediation Service;
- (b) Any premises approved by or on behalf of the
Committee for the conduct of mediation sessions:

“Committee” means the Executive Committee of the
Mediation Service:

“Co-ordinator”—

- (a) Means the person appointed by the Committee
to co-ordinate the work of the Mediation Service; and
- (b) Includes the person appointed by the Committee
as the acting Co-ordinator; and
- (c) Includes any person to whom the powers and
functions of the Co-ordinator are delegated by the Co-
ordinator:

“Mediation” means promoting discussion between parties to a dispute and encouraging the parties to come to a settlement of that dispute in a mediation session:

“Mediation Service” means the Christchurch Community Mediation Service Incorporated:

“Mediation session” means a mediation session conducted in approved premises by a mediator with the parties to a dispute:

“Mediator”—

(a) Means any person appointed by the Co-ordinator to act as a mediator in, or in connection with, mediation sessions; and

(b) Includes the Co-ordinator.

3. Act to bind the Crown—This Act shall bind the Crown.

4. Function of Mediation Service—(1) The principal function of the Mediation Service shall be to establish and operate a pilot project in Christchurch for the provision of mediation.

(2) Nothing in subsection (1) of this section limits any other function of the Mediation Service.

5. Functions of Committee—(1) The principal functions of the Committee shall be to—

(a) Co-ordinate the work of the Mediation Service:

(b) Lay down policy guidelines for the work of the Mediation Service:

(c) Give directions with respect to the work of the Mediation Service:

(d) Cause an independent evaluation to be made of the work of the Mediation Service.

(2) Nothing in subsection (1) of this section limits any other function of the Committee.

6. Mediators—(1) Subject to subsection (4) of this section, mediators may be appointed by the Co-ordinator in accordance with policy guidelines laid down by the Committee.

(2) The Co-ordinator may, in accordance with those policy guidelines, revoke the appointment of a mediator.

(3) The Co-ordinator shall revoke the appointment of a mediator at the request of that mediator.

(4) The Co-ordinator shall appoint as mediators only such persons as are, by reason of their training and personal qualities, suitable to undertake mediation.

7. Mediation—(1) Each mediation session shall be conducted by a mediator or mediators.

(2) Attendance at and participation in a mediation session are voluntary.

(3) A party may withdraw from a mediation session at any time.

(4) The Co-ordinator is entitled at any time and for any reason to refuse to accept a dispute for mediation.

(5) The Co-ordinator or a mediator is entitled at any time and for any reason to terminate a mediation session.

(6) Mediation shall be in private unless the Co-ordinator considers it desirable that a person who is not a party to the dispute should be present at, or participate in, the mediation session, and the parties agree.

(7) Mediation may be undertaken whether or not the dispute is the subject of proceedings before any court or tribunal.

(8) Notwithstanding any enactment or rule of law, an agreement made in the course of a mediation session is not enforceable in any court or tribunal.

(9) The rules of evidence do not apply to mediation sessions.

(10) Except as expressly provided in this Act, nothing in this Act limits or affects any rights or remedies that a party to a dispute has apart from this Act.

Cf. Act No. 134, 1980 (N.S.W.), ss. 21 (2)–(4), 23

8. Privilege—(1) This section applies to any oral or written statement (including a statement contained in a document) made in the course of and for the purposes of or in connection with—

(a) Making arrangements for a mediation session:

(b) A mediation session:

(c) Action taken to follow up a mediation session.

(2) No action in defamation lies against any person in respect of any oral or written statement to which this section applies.

(3) Evidence of any oral or written statement to which this section applies is not admissible in proceedings before any court, or tribunal, or a person acting judicially.

(4) Nothing in subsection (3) of this section applies to the admission of any oral or written statement to which this section applies, if—

(a) The parties to the dispute consent to the admission of the statement; or

(b) The statement is admissible evidence in favour of any person charged with an offence and that person adduces the evidence; or

- (c) The statement is admissible evidence against a person charged with an offence—
 - (i) Against the person; or
 - (ii) Against rights of property; or
 - (iii) Of threatening, conspiring, or attempting to commit any such offence—
being an offence arising from an act or omission occurring after the statement was made; or
- (d) The statement is admissible evidence against a person charged with an offence arising from the making of the statement.

9. Confidentiality—(1) This section applies to—

- (a) A mediator;
- (b) A member of the Committee;
- (c) An employee of the Mediation Service;
- (d) A person acting on behalf of the Mediation Service;
- (e) A person carrying out an evaluation of the work of the Mediation Service pursuant to section 5 (1) (d) of this Act.

(2) Every person to whom this section applies commits an offence and is liable on summary conviction to a fine not exceeding \$500 who discloses to any other person any information, statement, or admission received by or made to that person in the course of—

- (a) Making arrangements for a mediation session;
 - (b) A mediation session;
 - (c) Action taken to follow up a mediation session.
- (3) Nothing in subsection (2) of this section applies if—
- (a) The person from whom the information is obtained, or by whom the statement or admission is made, consents to the disclosure;
 - (b) There are reasonable grounds to believe disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;
 - (c) The information, statement, or admission is given in evidence pursuant to section 8 (4) of this Act;
 - (d) The disclosure is reasonably required for the purpose of providing mediation;
 - (e) The disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation, or other body; and—

- (i) The disclosure is for the purpose of aiding in the resolution of a dispute between the parties or assisting any such parties in any other manner; and
 - (ii) The person from whom the information is obtained, or by whom the statement or admission is made, consents to the disclosure:
- (f) The disclosure is reasonably required to facilitate the evaluation of the work of the mediation service pursuant to section 5 (1) (d) of this Act and such disclosure is authorised by the Committee.

10. Exemption from liability—No civil or criminal proceedings lie against the Mediation Service, the Committee, or any mediator for any act or omission in connection with providing mediation in accordance with this Act, the policy guidelines and directions of the Committee, and any document or instrument defining the constitution and rules of the Mediation Service, unless the act or omission was in bad faith.

11. Expiration—This Act shall expire with the close of the 31st day of December 1987 and shall be deemed to have been repealed as at the close of that day.

This Act is administered in the Department of Justice.

PROPOSED PROCEDURES TO SIMPLIFY THE PRESENTATION OF COMPLEX COMMERCIAL CRIMINAL CASES

A paper by the Government of Hong Kong

General

The substance of this paper was prepared by the Attorney General's Chambers in Hong Kong for presentation, along with other papers, to a Select Committee of the Hong Kong Legislative Council. The paper was prepared before the publication of the report of the Fraud Trials Committee chaired by The Right Honourable The Lord Roskill, P.C. but not supplied to that Committee. It is interesting to compare the paper and the Roskill Report in respect of the area they both cover.

2. The Select Committee was established after debates in the public forum and the Legislative Council over the Trial of Commercial Crimes Bill 1985 which proposed, for complex commercial criminal cases, a mode of trial by a High Court judge and three commercial adjudicators similar to that proposed in the Roskill Report. This paper does not deal with the mode of trial for these cases which was argued separately. The Select Committee was told by the Attorney General's Chambers that the more effective was the procedure for simplifying the issues, the less need there was for an expert tribunal to try the case.

3. Parts of the original paper dealing with entirely local issues have been removed from this version.

4. The Commercial Crime Unit of Attorney-General's Chambers in Hong Kong has a great deal of experience in the prosecution of complex commercial criminal cases; perhaps more than the prosecution authorities of any other Commonwealth jurisdiction. This situation is, we hope, because the Hong Kong authorities have a greater determination to prosecute these difficult cases, rather than that our businessmen are more dishonest than most. With our experience, we can, perhaps better than most people, understand the reluctance of many jurisdictions to press these prosecutions with enthusiasm when one is faced with the problem mentioned in this paper. The task is daunting logistically and the temptation to direct scarce resources to needs which may produce quicker and more visible results is difficult to resist. But criminal conduct of the kind concerned is a rot and, if unchecked, particularly in a community like Hong Kong which depends for its survival on the health of its business and financial sectors, is pernicious.

5. As a basis for these proposals, it may be helpful to attempt to set out some principles of general application.

6. Any system of criminal justice should, with as great certainty as possible, ensure that the guilty are detected, tried and sentenced and the innocent are acquitted.

7. A system of criminal justice should be as speedy, efficient and inexpensive as is consistent with the attainment of real and substantial justice.

8. The right of society to be protected from the effects of crime, being the sum of individual rights of all the people in that society, should be treated with respect and concern. These rights are too important to be the subject of 'games' played by lawyers.

9. Procedures which have no merit, other than an aura of historical responsibility, should be abolished and replaced by procedures which are direct, straight-forward and efficient.

10. When a society is faced with great changes, it can expect its system of criminal justice to be examined with an objective eye and, even if it is only its appearance that is unimpressive, it risks the danger of the good being discarded with the bad, resulting in the substitution of a different system which may be unacceptable.

11. The 'right to silence' as a constituent of our criminal justice system should be properly understood and not used as some kind of slogan or banner under which to fight changes to the system. The 'right to silence' means no more than the right of an accused person not to be obliged to incriminate himself. In the context of a trial, an accused person is not obliged to say anything but if he exercises that right in the face of sufficient and credible evidence, he runs the risk of that evidence being accepted.

Background

12. Although the proposals regarding the mode of trial in selected complex commercial crime matters is debated, there is general agreement amongst commentators and legal practitioners that there is room for improvement both in the investigation and presentation of these cases.

13. It is clear that the current method of presentation of these cases is cumbersome, time wasting and does not necessarily achieve just results. The issues may be blurred even up to time that the jury are asked to consider their verdict and the job of the jury is made more difficult by the way in which the case is presented. It often occurs that the defence probe a witness's testimony without any specific allegations being put to the witness and at the conclusion of the evidence it remains unclear whether that witness's evidence and other evidence relating to the issue is disputed. Furthermore, the defence as they are presently entitled, often use the complexity of the case to advantage by putting the prosecution to strict proof on matters that are not in dispute thereby creating confusion and extending the cost and time of the trial.

14. Before we deal with the problems in detail and propose some solutions which in our view would assist in presentation of these cases let us first deal with what actually occurs under our system at the present time.

The current situation in Hong Kong

15. Large scale commercial fraud is investigated by two agencies namely Commercial Crime Bureau (CCB) of the Royal Hong Kong Police or the Independent Commission Against Corruption (ICAC). The reason that ICAC become involved is that many large commercial frauds have as their basis corruption on a gigantic scale. The most recent examples of this type of corruption/fraud are seen in the large amounts of money and other advantages flowing to senior bank officials to induce them to make large loans, not with ordinary commercial criteria in mind, but rather their own individual benefit. The main point that we should emphasize in this paper is that these large commercial frauds cannot be viewed in the same light as other crimes with which the criminal law deals. The usual investigatory techniques cannot be successfully applied to this type of crime. Some of the distinguishing features are as follows:

- (a) There is rarely an identifiable victim. The victim of this type of crime is remote from the criminal conduct. In many cases it is shareholders and

creditors who suffer and they are not directly involved in the running of the company. Therefore often there is no complainant in the traditional sense. There may be a liquidator, there may be the Commissioner for Banking or the Commissioner of Securities or the press calling for an inquiry, but rarely in a large collapse do the investigators find people pushing down the door with specific allegations of fraud. Often small investors or creditors complain vocally however they are unable to assist the investigator other than to complain that they have lost money. They are unaware of how the money has been lost or what circumstances precipitated a particular collapse. Very often all the investigator has is his own suspicion that there is criminality involved in the collapse.

- (b) Added to the above mentioned problem the investigator is generally faced with reluctant witnesses. There are firstly the large bankers and creditors who generally have made the commercial decision to cut and accept their losses. They are not keen to have their affair or their conduct examined although in most cases their co-operation as witnesses is sought and is of utmost importance. Then there are those, who have an interest of their own to serve and will only co-operate as a last resort. For example, professionals who fear possible civil repercussions and others who fear some form of non criminal action if they co-operate, or people who have been peripherally involved or assisted in the fraud who fear possible prosecution. Finally those who worked closely with the main fraudster and therefore are sympathetic and faithful to him are also reluctant if not positively hostile to the investigation.

The investigator is therefore faced with a mountain of documentation, a smell of criminal conduct and enormous pressure to produce quick results.

- (c) The fraudster is often influential, wealthy and usually intelligent and has had and continues to have the best professional advice that money can buy. Sometimes the professional advice has gone far beyond just professional assistance (that is involvement or a personal friendship with the person being investigated) and of course this makes the investigator's task more difficult. Although there is a veneer of cooperation, rarely is that forthcoming and the investigator is therefore operating in a hostile environment.
- (d) At a very early stage, the investigator is assisted by professional accountants and lawyers who hopefully will conduct the prosecution, however, the material seized from searches must be examined and analysed in order to determine if criminality exists and if it does its nature and who was involved. In Hong Kong because one is dealing with a wealthy commercial community witnesses leave the jurisdiction without any requirement to return, there is no method of taking evidence before they depart, documents disappear before investigators become aware of their existence and generally the investigation is hamstrung from the outset.

16. Faced with the situation described the investigator and his advisors work through the case. They are generally at a disadvantage because powers of search and seizure are restrictive. The opponent has time to avoid search and seizure and others can hold the investigator off for some time until there is general consensus as to how to treat the search warrants. The defendants have sufficient notice of any search and can therefore dispose of anything incriminating. Professional offices and banks create problems of their own. Generally one does not wish to in any way disrupt the ordinary business or professionals or bankers but unless they are prepared to co-operate it is difficult to obtain documents quickly.

17. Although the ICAC have extensive powers of investigation the police do not have similar powers. Often in the case of large scale commercial fraud corruption of senior executives is part of the fraud. We have difficulty in justifying a distinction between the powers given to ICAC and those needed by CCB to adequately investigate large scale fraud. Section 50(7) of the Police Force Ordinance (Cap.232) empowers a magistrate to issue a search warrant upon an application on oath by any person. The scope of such a warrant is very wide, however, there are times when it is necessary for the investigators to secure documents without any delay and it is our experience that documents are often missing or destroyed by the time the investigator is able to move. In special circumstances where it appears to the Commissioner of Police or certain delegated officers that because of the urgency of the matter a warrant should issue we recommend that he have power to issue the warrant. We refer specifically to Section 17 of the Prevention of Bribery Ordinance (Cap. 201) which gives special power to the ICAC. Such powers should be given to the police.

18. Section 14 of the POB Ordinance (Cap. 201) empowers the Commissioner to require a suspected person to furnish information about assets, liabilities, income and expenditure. Powers of a broadly similar nature relevant to the investigation of commercial crime should be given to the Commissioner of Police. Similarly we recommend that provisions be enacted similar to those in Section 14A of the POB Ordinance regarding restrictions on the disposal of assets.

19. One of the major problems in the investigation of commercial crime in Hong Kong is the disappearance not only of suspects but of people who could assist. Furthermore, potentially reluctant witnesses often leave without notice therefore making the task of the investigator and prosecutor extremely difficult. In many cases suspects are arrested and have to be charged long before the investigation is sufficiently advanced and therefore the prosecutor is forced to make decisions long before he has sufficient evidence to make the most informed analysis of the case. Section 17A of the POB Ordinance (Cap. 201) provides that a court may order a person subject to an investigation to surrender any travel document in his possession. Such an order can operate for 6 months and for a further 3 months if a magistrate is satisfied that an investigation could not reasonably have been completed within the 6 month period. We recommend similar provisions be enacted to grant the Commissioner of Police similar powers in cases of commercial crime.

20. In respect of witnesses there should exist a power to obtain evidence at an early stage. In cases where a potential witness refuses to make a statement to the police or alternatively where that witness is considered to be hostile to the investigation we recommend that the Attorney General be empowered to apply to a magistrate to have that person examined on oath. Section 83 of the Criminal Procedure Act 1955 (Zimbabwe) provides that:

"A magistrate may at any time upon the request of the public prosecutor require the attendance before him for examination by the public prosecutor of any person who is likely to give material evidence as to any alleged offence whether or not it be known or suspected who the person is by whom the offence has been committed."

We recommend a similar provision be enacted in Hong Kong.

21. As to the availability of witnesses, if it appears to a magistrate that a potential witness is an essential witness in a prosecution he should have power to order that the witness not to leave Hong Kong or at the very least that the person deposit some security to ensure his attendance at any time in the future when required.

22. Eventually after an extensive enquiry the prosecution is in a position to lay charges. Often it has been necessary to grant immunities, and often witness statements are far from complete because of the reluctance already described. Charges are preferred and the defendants are presented to a court. There is no guarantee that those witnesses from whom

statements have been taken will attend at the hearing. Currently, there is no method of ensuring a witness's attendance at court other than by way of witness summons. A magistrate cannot issue such summons requiring a witness to attend in the High Court other than after a preliminary enquiry. Furthermore a witness is free to leave the jurisdiction even after service of a summons upon him and once out of the jurisdiction there is no way of ensuring his attendance. Section 37 of the Criminal Procedure Ordinance (Cap. 221) empowers a court to issue an arrest warrant in the case of a witness where it can be satisfied on oath that the witness is unlikely to comply with the summons. In practice it is almost impossible to obtain that evidence until after the witness has left. We recommend that magistrates be empowered upon application by the prosecution to ensure a witness remains within the jurisdiction. Again, if a witness is to leave and there is doubt that he will return a magistrate should be empowered to order him to deposit security to ensure his future attendance.

The Law

23. The Theft Ordinance (Cap. 210) creates numerous offences. In our view the Ordinance does not adequately provide protection in the case of a great many large scale frauds. The prosecution is often required to find substantive offences to fit circumstances which do not adequately illustrate the criminal conduct. These attempts are artificial and unsatisfactory. In many cases the prosecution, if it is to present the total picture and an accurate account of the criminal conduct must charge conspiracy to defraud. The use of conspiracy has been criticized by the Courts and there is a view that the prosecution should if possible charge substantive offences. Many commentators have suggested a general offence of fraud. New South Wales has such legislation, the DPP of UK recommends it in strong terms and Hong Kong would benefit enormously if such an offence were created. The DPP in the UK on the 7 August 1984 recommended the creation of an offence of fraud where a person dishonestly acts in a manner which prejudices or takes the risk of prejudicing another's rights knowing that he has no right to do so. He recommends that it not be restricted to a risk of possible injury resulting in economic loss.

24. If a person dishonestly acts in a manner and prejudices the rights of others this should be an offence and lawyers ought not have to spend hours attempting to fit the conduct into an offence which had its origins many years ago when large scale commercial fraud as we know it today was unknown. Furthermore the defence should not be able to put forward a multitude of technical objections in a situation where their client has clearly offended however he is attempting to avoid the charge on technical grounds. We recommend the introduction of a general offence of fraud. An offence of fraud is common in countries the legal systems of which are based on Roman Law, such as Scotland. A statutory provision creating such an offence might read as follows -

" Any person who by an deception (whether or not such deception was the sole or main inducement) dishonestly causes actual or potential prejudice to another commits an offence and is liable to imprisonment for 14 years".

Procedure after charge

25. In due course the defence are served with a copy of the charges, copies of all statements upon which the prosecution intends to rely, copies of exhibits and an exhibit list (Section 80B Magistrates Ordinance (Cap. 227)).

From this material the defence are required to decide whether they require a committal hearing or whether the matter should be automatically committed to the High Court. The position is unsatisfactory for a variety of reasons:

- (a) The material served is generally voluminous. Therefore even though theoretically the defence has the prosecution case, for counsel to properly understand the case an enormous amount of work is required and the defence may never really understand the case until the Crown opens. Even then if the Crown opening is general the essential issues may not become obvious until towards the end of the case (if ever).
- (b) Defence Counsel may not look at the case until very late in the piece. This can be due to pressure of work; or if legal aid is involved the failure to properly compensate them for committal and pre-trial work.

26. Therefore based usually on inadequate preparation and the difficulties described, the defence are required to elect whether to have a preliminary enquiry. However if they elect, the case, (unless dismissed by the Magistrate), is then transferred to the High Court. We do not wish to deal with the advantages and disadvantages of committals here as this is the subject of a separate paper.

27. The defence up to this time have not given nor are they required to give any indication of their plea or their defence. Even up to the date of trial the Crown is often uncertain as to plea. Certainly the issues in dispute are rarely known at this stage. The Crown prepares its case on the basis that all will be in dispute. The defence takes the attitude that it is for the Crown to prove its case. Therefore a great deal of time, effort and money goes into establishing matters which in due time are undisputed. An inordinate amount of time is spent ensuring documents which are not the subject of dispute and properly proved.

28. Furthermore, the trial judge is kept in the dark. Although he has all documents, statements and depositions it is usually unclear to him what the issues are in the case. There is now provision for a form of pre-trial conference. On the 30th November 1984 the Chief Justice issued a practice direction (APPENDIX 1) dealing with the subject of pre-trial procedure. Although the practice direction is detailed and provides a framework within which the prosecution and defence can work there are practical difficulties in applying it. Firstly, there is no compulsion upon the parties to comply. Our experience has been that because defence counsel often receive the brief at a late stage no meaningful agreement can be reached prior to trial. Secondly, the Judge who conducts the pre-trial review is not necessarily the trial Judge. Therefore in a complex commercial crime case the advantage of having the trial Judge involved at an early stage may be lost. It is important that the judge who conducts the pre-trial review be familiar with the case. Unless that person is the trial judge it seems to us to be a waste of judicial time to have one judge read into the case for pre-trial purposes and another to come to it at a later stage for trial. Thirdly, the Judge cannot apply any sanction if the pre-trial procedure does not work. It is difficult for the defence to cooperate if they do not have, in advance, the prosecution's statement of case. Fourthly unless there is some method of ensuring that counsel briefed for trial cooperate in the procedure there is still doubt at trial as to what matters are agreed. Counsel at trial are not necessarily bound by earlier admissions made and the Crown may still be in a position at the last moment when it is unsure about agreed matters.

29. The experience in our general prosecutions section has been that it is difficult in practice to implement the procedures and we consider that the procedure does not go far enough to ensure smooth running of a complex commercial trial. One of the major difficulties is that counsel do not consider their case until a very late stage and usually meaningful discussions only take place just prior to the commencement of the trial. This is not satisfactory in complex commercial cases. It is our view that unless there is full disclosure between the prosecution and the defence then it is unlikely that the issues can be isolated sufficiently to ensure that the trial is significantly shortened and that the case can be presented in its simplest form to the jury. The present pre-trial procedure depends basically on the goodwill of counsel, and in our view that is unsatisfactory.

30. Furthermore, counsel dealing with the case at its early stage may not later act at trial, therefore one is never sure that what appears to be agreed one day will be agreed at trial. In legally aided cases counsel are not properly remunerated for pre-trial work and unless there is a fundamental change in approach the system cannot work in a satisfactory manner. We therefore recommend that the solicitors and counsel be adequately remunerated for work done prior to trial and in particular preparation for pre-trial conferences.

31. Generally what occurs is that on the morning of the trial the Judge is asked to adjourn for a day or more whilst counsel try to sort out agreed facts. The present system is therefore a piecemeal approach which although of some use does not in any meaningful way solve the problem. The Judge is in due course informed and after a jury has been empanelled and after preliminary legal argument the Crown opens its case. We suspect that it is during the opening that the Judge and defence discover how the Crown is presenting its case.

32. The trial proceeds with an opening speech from the prosecutor. More often than not the Judge and defence counsel do not have a copy. They do not know how the prosecution will present its case. The jury are never provided with the opening speech. They are required to listen and absorb complex commercial concepts without any assistance other than the prosecutor's opening speech. In our opinion it is virtually impossible for them to absorb the detail. It is often difficult for the Judge at first blush to understand the case and the defence is in much the same position. It therefore follows that in this adversarial situation the defence is reluctant to agree evidence and exhibits and the Judge is reluctant to push the defence to make concessions. It is only as the trial proceeds that the real issues start to become evident. Often witnesses are called whose evidence is not in dispute or where the defence wish to elicit a fact which the Crown may have conceded if placed on notice. Experts from each side are kept away from one another, therefore cross-examination of them can be length only to find out that the area of disagreement falls within a narrow compass. Very technical evidence is received viva voce from witnesses whose evidence can be most confusing unless carefully explained.

33. The defence then present their case. Until that stage it may not have been made clear what the defence case really is, nor may it ever become clear. Defence experts can be called without notice to the prosecution. The whole case is presented in an adversarial atmosphere with various tactics and techniques used, not necessarily to assist in making the issues clear. In fact some have described the whole procedure as a "game lawyers play" where tactics, advocacy and confusion take pride of place over clarity and a search for the truth. At the conclusion of this length procedure the Judge has the daunting task of summing up the case to the jury. The jury is expected to listen and absorb complex directions which can take several hours or even days. At the end of it all they are required to announce a verdict on this mammoth presentation.

34. Most commentators agree that there is need for improvement of the system. There are varying opinions, but the great majority consider there is a need to introduce extensive pre-trial procedures in an attempt to isolate the issues, simplify the case and shorten the trial. We recommend that extensive pre-trial procedures be introduced in complex commercial crime cases.

35. The question that one immediately asks is should there be compulsion upon the parties to cooperate in such a procedure and how far should the defence be forced to reveal its hand? How will a court ensure compliance? What are the sanctions for non compliance?

Does a non compulsory system work?

36. It is our considered view that a system which relies on the goodwill of the parties will not work. In a system which is designed to put the prosecution to proof and which does not require the defence to show any part of its hand, the defence is in an extremely difficult position when asked to voluntarily cooperate. At all time they must have their client's interest in mind and it is often the case that in order to secure an acquittal they require the Crown to prove every part of its case. This approach is not necessarily in the interests of the smooth administration of justice or in getting to the ultimate truth but it is in the interest of the defendant. Furthermore, unless there is a basic change in the attitude of the profession and the legal aid office to payment for preparatory work one cannot expect counsel to spend many hours preparing for a pre-trial review. There must also be a basic change in the approach of the judiciary so that the trial judge is brought into the picture earlier and he is the one to decide pre-trial matters and play an active role.

37. The experience to date has been that a voluntary form of pre-trial procedure has not proved to be satisfactory for a number of reasons: Firstly in cases which are legally aided, counsel is not remunerated sufficiently for work done prior to trial. For the system to work adequately a considerable amount of work must be performed by counsel before trial if agreement is to be reached. Secondly the present attitude of the defence has been that they will only agree matters when they are clearly satisfied that the prosecution can prove the matters sought to be agreed. This approach cannot be criticized because there is no requirement upon the defence to make any admission even though their instructions may be that the matters sought to be agreed are not in dispute. There needs therefore, to be a fundamental change in approach so that the defence are required to positively assert their object rather than take a passive approach and say in effect to the Crown "you prove it".

38. It is therefore recommended that legislation be enacted that upon the application of the Crown or the defence a structured pre-trial procedure be followed.

The pre-trial procedure

39. A number of jurisdictions have approached pre-trial procedures in different ways.

(a) United Kingdom

The United Kingdom has no form of pre-trial review which is either compulsory or effective. The present system of pre-trial review depends basically upon the goodwill of counsel involved in the case and there is no specific provision that the trial judge be involved in the pre-trial review. The Roskill Committee have received numerous submissions, a great many of which advocate extensive pre-trial review procedures. The present situation in Hong Kong is unsatisfactory.

(b) Scotland

There is no form of pre-trial review in Scotland nor is there any formal discovery of documents. There is however a judicial examination procedure which enables the prosecutor to put questions to the accused shortly after he has been charged and in the presence of a sheriff. The purpose of such examinations is to elicit from the accused on account of the matters averred in the charge or of any alleged confession. He is informed that prior to trial the defence is required to give notice of certain specified defences and failure to give notice can result in the Court refusing to allow those defences to be raised. The defence must provide a list of their witnesses at least ten days prior to trial. This allows the prosecution time to interview any defence witnesses if it so desires.

(c) Ireland

There is no pre-trial review.

(d) Australia

In Victoria there are pre-trial criminal procedure rules (APPENDIX 2) which provide that an accused person or the Director of Public Prosecutions may make application to a judge for directions with respect to the preparation for trial, readiness of trial or conduct of trial of a criminal case in any case where it is necessary for the fair and expeditious conduct of the trial. At the hearing of the application the judge may ask such questions of the parties and give such directions with respect to the preparation for trial, readiness of trial or conduct of trial as the judge thinks proper having regard to all circumstances. The accused is present throughout the hearing.

The effect therefore of these rules is that there is no sanction upon a defendant if he does not comply with the rules and there is certainly no procedure by which a defendant can be compelled to cooperate with the pre-trial review procedure. We have already made our views clear that in a voluntary system unless the judge participates in a very forceful way the pre-trial review can serve little useful purpose.

South Australia also has rules which relate to pre-trial conferences. Other States of Australia do not have any procedure.

(e) New Zealand

New Zealand has no procedure.

(f) Canada

The Canadian experience in relation to pre-trial reviews is that in some Provinces pre-trial reviews do take place, however it appears there is no formal procedure by which these pre-trial conferences are held. Again the situation is that the onus is upon the Crown and the defence to cooperate. It seems that these pre-trial review procedures in Canadian Provinces are designed basically to ensure the Crown has provided the defence with a great deal of material, but there is no requirement upon the defence to make admissions or to agree or to discover documents.

(g) United States

We have not looked in detail at the various States of the United States of America however we have investigated the position in New York and in Illinois. There are extensive rules in New York and in Illinois dealing with pre-trial discovery and pre-trial procedures.

40. We recommend that legislation be enacted in Hong Kong dealing with pre-trial procedures and discovery. The legislation should contain the following provisions:

(i) Whether committal proceedings are retained or not there be provision that within seven days of filing of the document either party can apply to a judge for an order requiring a pre-trial conference. Provision should also exist which enables the court upon its own motion and upon hearing counsel to review a pre-trial conference.

(ii) Upon the application being granted we recommend that if by that stage the trial judge has not been appointed the Chief Justice thereupon appoint the trial judge

who from that moment on shall have conduct of the pre-trial proceeding. The parties, upon the order being made, would be required to attend before the judge. Again we suggest that it be desirable that counsel who would be involved in the case would be involved in the pre-trial procedure and therefore the court should allocate time which would be convenient to counsel's other commitments.

(iii) Upon attending before the pre-trial judge he would make orders requiring the Crown to file and serve upon the defence within a period specified by him the following documents:

- (a) A statement of the Crown case. This statement should be in the form of an outline of the Crown opening and should specify broadly what evidence the Crown relies upon and its relevance to the Crown case. The statement should contain the Crown's submission on the law applicable to the charges. (The purpose of providing this document to the defence is so that at a very early stage they can see exactly how the Crown case is to be presented).
 - (b) All statements of witnesses upon whom the Crown intends to rely. this should include any written and the substance of any oral statements.
 - (c) Reports or statements of experts, including physical and mental examinations and scientific tests which resulted both in positive and negative results.
 - (d) Any books, papers, documents, photographs or tangible objects which the prosecution intends to use in the hearing in support of its case.
 - (e) Any charts or other aids upon which Crown would rely.
 - (f) A list of previous convictions of the defendant any any witnesses upon whom the Crown intends to rely.
 - (g) Statements of witnesses who may assist the defence.
- (iv) Provision should be made that this discovery be on a continuous basis and the Crown be responsible to ensure that any material matter is discovered to the defence as soon as practicable after it becomes known to the prosecutor.
- (v) Any claim of Crown privilege or claim of confidentiality due to public policy should be referred to the judge who should have a discretion as to whether the material should be discovered.
- (vi) The matters which need not be discovered are:
- (a) Any documents relating to legal research any records, correspondence, reports or memoranda to the extent that they contain opinion, theories, conclusions of legal and investigative personnel.
 - (b) Any details which might lead to the identification of an informant.
 - (c) Any matters which are matters of security.

If there be debate or disagreement about material which ought to be discovered the trial judge should be the final arbiter.

(vii) After the Crown has served its documents pursuant to the order the defence would be required to serve on the prosecution and file with the court the following:

- (a) A statement from defence as to the defence or defences upon which it intends to rely.
- (b) A statement from the defence as to which witness statements are:
 - (i) agreed
 - (ii) required for pre-trial evidence
 - (iii) required for evidence at trial

When we refer to evidence required for pre-trial evidence we recommend that there be provision that prior to trial upon the application of either the defence or the prosecution, witnesses whose statements have been served and would be relied upon can be called before the judge some time before the trial. The deposition is taken and can be tendered at the trial. If either party objects to pre-trial evidence being given the judge shall have a discretion not to order such pre-trial evidence and the witness would then be called at trial. We recommend this procedure because it is our view that on many occasions there are witnesses who are required to attend at trial whose evidence could normally be agreed. However, the defence may wish to ask questions to obtain some detail or additional evidence, when in fact there is no dispute about that witness's evidence. We realise that where a witness's credit is in issue then it is essential that witness be seen and his evidence heard by the jury however we feel that there are many witnesses in large commercial cases whose evidence is not in dispute but nevertheless the defence wish to cross-examine. It may be in many of those cases the defence would be content with cross-examining that witness in the absence of the jury and then have the witness's evidence read to the jury and for it to be explained to the jury that the witness's evidence was given prior to the trial. In circumstances where witnesses are going overseas or leaving the Territory this procedure would be extremely valuable.

- (c) Documents - The defence would be required to indicate which documents are disputed and the basis for the objection. In the absence of objection from the defence the documents become admissible without formal proof thereof. The signatures and handwriting appearing thereon are presumed to be prima facie evidence of the fact that the person whose name or writing appears on the document in fact signed or wrote on it. If a stamp or writing on the document indicates that it has been received then that is prima facie evidence of the fact of the document was so received.

Photostat or photograph copies of documents would be admissible unless there is objection. The objection should be ruled upon by the trial judge taking into account the relevance of the document and its evidential value. All these objections could be heard during the pre-trial proceeding.

- (d) The defence to supply names and addresses of any witnesses they intend to call plus statements and memoranda of oral statements relating to those witnesses.

- (e) The defence to produce all books, papers, tangible or intangible objects, etc. which they intend to use in the trial as evidence or for the purposes of cross-examination.
 - (f) The defence to supply all reports or statements of experts. Experts from either side should be encouraged to confer in the presence of solicitors or counsel to see if a great deal of complex evidence can be agreed.
- (viii) Once the parties have had the opportunity to examine each other's documents and each other's case then further pre-trial conferences would be held to ascertain what agreed facts could be put to the jury and how they would be presented.
- (ix) It is essential if this system of pre-trial is to work that the trial judge who will in due course conduct the trial be a party to the pre-trial proceeding and that he play an active role in the pre-trial proceeding to ensure that parties thereto co-operate.
- (x) We suggest the pre-trial conferences be held in court and that the defendant be present throughout the pre-trial conference. The hearings should be in private and not be the subject of press reporting.
- (xi) If a defendant refuses to cooperate in the pre-trial proceeding then his failure to cooperate can be a matter of comment at trial by the trial judge. Furthermore, if his failure to cooperate is due to counsel or solicitors or both not being prepared then the sanction of costs thrown away should be applied. If the matter is legally aided the trial judge should have discretion to order that solicitors and/or counsel should not be remunerated for certain days which he considers were wasted by failure of the defence to agree matters not in dispute. The trial judge should have wide powers to make any order he considers to be just.
- (xii) It is our view that if a system of proper pre-trial procedure was implemented with a view to obtaining substantial agreement on matters which should not be matters of dispute then the length of trial could be reduced by up to 50%

Plea bargaining

41. In *R v Turner* (1980) 2QB 321 the Court of Appeal gave the following directions on plea bargaining.

- (a) Counsel must be completely free to do what is his duty, that is to give the accused the best advice he can and if it need be in strong terms. This may often include advice that a plea of guilty shows an element of remorse which is a mitigating fact enabling a court to give a lesser sentence.
- (b) The accused having considered counsel's advice must have a complete freedom of choice whether to plead guilty or not guilty.
- (c) There must be freedom of access between counsel and judge. Any discussion, however, must be between the judge and both counsel. If a solicitor representing the accused is in court, he should be allowed to attend the discussions if he so desires.
- (d) The judge, should, subject to one exception never indicate the sentence which he has in mind to impose. A statement that on a plea of guilty he would impose one sentence and on conviction following a plea of not guilty he would

impose a severer sentence should never be made. In the case of *R v Cain* (1976) Cr L R 464 the Court qualified the above mentioned observation in that it stated that it was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full-dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better. What would be condemned in *R v Turner* was a more precise offer or suggestion on the part of the judge in which the actual penalty was more closely defined. The judge [in such circumstances] would in a sense be inviting the accused to bargain with him and that was something which should be condemned.

42. Furthermore in *Turner* the court held that where any discussion on sentence had taken place between the judge and counsel for the defence it should be disclosed to the accused. In *Cain's* case what statement was qualified in the following way. It was not uncommon for a defence counsel who did not know the judge well and who is not quite familiar with the tariff of sentencing to wish to get some guidance from the judge as to what sentence he had in mind so that he might accordingly advise his client. One of the advantages that flowed from the close relationship between judge and barrister was that the barrister in that situation could go to the judge and ask him for guidance. If the judge felt disposed to give it to him, counsel would then have a reliable idea of what sort of sentences his client faced and could advise him properly. But the whole point would be destroyed if he disclosed what the judge told him. The confidentiality in their relationship would be broken. In a practice direction issued subsequently to *Turner* and *Cain's* case (1976) Cr. Law Review 561 the court directed that the directions in *Turner* and *Cain* should be followed. However where there was inconsistency the decision of *Cain* should prevail.

43. The decisions in *Turner* and *Cain* and the observations of the Court of Appeal in England must be read in the light of the Hong Kong decision in *CHEUNG Ping-kei v. The Queen* No. 1342 of 1983. The effect of the decision is that where counsel see the judge in Chambers the Court of Appeal in Hong Kong has indicated that it is preferable if not required that counsel communicate those communications to his client. The court of Appeal in England in *Cain's* case clearly thought it proper that counsel not communicate to his client communications with the judge in a case where counsel is attempting to find out from the judge his views as to the tariff in a particular case.

44. In cases of complex commercial crime where there may be a multiplicity of counts it is our view that counsel should be free to bargain as to plea. In practice considerations of sentence are vitally important when plea bargaining takes place. It is our view that it should be permissible for counsel to discuss sentence with the judge within the guidelines laid down in *Turner* and *Cain's* case. We would go further and suggest that it would be proper for a judge to indicate in clear and direct terms his views about the case and his views about sentence. We consider that any cases of complex commercial crime would result in pleas if the judge and counsel were free to discuss their views of the case and that these views be expressed on occasions "off the record". This particularly applies where the judge has been involved in pre-trial discussions and has a fuller understanding both of the Crown and the defence case. We accept that a defendant ought not to be intimidated into pleading guilty by promises of a light sentence. However, in cases of commercial fraud defendants are usually represented. They receive the best advice available and one can assume their counsel will advise them so that they do not feel intimidated. There should be freedom between counsel and the judge to discuss both plea and sentence.

45. Perhaps the protection that could be afforded to an accused person is that where a possible plea has been discussed in Chambers and an accused person is arraigned or re-arraigned, before the plea is taken the judge should explain to him that he should not be intimidated or influenced in his plea by the fact that there have been discussions about sentence prior to the plea being taken.

Indictment

46. It should be open for the judge during the pre-trial hearing to suggest to the prosecution that they amend the indictment in order to simplify the case. There should be freedom of discussion between the prosecution, the defence and the trial judge as to the form of the indictment. At the end of the day it is a matter for the Attorney General to file the indictment and he decides what form it should take. However it is our view that the judge should be free to discuss with counsel his views about the indictment in an attempt to simplify the case and make the issues simpler for the jury.

The Judge

47. In our view it is highly desirable that there should be a panel of judges appointed to try matters of complex commercial crime. These cases are not simple cases and those judges who are appointed to such a panel should be specialists in this area. It is a matter of course for the Chief Justice to determine which cases are matters of complex commercial crime and when it would be appropriate to appoint a specialist judge. We suggest that the judges who are appointed as special commercial judges should undertake some form of training, in particular it would be desirable for them to meet with senior members of the commercial community and to discuss various business practices in certain specified areas. For example it would be desirable for judges to meet with senior bankers and learn from them certain basic matters relating to banking practice. Equally judges should spend some time with the accountancy profession to discuss certain basic accountancy matters such as the way in which accountants approach an audit, how standards evolve, what guidelines accountants use in their approach to certain accounting problems. We could give examples in other areas however once judges were assigned, we consider that the communication between them and people in commerce who have specialist knowledge could be fostered.

The jury and presentation of the case

48. The method of presentation of the criminal case whereby a number of jurors who have no knowledge of the case are confronted with an opening speech, the evidence, closing speeches, and a summing up without any recourse to material other than exhibits is totally unsatisfactory in a difficult commercial crime case. We are of the view that the jury should be provided with as much material as possible to assist them. We are particularly aware of the problem of providing them with too much material, however as a minimum we would suggest that before a jury commence to hear evidence they be provided with firstly a glossary of terms and the explanation of those terms. For example, in a case where banking practice and letters of credit are being discussed by many witnesses a jury should be provided with a written glossary of terms which describe in layman's language the type of documentation and the type of expressions that will be used by the witnesses. The glossary should be the subject of agreement between counsel. If counsel cannot agree the judge should make a final decision as to how the terms should be explained to the jury. They should be provided with the written opening statement of the Crown and they should be given the opportunity of having the evidence of witnesses available for them to pursue when they finally deliberate upon their verdict. This would of course mean that in a complex commercial crime case the evidence is taken verbatim as it proceeds. They should be provided with the defence opening speech and both the Crown and defence closing speeches. Speeches should be kept to a reasonable length so that the jury can absorb them. This could be done as a result of the discussion between the judge and the counsel as to which are the real issues in the case and a concentration by judge and counsel upon those issues. It seems unnecessary for counsel to have to go over in detail matters which are essentially agreed. A simple statement from counsel as to agreed matters could be made and incorporated in the closing address of Crown counsel. Counsel could then concentrate their comments on the matters in issue.

49. The jury should be provided with a copy of the summing up. At the end of the summing up it is our view that the judge should not leave the matter to the jury at large however he should ask certain specific questions for the jury to answer. The questions should be formulated as a result of discussions between counsel and the judge with the judge of course making the final decision. The jury would then be given an opportunity to direct their minds to certain key questions the answers to which would result in a general verdict either of guilty or not guilty. During their deliberation the jury should be free to have access to all material presented to them at trial including evidence of witnesses. In lengthy cases the evidence of a number of witnesses has been given some considerable time prior to the jury being asked to consider their verdict and it seems unfair to require the jury to make their own notes or alternatively to try to recall in detail evidence given by witnesses over a period of weeks.

50. Prior to summing up the judge should indicate to counsel how he intends to direct the jury on the law applicable to the case. He should invite counsel to make any submissions upon the proposed direction. Furthermore, we recommend that it should be the duty of counsel to intimate their objection to any matter in the proposed summing up to which counsel disagree. The Court of Appeal should only in the most exceptional cases allow Counsel to be heard on a matter where no objection or protest was made to the Trial Judge.

Summary of recommendations

51. That powers of search and seizure contained in Section 17 of the Prevention of Bribery Ordinance (Cap. 201) be given to the Commissioner of Police to be used specifically in commercial crime cases (Para.17).

52. That similar powers to those contained in Section 14 of the Prevention of Bribery Ordinance (Cap. 201) relating to disclosure of assets be given to the Commissioner of Police to be used in the investigation of commercial crime (Para. 18).

53. That a provision similar to that contained in Section 17A of the Prevention of Bribery Ordinance (Cap.201) relating to surrender of travel documents be enacted empowering the Commissioner of Police to apply to a magistrate for an order that a suspect surrender his travel documents (Para. 19).

54. That there be provision for examination of witnesses who refuse to make a statement or alternatively who are hostile to the prosecution (Para. 20).

55. That there be provisions to secure the attendance of witnesses (Paras. 21 and 22).

56. That there be a general offence of fraud (Paras. 23 and 24).

57. That solicitors and counsel in legally aided cases receive adequate remuneration for preparation for pre-trial conferences (Para. 30).

58. That legislation be enacted providing for extensive pre-trial procedures and discovery in cases of large scale commercial fraud (Paras. 34, 38 and 40).

59. That within seven days of filing of an indictment either party be at liberty to apply for a pre-trial conference or that court upon its own motion be empowered to order a pre-trial conferences (Para. 40(i)).

60. That the Trial Judge be the judge who conducts the pre-trial conferences (Para. 40(ii)).

61. That the Crown be required to file and serve upon the defence various specified documents (Para. 40(iii)).
62. That discovering be on a continuous basis up to trial (Para. 40(iv)).
63. Claims of Crown privilege or confidentiality be referred to the judge (Para. 40(v)).
64. That certain specified matters not be subject to discovery (Para. 40(vi)).
65. That the defence be required to file and serve upon the Crown various specified documents (Para. 40(vii)).
66. That there be provision for the taking of evidence prior to trial (Para. 40(vii)(b)).
67. That the defence be required to make discovery (Para. 40(vii)(c)).
68. That the defence supply to the prosecution names addresses and statements of defence witnesses (Para. 40(vii)(d)).
69. That pre-trial conferences be held privately in the presence of the defendant (Para. 40(x)).
70. That failure by the defendant or his legal advisors to cooperate in the pre-trial procedure be subject to sanctions (Para. 40(xi)).
71. The plea bargaining be permitted (Para. 44).
72. That the judge be free to discuss his views about the form of indictment (Para. 46).
73. That there be a panel of judges appointed to try complex commercial crime cases. That those judges receive advice from the commercial community as to commercial practice (Para. 47).
74. That the jury be provided with:
 - (1) a glossary of terms;
 - (2) a copy of the opening speeches;
 - (3) a statement of matters agreed;
 - (4) a copy of the summing up;
 - (5) a series of specific questions;
 - (6) opportunity to read the evidence of witnesses; (Paras. 48 and 49).
75. That the trial judge consult with counsel prior to delivery the summing up and hear counsel on the proposed directions of law that he intends to give (Para. 50).
76. That subject to exceptional cases the defence be prohibited from raising matters on appeal where no issue was taken at the trial (Para. 50).

PRACTICE DIRECTION

Pre-trial procedures in the High Court

This direction is issued by the Chief Justice for the guidance of practitioners in proceedings in the High Court in the exercise of its criminal jurisdiction.

It will come into effect from 1 January, 1985.

Pre-trial procedure

1. The Attorney-General may serve on the accused or his solicitor, a notice to admit such facts as may be specified therein relating to -

- (a) the chain of evidence for exhibits;
- (b) that the offence was committed, if this is not to be contested by the accused;
- (c) the admission of documentary exhibits;
- (d) any other matter which may be specified in such notice.

A copy will be served on the Registrar. Such notice will be served after the filing of the indictment and where practicable not less than 28 days before the date fixed for trial.

2. The solicitor for the accused is expected to obtain his client's instructions in the matter and, within 14 days after the notice to admit facts is served, to serve on the Attorney-General a notice in reply stating which facts are admitted. Any admissions should comply with the provisions of section 65C of the Criminal Procedure Ordinance which include the right to seek the leave of the court to withdraw any such admission. A copy of the notice in reply should be served on the Registrar.

3. The Attorney-General may serve notice on the accused or his solicitor that he intends to tender the written statement of any witness, pursuant to section 65B of the Criminal Procedure Ordinance, without calling that witness to give oral evidence. Such notice will, where practicable, be served after the filing of the indictment and not less than 7 days before the date fixed for trial. A copy of the notice will be sent to the Registrar not later than 7 days prior to the date fixed for trial. If objection is made to a statement being tendered in evidence the solicitor for the accused is expected to let the Attorney-General and the Registrar know of this as soon as possible.

4. Not less than 4 days before the date fixed for trial (unless counsel for the Crown and the Defence agree to a later date and shall so inform the judge), a judge who shall if practicable be the judge who is to try the case, may, if he considers it desirable to do so, require counsel for the Crown and the Defence to attend a meeting in his Chambers, presided over by him.

5. At such meeting, counsel will be expected to inform the judge of the following matters -

- (a) of the pleas to be tendered at trial;
- (b) whether any additional evidence is to be called by the Crown and the substance thereof;
- (c) whether or not the facts included in the Attorney General's Notice to Admit Facts are to be admitted; or, if no such notice was served, what facts, if any, are to be admitted and in what form that admission is to be put to the jury;
- (d) which of the prosecution witnesses named on the back of the indictment is available, which of them the Crown intends to call, and which of them defence counsel wishes to be made available;
- (e) whether any statements are to be tendered pursuant to section 65B of the Criminal Procedure Ordinance;
- (f) whether objection is to be taken to the admissibility of any of the Crown evidence, and how long the hearing of such objection is likely to take;
- (g) if any expert testimony is to be called;
- (h) of the order in which prosecution witnesses are likely to be called;
- (i) of the names and addresses of witnesses from whom statements have been taken by the prosecution but who are not going to be called;
- (j) of any alibi not already disclosed;
- (k) of his estimate of the probable length of the trial and of any other significant matter which might affect this;
- (l) whether or not it is intended to make any submission as to:
 - (i) the severance of the accused or of any count of the indictment;
 - (ii) the quashing of the indictment;
 - (iii) the provision of further and better particulars of any count in the indictment; or
 - (iv) any other matter which should be determined in the absence of the jury before the accused pleads to the indictment.
- (m) of any point of law which may arise in the trial, and of any authority in which either party intends to rely as far as can be envisaged at that stage; and
- (n) of any other significant matter which might affect the proper and convenient trial of the case.

6. At such meeting the judge will give such directions as appear to him necessary to secure the proper and efficient trial of the case.

7. The accused shall be present at such a meeting unless the accused or his solicitor informs the judge that he does not wish to attend.

General

8. If possible on the day fixed for the trial any preliminary issue of law will be heard and determined before the jury is empanelled.

9. Any practitioner who, in relation to any particular case, experiences difficulty in complying with this direction should, as soon as possible, contact the Registrar.

Dated this 30 day of November, 1984.

Chief Justice
Supreme Court
Hong Kong

STATUTORY RULES 1984

No. 331

Supreme Court Act 1958 Interpretation of Legislation Act 1984

Supreme Court (pre-trial Criminal Procedure) Rules 1984

IN PURSUANCE of the powers conferred by the Supreme Court Act 1958 and section 50 of the Interpretation of Legislation Act 1984 and all other powers thereunto enabling the Judges of the Supreme Court hereby make the following Rules:

1. These Rules may be cited as the Supreme Court (Pre-Trial Criminal Procedure) Rules 1984.
2. These Rules shall come into operation on 3 September 1984.
3. In the Table preceding Chapter 1 of the Rules of the Supreme Court after the expression Chapter VIII - Industrial Property Rules Orders 1-7 there shall be inserted the expression Chapter IX - Pre-Trial Criminal Procedure Rules: Orders 1-2.
4. There shall be added to the Rules of the Supreme Court as Chapter IX thereof the following Chapter.

CHAPTER IX

PRE-TRIAL CRIMINAL PROCEDURE RULES

Order 1 - Interpretation

1. In this Chapter unless the contrary intention appears -

"Accused person" means a person in respect of whom a presentment for an indictable offence has been made at the Supreme Court.

"Criminal case" means a case entered in the List.

"List" means the Criminal List of cases in the Supreme Court compiled by the Criminal Trial Listing Directorate.

"Pre-trial hearing" means the hearing of an application under Rule 2 of the Order 2.

Order 2 - Pre-Trial Hearings'

1. (1) A Judge nominated by the Chief Justice shall be in charge of the List in this Chapter any reference to the Judge shall be read and construed as a reference to the Judge for the time being in charge of the list.

- (2) The powers of the Judge with relation to a case entered in the List may be exercised by some other Judge if the judge requests him so to do or if in special circumstances that Judge thinks fit to exercise them.
2. (1) An accused person or the Director of Public Prosecutions or the Criminal Trial Listing Directorate may make application to the Judge for directions with respect to the preparation for trial, readiness for trial or conduct of the trial of a criminal case in any case where it is necessary for the fair and expeditious conduct of the trial.
 - (2) An application under this Rule shall be made by notice in the form numbered 1 in the Schedule filed with the Prothonotary and -
 - (a) in the case of an application by an accused person served on the Director of Public Prosecutions and the Criminal Trial Listing Directorate;
 - (b) in the case of an application by the Director of Public Prosecutions, served on the Criminal Trial Listing Directorate and the accused person; and
 - (c) in the case of an application by the Criminal Trial Listing Directorate, served on the Director of Public Prosecutions and the accused person.
 - (3) Where an application is made under this Rule the Prothonotary shall cause notice of the hearing of the application in the form numbered 2 in the Schedule to be served on the accused person, the Director of Public Prosecutions and the Criminal Trial Listing Directorate.
 - (4) An application or notice under this Rule may be served -
 - (a) in the case of service on the Criminal Trial Listing Directorate - by posting it to the Director of the Criminal Trial Listing Directorate or by delivering it to the Director;
 - (b) in the case of service on the Director of Public Prosecutions - by posting it to the Director of Public Prosecutions or by delivering it to the Director; and
 - (c) in the case of service on the accused - by posting it by certified mail to the address shown on the accused's recognizance of bail or to such other address as has been notified to the Prothonotary to be the correct address of the accused or to such other address as the judge directs or if the accused is not on bail, to the Director General of Corrections under direction that it be forthwith provided to the accused.
3. (1) Where on the hearing of an application under Rule 2 the Judge is satisfied that it is necessary for the fair and expeditious conduct of the trial of the relevant criminal case, the Judge may -
 - (a) ask such questions of the parties; and
 - (b) give such directions with respect to the preparation for trial - as the Judge thinks proper having regard to all the circumstances.
 - (2) Questions asked of the parties in accordance with sub-rule (1) may include the questions set out in Form 1 in the Schedule.

- (3) An application under Rule 2 shall be heard in Court.
 - (4) The accused person shall be present at the hearing of an application under Rule 2.
 - (5) Nothing said by an accused person at a pre-trial hearing and no failure by an accused person to answer a question at a pre-trial hearing, shall be used in any subsequent trial or made the subject of any comment at the trial.
- 4.
- (1) All proceedings on the hearing of an application under Rule 2 shall be recorded and transcribed in any manner authorised by Part VI of the Evidence Act 1958.
 - (2) The Prothonotary shall cause all records and transcripts of proceedings on the bearing of an application under Rule 2 to be filed in court.

SCHEDULE

Form 1

Application for pre-trial hearing

Application is hereby made under Rule 2 of Order 2 of the Supreme Court (Pre-Trial Criminal Procedure) Rules for directions with respect to the preparation for trial readiness for trial or conduct of the trial of.....

The reasons for which this application is made are as follows:

(Set out in detail and in simple language the reasons that make an application desirable).

IMPORTANT NOTICE TO THE PARTIES

Please read the information set out on the back of this form.

Dated this day of 19

As the case may be

.....

Director of Public Prosecutions

.....

Solicitor for the Accused

.....

Officer of the Criminal Trial

Listing Directorate

To:

And to:

INFORMATION FOR THE PARTIES

1. You will be notified by the Prothonotary of the Supreme Court of the date and time for the pre-trial hearing.

2. At a pre-trial hearing the Judge may ask the following questions and counsel (or the accused if he is unrepresented) will be expected to be able to inform the Court in relation to the following:

1. Has the presentment been filed?
2. Has a copy of the presentment been received by the accused or his representatives?
3. Is any amendment of the presentment likely to be sought by the prosecution?
4. Are further particulars of the presentment likely to be sought by the accused?
5. Is there to be any application to sever the presentment and if so, what is the application likely to be?
6. Is there to be an application for a separate trial by any and which accused?
7. Does the accused presently intend to plead Guilty or Not Guilty to any and which count(s) in the presentment?
8. Is there any possibility of a change of plea?
9. Is it intended there will be a conference between counsel for the Director of Public Prosecutions and counsel for the accused?
10. Does the prosecution propose to call any additional evidence?
11. Has the prosecution notified the accused and/or his representatives of any additional evidence and if it intends to do so when is it proposed to furnish a proof of evidence?
12. What is the probable length of the trial?
 - (a) Prosecution estimate.
 - (b) Accused estimate.
13. Is any point of law or of admissibility of evidence likely to be raised before the trial commences? If yes, of what duration are the matters to be raised likely to take?
14. Does the accused or the prosecution intend to raise a special issue? e.g. unfitness to plead, change of venue.
15. Does the accused intend to raise a special plea? e.g. Lack of jurisdiction: autrefois convict, autrefois acquit etc.
16. Does the accused intend to rely upon an alibi not yet disclosed in conformity with the Crimes Act?

17. Do the parties anticipate any problems as to the availability of witnesses? If yes, give details.
18.
 - (a) What admissions of fact are sought by the prosecutor?
 - (b) Is the accused prepared to make the admissions sought or any of them?
 - (c) What admissions of fact are sought by the accused?
 - (d) Is the prosecution prepared to make the admissions sought or any of them?
19. Does any difficulty arise about photographs or plans and formal proof of them?
20. Is any order sought for the inspection of prosecution exhibits or other evidentiary material in the possession of the prosecution as to which a question may arise in the course of the trial?
21. Is any order sought for the preservation or detention of any document or thing relating to the trial?
22. Is any order sought for the production before the court of any document tape recording or thing relating to the trial?
23. Does any party propose to deliver the other party a notice to admit in respect of anything not covered by question No. 18?
24. What arrangements have been made for Counsel to hear any tape recordings in the custody of the prosecution and to be provided with any transcript thereof?
25. Does any party intend to apply for a view, and if so, where and at what stage of the trial?
26. Will an interpreter be required during the trial?
27. Are there any other significant matters which might effect the proper convenient trial of the issues?

Form 2

In the Supreme Court
of Victoria
Between

The Queen
and
A.B.

NOTICE OF PRE-TRIAL HEARING

Take notice that on the day of 19
at o'clock in the morning/afternoon* at the Law Courts, Melbourne, the Judge in charge
of the Criminal List of cases in the Supreme Court will hear an application by (name of
applicant) for directions with respect to the preparation for trial, readiness for trial or
conduct of the trial of this case.

Dated the day of 19

.....

To:

And to:

*Delete whichever is inapplicable

Dated this 9 day of August 1984.

JOHN McI. YOUNG, C.J.
KEVIN ANDERSON, J.
PETER MURPHY, J.
B.L. MURRAY, J.
R.K. FULLAGAR, J.
R.E. MCGARVIE, J.
NORMAN M. O'BRYAN, J.
ROBERT BROOKING, J.
I. GRAY, J.
BARRY BEACH, J.
J.A. GOBBO, J.
ALEC SOUTHWELL, J.
R.C. TADGELL, J.
ALASTAIR NICHOLSON, J.
G. HAMPEL, J.
W.F. ORMISTON, J.
H. NATHAN, J.

LAW, TECHNOLOGY AND DEVELOPING COUNTRIES

A paper prepared by Professor C M Campbell
of The Queen's University of Belfast

The interest in harnessing technology to legal work is longstanding in many industrialised countries. Yet the success of efforts so far has been patchy. Many promises have been unfulfilled, and the early optimism has been replaced by a more cautious view of the relevance - and particularly the cost effectiveness - of technology. During this time the contribution of technology to legal work in developing countries has been minimal and few commentators have predicted significant growth. In this paper some aspects of the developments in applying technology to law are highlighted. This is done mostly by reference to the United Kingdom, but attention is also given to the 'small jurisdiction' of Northern Ireland. Some suggestions as to where technology may be of relevance to developing countries and to other small jurisdictions in the Commonwealth, are attached.

Background

2. When enthusiasts first recommended the exploitation of technology in legal work in the 1960s, the focus was on information retrieval. The idea then was that since the text of the law was so voluminous it should be possible, given current computing techniques, to hold and search the text on computer. This would aid legal work by improving the accuracy and reliability of legal research and thus be attractive to the legal profession. First in the United States, and then in Europe, full text information retrieval systems were launched - either commercially or subsidized by government. In America the LEXIS and WESTLAW systems are best known. In the United Kingdom LEXIS (this time in partnership with the legal publishers Butterworths) and EUROLEX were launched. For a number of years informed commentators knew that, despite publicity to the contrary, both systems were finding it hard going. There are various conjectures as to why progress in the United Kingdom should have been so halting. The different research habits of a divided profession, the significant cost of searching the LEXIS and EUROLEX databases, the relative awkwardness experienced by 'novice' users in arranging telecommunication access, have all been suggested. But no matter the exact reason, both systems struggled. EUROLEX was effectively closed down in 1985 with some of its operations being taken over by LEXIS. It does not seem that the profession at large has even now endorsed in a practical way the theoretical appeal of such services - i.e. there is still not a widespread uptake. This is disappointing given the enormous technical strides made by those offering the service - there have been significant improvements in the reliability and sophistication of the systems in recent years.

3. Yet this lack of progress in information retrieval is off-set by the uptake of technology in other areas in the practising legal profession. In essence the success story for the legal profession has been the installation and development of wordprocessing (WP) systems. A clear majority of all legal practices in the United Kingdom (from the smallest to the largest) now use and depend on wordprocessors. On the back of WP have been built Time-recording and Accounting systems. These three applications are trusted and well proven in the profession. So the enthusiasts of the 1960s were right to suggest technology was of increasing relevance, but wrong in the area they highlighted as a particular priority. Of course now there are many other applications of technology in the legal profession even if

none of them has achieved anything like the success of the three just mentioned. Legal support systems, debt collection systems and improvements to communications can all be found in the practising profession. Details are contained in the Study of Lawyers and Office Technology, National Law Library, 1983

4. One area in which the United Kingdom has continued to lag behind has been in exploiting computers for legislative drafting. The early progress made in Canada (reported in Memoranda to 1983 Meeting of Commonwealth Law Ministers, Colombo, Sri Lanka and available from the Commonwealth Secretariat) provided an appealing and strong case for using technology to assist in the legislative process. However, for circumstantial reasons the early experiments made in the Houses of Parliament in Westminster were not notably successful and it remains true that little practical work has been done. There have been developments in Northern Ireland (as will be explained below) but even here the accomplishments are of a limited nature.

Underlying Factors

5. As indicated, the current status of technology and law in the United Kingdom is that information retrieval systems so far have had a disappointing career, but that technology has been applied popularly and widely in other areas. Progress to this present state has not been free of difficulty or expense. Many lawyers have been involved in financial burdens and mistakes (understandably few admit to this in public) and many legal practices have been wrongly advised or have been misled by aggressive overselling by the computer industry. Even though technology is now a stable and dependable contributor to the legal process in the United Kingdom, lessons can be learned by reviewing the factors that influenced development.

6. First, the commercial dimension can never be ignored. The computer industry is one of the fastest growing, but also most volatile, sectors in many Western economies. Extreme competition has caused problems for many customers. Technologies have appeared on the market place and then been withdrawn quickly, equipment has proved incompatible, and it has been difficult to know what trends in the industry were really reliable and would continue. These worrying features, combined historically with the relatively high cost of technology, inhibited many lawyers from installing systems and making effective use of them.

7. Second, with benefit of hindsight, it is clear that the early focus on full text information retrieval - databases containing the full text of statutes, statutory instruments and case law - was based on a misreading of the work of the legal profession. It might be that American lawyers have recourse to original source materials regularly but that does not mean the same applies in the United Kingdom. For example it is now apparent that solicitors use the Bar for much research work. Solicitors certainly do work in an information intensive environment and constantly require access to information. But the information needed is often practical 'know how' -material on 'how to do it' (i.e. secondary information) rather than access to primary sources. In any event there are obvious inhibitions to using databases at charges of more than £100 an hour, where the services can be difficult to use or require 'dedicated' equipment additional to that already possessed in the office. EUROLEX paid the price for misreading the market. Perhaps, however, useful lessons have emerged from experience to date. In particular there is now a growing interest in inhouse information retrieval system, and this is combined with an increasing feeling that technology used for one purpose should, to the maximum extent, also be capable of being used for other purposes.

8. Third, there are policy and even public policy issues involved in the development of technological applications to law. Some commentators have worried about legal databases being held in countries other than the sovereign jurisdiction. Some countries have recognised a governmental obligation to 'publish' laws in magnetic form; others have not and

feel it right to rely on market forces. Yet where market forces are recognised (as in the United Kingdom) there are anxieties that this may introduce distortions to legal practice and to the legal profession. Such distortions flow from the charging policies of services which favour the larger (and richest) law firms. The questions that can be posed from this brief review are (1) On the basis of experience so far, what developments are likely in the future? (2) How relevant may these developments be for developing countries?

Current Developments

9. There are three current developments in computing which hold promise for the future both generally and for developing countries. These relate to microprocessors, storage media and financial costs.

I. Micros

10. When early work in applying computers to law was undertaken there was reliance on the large or 'mainframe' computer. When it became possible, about 10-15 years ago, to have real computing operations carried out in small micro computers something of a revolution got underway. It is well known that the micro is now reliable and its power has increased dramatically while prices have remained static (this representing a significant fall in real terms). Micro computers began with the eight bit processor but the sixteen bit or even thirty-two bit processor is now common. Put simply, this has extended the capacity of the micro to undertake a wider and wider range of tasks and still give good performance. And since the micro is an inhouse computer a new market of enormous size has opened up to the industry.

11. Now it is possible for non-technical users to use micros, and they need not have telecommunications access to the other installations. The developments in this part of the industry are so rapid that desk top terminals are becoming a reality in many professions and occupations. And the computers themselves have been redesigned so as to allow use by the financial controller, lawyer, manager or executive - someone who would not know how to log in to or use a mainframe computer. The computers, in other words, have become smaller, faster and much easier to use.

12. Examples underline the significance of the progress made. Amstrad wordprocessors (keyboard, processor, screen and printer) now sell at a price lower than a respectable typewriter. Buying a wordprocessor for £400 or £500 is, accordingly, no longer a high risk business. Equally a desk top terminal (comprising a telephone, telecommunication access to databases, wordprocessing, spread sheet, archival software, programming facilities and calculator) is available from ICL in a package called One-Per-Desk. Prices for this unit vary between £1,500 and £2,000. The MacIntosh from Apple Corporation costs under a thousand pounds and offers other attractive features - in particular those who wish to avoid using a keyboard but be able to exploit the excellent graphic capabilities now have facilities for doing so. Built round the industry standard of IBM there is now an encyclopaedic range of software to allow most users to make extensive and effective use of a micro.

13. The growth of the micro computer market has helped to reposition the computing industry. The micro is portable, cheap, relatively easy to use and reliable. It has no very rigorous operating constraints (e.g. it does not require air conditioning) and is thus suitable for use at home or in the office, and in most countries of the world.

II. Storage

14. When the micro computer first became available it used small (5 inch or 7.5 inch) 'floppy' discs. These discs could, variously, hold between 30 and 100 pages of text and provided sensible precautions were adopted, offered a relatively secure storage medium. Gradually safeguards against degradation and corruption have been improved, and such discs remain popular and widely used. More reliable and secure discs, capable of holding more information, are the so-called hard discs (or Winchester discs). These are now readily available for most micros and a disc can contain 10, 20, 40 or more megabytes (each megabyte is about 400 pages of text). Combined with advances in the power of micro itself these storage media have extended the utility of the inhouse computer.

15. Now another technology is about to pull this development through to another stage. The CD ROM (Compact Disc - Read Only Memory) is one of the most exciting and potentially most important advances in technology to have appeared in the last decade. The CD ROM disc can hold text, data, image as well as sound - where the compact disc is already popular with hi-fi aficionados. But the technology is a quantum leap forward both in storage life (the disc can last for 10 years as compared with a norm of 3 years for hard discs) and in volume. A 12 inch disc can hold 2 gigabytes (equivalent to 600,000 letter size pages of text) and a 5 inch about 400 megabytes. A laser beam searches the disc to find information and presents it on the screen - as noted this can be the text of a document, a drawing, or photograph. At the moment discs on the market are 'read only' by and large, although it is confidently predicted that 'write and read' discs will be available at an affordable price soon. At that stage it will be possible to think not only of maintaining the entire required library inhouse, but of adding to it or editing it regularly.

III. Costs

16. As the micros and the storage media have improved dramatically, the industry claim that costs have fallen significantly in real terms is in fact true. Micro computers in a price range between £500 and £3,000 are now attractive aids to many offices. The price, when set against labour costs, makes use of the micro a sensible proposition requiring a write-off period of between one and three years.

17. In summary the power of the computer, the extent of the storage and the range of prices, combine to suggest that the outstanding issues for most users thinking of computers now relate to organization and management. The technology and the price are right if - but only if - those managing the installation know how to manage it properly. Progress can be made in simple tasks, and the experience accumulated is an investment for more challenging applications at a later stage.

A small jurisdiction

18. By way of example some instances of applying technology to simple tasks in a small jurisdiction can be cited. The work referred to has been undertaken in Northern Ireland in the last 7-8 years and it is thought that the experience has been entirely cost effective as well as beneficial to the users.

19. Like many small jurisdictions Northern Ireland has not enjoyed an extensive range of legal publications. The market was not big enough to attract commercial publishers. It was decided in 1980 (with the benefit of a small recurrent subsidy) to launch the Servicing the

Legal System programme, which would publish a current awareness service for the legal profession, legal textbooks, materials about the law for the lay public etc. At the outset the decision was made to produce all current awareness materials on a wordprocessor. Given the amount of collating, editing and revision involved this seemed essential. But the decision was also made at the same time to retain the magnetic copy of the text typed. That is, the wordprocessor was used to prepare and edit the material which was printed, and available on sale to the legal profession. But as the profession bought the monthly issues, the discs that held the original copy were retained and held against the day when computer based information retrieval would become viable. At virtually no cost, and as a by-product to the publishing venture itself, a computer database of legal developments in Northern Ireland has been constructed.

20. Similarly when the Government decided to produce a new consolidated edition of the statutes in force, the perceptive judgement was made that computer based photo-typesetting methods should be used. This was justifiable on economic grounds but again the magnetic tapes have been made available so that (after some admittedly complicated editing) the legislation is available for electronic information retrieval.

21. The logic in both these examples is that text should only be typed (or keyed) once. If the magnetic version of the text is then retained it may be copied, edited, up-dated, or re-edited; but the labour intensive and costly exercise of typing material is only done once.

22. The biggest challenge is in maintaining the right balance between paper copy (so called hard copy) and computer copy (soft or magnetic copy). Some material is already available in computer form; some is only available in paper form but facilities such as OCR (Optical Character Recognition) allow the paper form to be fed into a computer without rekeying. The challenge is to plan for the time when computers will be relied on for most organizational and administrative tasks (in the much vaunted 'electronic office') while maintaining cost-effective procedures that cater for both hard and soft copy.

23. One dimension which is of growing importance in some industrialized countries is that of electronic communications. Electronic mail and electronic messaging (e.g. with Teletex, the new International super Telex which operates at 240 characters per second in upper and lower case) should promote efficiency and work flow. They should also however advance the movement to the electronic office. This is because the capture of keystrokes electronically makes possible the interface of wordprocessing, communicated messages and inhouse retrieval systems - materials produced inhouse or received by electronic methods can be stored in the electronic filing system.

Developing Countries

24. The context for work in developing countries varies significantly according to economic, geo-morphological and technological factors. Clearly if there is not an advanced telecommunications infrastructure, exploitation of electronic messaging - or even use of remote information retrieval systems - is out of the question. However there may be some basic steps that are worth considering in many developing countries.

25. First, if the argument about the changes in microcomputers and storage is correct, there is strong reason to acquire a suitable micro and storage system. In this way, practical experience and real understanding of what is involved in applying computerised methods to various tasks can be gained. It would not be surprising if the position in the United Kingdom was not mirrored in many developing countries i.e. the current managers or heads of organizations have missed any formal education in computing, and yet must accept that computers have significant contributions to make. Actual experience with computing (so

called 'hands on experience') is essential to gain insight into what is really possible, and to cut through the competing claims made by pundits and luddites.

26. Second, if a microcomputer is made available it is wise to concentrate on simple tasks at the outset. Here wordprocessing is the prime candidate for early work, and even limited experience of wordprocessing will teach the advantages of only capturing data once or only keying in data once. Material keyed in on a wordprocessor may be retained in floppy or hard disc, and gradually a library of inhouse materials may be built up. If, as is likely, it is essential to maintain an organization which deals both with paper copy and magnetic copy, early consideration should be given to using the more advanced printers (the laser printers) now becoming available. In most wordprocessing installations the printer has slowed operations, but the modern laser printer can be connected to the smallest system and can produce better quality output at high speed. This allows offices (those of legal practitioners, faculties of law, or government agencies) to produce or publish material more efficiently than before, but also to maintain electronic databases for exploitation in future years.

27. Now that computers really do work it is possible to think that after a short period of familiarization, for the lawyer, public servant or manager to identify and organize purpose-built applications (perhaps in consultation with his supplier) without requiring much technical backup. Outside agencies, temporary programming staff and consultants may be engaged as appropriate to implement various tasks, but the management of the installation can soon truly belong to the non-technical manager. In these circumstances discussions between representatives of developing countries, or 'small jurisdictions', on common problems seems desirable. The first meeting between Law Officers from small Commonwealth jurisdictions was convened in 1983 in the Isle of Man, and regular exchange on technological applications to common problems would seem desirable.

28. Finally, and in case some of the suggestions above seem simplistic, it is possible to engage consultants for advice. Unfortunately, as is well known, experience with outside consultants has been highly variable and sometimes very expensive. Depending on the level of interest in developing countries it is worth considering whether an information clearing house or the establishment of a retained consultancy resource, might be an inexpensive way of ensuring that various jurisdictions had access to the required expertise.

LEGAL PRACTITIONER MOBILITY IN THE COMMONWEALTH

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

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

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

A. WHAT SORT OF PRACTITIONER MOBILITY MERITS RECOGNITION?

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

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

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

(i) Educational mobility

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

(ii) Practice without admission in the host country

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

(iii) Immigration and work permits

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

B. WHY HAS PRACTITIONER MOBILITY BEEN RESTRICTED?

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

(i) Protection of local legal education

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

(ii) Protection of the host legal profession

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

(iii) The interests of the host society

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

C. WHY SHOULD THERE BE INCREASED FREEDOM OF MOVEMENT?

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

(1) Consumer choice

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

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

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

(iii) Value of comparative experience

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

(iv) Reality of a common Commonwealth legal heritage

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

(v) Contribution to the development of Commonwealth law

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

(vi) Inequities in the present system

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

D. WHAT APPROACHES ARE TAKEN IN COMMONWEALTH LEGISLATION?

(i) Recognised overseas qualifications

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

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

(ii) Citizenship/residence requirements

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

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

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

(iii) **Additional educational requirements**

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

(iv) **Special admission**

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

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

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

E. MATTERS FOR CONSIDERATION BY LAW MINISTERS

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

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

24. On this basis, the following issues arise:

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

WORKING PAPER ON A PROPOSED CONVENTION ON AIRPORT SECURITY

Prepared by Canada, Austria, The Netherlands, New Zealand and Italy
for the Assembly of the International Civil Aviation Organization
and presented to the Meeting by the Government of Canada

1. Developments in recent years indicate that despite the advancement of technical preventative measures implemented under the auspices of ICAO and broad international acceptance of the Tokyo, Hague and Montreal Conventions, unlawful acts against the safety of civil aviation continue to seriously affect the operations of air services. Such unlawful acts have not been confined to aircraft in flight. In recent years, acts of violence at international airports have involved indiscriminate killing of innocent travellers. Incidents such as the bomb explosion at Narita Airport in June 1985 and the attacks at the Rome and Vienna airports in December 1985 are more recent examples of new forms of violence against the safety of civil aviation.

States have an understandable interest in the safety of airports in their territories and in the protection of their citizens travelling abroad. Since large concentrations of travellers at international airports make such airports preferred targets for attacks, enhanced cooperation between States appears to be desirable, not only to prevent unlawful acts of violence at airports, but also to ensure that the perpetrators of such acts do not go unpunished.

There have been in the past some attempts to establish, for acts of violence at airports, a prosecution/extradition regime similar to that applicable to offences under the Hague and Montreal Conventions. Specifically, such proposals were made by Greece at the International Air Law Conference held in Rome in August/September, 1973. The continued seriousness of the matter, and also the generally positive experience of States that have accepted and implemented the three Conventions dealing with unlawful interference with aviation, seem to require that an attempt be made to revisit the subject of suppression of unlawful acts of violence at airports serving international air transportation.

2. The following is a list of incidents of acts of violence at airports serving international air transportation in the period 1973-1985. This list, although possibly not complete, serves to illustrate the seriousness of the situation:

1973	3	incidents	(Calvi; Athens; Rome)
1974	2	incidents	(Heathrow; Los Angeles)
1975	2	incidents	(Orly; La Guardia)
1976	4	incidents	(Tel Aviv; Delhi; Beirut; Ajaccio)
1979	2	incidents	(Frankfurt)
1981	2	incidents	(Collingwood; Cairo)
1982	2	incidents	(Miami; Los Angeles)
1983	2	incidents	(Narita; Orly)
1984	2	incidents	(Kabul; Beirut)
1985	4	incidents	(Frankfurt; Narita; Rome; Vienna)

Not included in the list are several miscellaneous incidents other than bombing attacks at airports, adversely affecting the smooth operation of international air services and the security of passengers and airline personnel and facilities.

3. We consider that the time is ripe for a new international initiative within ICAO aiming at the adoption in respect of perpetrators of acts of violence at airports, of a prosecution/extradition regime comparable to that under the Hague and Montreal Conventions. At this stage, we are flexible as to the form of a possible new international instrument to deal with the matter, whether it be a new convention separate from the three existing Conventions or a supplementary protocol amending the 1971 Montreal Convention. This matter, as well as a number of other policy or legal problems, would have to be addressed in the course of the development of a new instrument.

To facilitate the Assembly's consideration of the proposal, an attempt has been made to formulate basic principles or elements of a possible new instrument. These elements are listed in the Appendix to this paper for the information of the Assembly and possible later examination by other appropriate bodies.

4. It is recommended that the Assembly include in the work programme of the Legal Committee, with the highest priority, the question of a possible instrument on the suppression of unlawful acts of violence at airports serving international air transportation. The subject would be considered in accordance with the ICAO procedures for the approval of draft conventions set forth in Assembly Resolution A7-6. The Council could be invited by the Assembly to use its powers with a view to speeding up the process of elaboration and adoption of the instrument, particularly in terms of early scheduling of preparatory meetings and the eventual convening of a diplomatic conference.

Suggested principles/elements for possible inclusion in an instrument for the suppression of unlawful acts of violence at airports serving international air transportation:

- (A) The following acts could be considered offences under the proposed instrument, whenever they were likely to endanger the safety of international civil aviation:
- (a) an act of violence against a person at an international airport, if the act interferes with the safe operation of an international flight or with the safe commencement or completion of an international journey by air;
 - (b) the placing or causing to be placed upon the premises of an international airport, by any means whatsoever, of a device or substance which is likely to cause destruction or damage thereon;
 - (c) the destruction or damaging of security control gates or other security facilities, or interference with the operation of airport security facilities and services; and
 - (d) the unlawful penetration of security controlled areas with the intention of endangering the safety of international civil aviation.

The definition of the second and third offences would remain close to Article 1, sub-paragraphs 1(c) and 1(d) of the Montreal Convention. The criterion of endangering the "safety of aircraft" of that Convention would be widened so that any acts resulting in serious infringement of the protection of international civil aviation provided by the security facilities and services of individual States would constitute an international offence. The objective would thus be to ensure in general terms the safe and orderly development of international civil aviation as postulated by the Preamble to the Chicago Convention.

The acts of violence subject to the new instrument would be those which take place at an "airport serving international air transportation". This concept would include any airport receiving scheduled air services or other international air transport flights and any area in such airports where acts of violence could have the effects expressed in the description of the offence.

- (B) The new instrument is aimed at ensuring that the perpetrators of acts of violence at airports do not go unpunished, especially when they leave the country in which the act of violence was committed. In such cases, a State Party to the new instrument in whose territory the offender is found would be obliged to establish its jurisdiction if it decides not to extradite such person(s) to the State where the offence was committed.
- (C) As in the Montreal Convention (Article 1, paragraph 2), the new instrument would also include "attempts" to commit the offence (i.e. an unlawful act of violence), and being an accomplice of a person who commits or attempts to commit any such offence.
- (D) A new instrument could also contain provisions on sharing of information among Contracting States relating to the prevention or suppression of unlawful acts of violence at airports (along the lines of Article 12 of the Montreal Convention).

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